

JUN 13 2003

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Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

IN RE ENRON CORPORATION §  
SECURITIES AND DERIVATIVE & § MDL 1446  
"ERISA" LITIGATION §

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MARK NEWBY, et al., §  
§  
*Plaintiffs,* § CIVIL ACTION NO: H-01-3624 ✓  
§ AND CONSOLIDATED CASES  
v. §  
§  
ENRON CORPORATION, et al., §  
§  
*Defendants.* §

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PAMELA M. TITTLE, on behalf of herself §  
and a class of persons similarly situated, §  
et al., §  
§  
*Plaintiffs,* §  
v. § CIVIL ACTION NO. H-01-3913  
§ CONSOLIDATED CASES  
ENRON CORP., an Oregon Corporation, §  
et al., §  
§  
*Defendants.* §

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**OUTSIDE DIRECTOR DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM  
OF LAW IN OPPOSITION TO THE OUTSIDE DIRECTOR DEFENDANTS' MOTION  
FOR A PROTECTIVE ORDER**

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TO THE HONORABLE MELINDA HARMON:

**INTRODUCTION**

The question presented in this motion for protection is simple:

Are the *Newby* Plaintiffs entitled to the production of irrelevant personal information embedded in documents that have already been produced in a form that protects that irrelevant, personal information from discovery?

Critically, the *Tittle* Plaintiffs agree that the answer to this question is “No.” They have made clear that they have “no objection at this time to the redaction of either category of information [account statements and social security numbers] of information that the directors personally produce.” *See Tittle Response and Opposition to Outside Directors’ Motion for Protective Order (Instrument # 591) at 2.* This position is sensible: The law makes clear that plaintiffs have no right to the production of irrelevant information, particularly when that information implicates personal privacy interests of constitutional dimension.

The *Newby* Plaintiffs contend that the Court should entrust them with this information, because they will deal with it responsibly. *See Plaintiffs’ Response to the Outside Directors’ Motion for Protection (“Response”) (Instrument # 1434) at 14.* Plaintiffs have made clear, however, that the opposite is true: Their response deliberately makes public the very information the Outside Directors sought to protect. This public dissemination of home telephone numbers, addresses and personal identifying information is in violation of this Court’s standing orders concerning the protection of identifying information—and it makes clear that the *Newby* plaintiffs cannot be trusted to deal responsibly with the Outside Directors’ private information.

Equally important is this: The *Newby* Plaintiffs cannot distinguish the plain authority holding that parties are entitled to protective orders shielding their personal financial information

and tax returns from pre-judgment discovery. Nor have these plaintiffs established any basis upon which they are entitled to discover this irrelevant financial information. Plaintiffs claim that such discovery is relevant to establish fraud, but their fraud-based claims against the Outside Directors have been dismissed with prejudice. *See* Memorandum and Order Regarding Enron Outside Director Defendants' Motions (Instrument #1269) at 149. *See Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 n.8. (5th Cir. 1993) ("[I]t is well established that a dismissal is presumed to be with prejudice unless the order explicitly states otherwise.").

For the reasons stated in their original motion, and those we state briefly here, the Outside Directors are entitled to the entry of the Protective Order they have sought.

### ARGUMENT

#### **I. Financial Information Concerning Transactions In Other Securities Or Other Business Dealings Is Irrelevant**

Plaintiffs'<sup>1</sup> response makes two arguments in support of the claimed relevance of the Outside Directors social security numbers and financial information not related to Enron. First, they claim that this is somehow relevant to the Outside Directors' Section 11 defense that they acted in good faith. Plaintiffs misconstrue the defense. As the Court is well aware, the Directors' due diligence and good faith defenses require proof that they relied in good faith upon information provided by management and third party experts. Plaintiffs do not explain how the directors social security numbers or personal brokerage statements are "reasonably calculated" to provide relevant evidence of their reliance upon third parties. Their silence on this point speaks volumes.

Plaintiffs next invoke a "report" of the Permanent Subcommittee on Investigations (PSI) to

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<sup>1</sup>Given that the *Title* Plaintiffs do not contest the relief sought by the Outside Directors, the term "plaintiffs" in this response will refer solely to the *Newby* Plaintiffs.

justify their claimed need to investigate “fraud” allegations against the Outside Directors. Three points give lie to this argument. First, the Enron business the PSI contended was “steered” to the directors’ “personal and business affiliates” was fully disclosed, annually, in Enron’s proxy statements. *See* Enron Corp. SEC App.<sup>2</sup> tabs 20-21, 85-88 (Enron Corp. Proxy Statements) (Instrument # 1200); The Outside Directors’ Response in Opposition to the *Tittle* Plaintiffs’ Motion for Judicial Notice (Instrument # 385) at Ex. 2. Second, the Court has already considered and rejected Plaintiffs’ claim that the PSI’s so-called report suffices to raise inferences of fraud by the Outside Directors in refusing to take judicial notice of the Report. *See* Order (Instrument # 390) at 4-5. And Plaintiffs themselves have chosen not to incorporate any of the Reports’ allegations in their recently filed amended Complaint. Finally, the Directors are producing documents within their custody relevant to their transactions with Enron—it is only their transactions with unrelated parties that they have sought to protect because that material is irrelevant.

Put simply, Plaintiffs claim they need this discovery to establish fraud by the Outside Directors—but there is no fraud claim made against them. Plaintiffs have recognized, indeed they have argued, that their Section 11 claims do not require either proof of fraud or scienter. *See* Plaintiffs’ First Amended Consolidated Complaint (Instrument # 1388) at 631; *Newby* Plaintiffs’ Response to the Outside Director Defendants’ Motion to Dismiss (Instrument # 853) at 79-80. Since fraud is not an element of any claim that remains against the Outside Directors, evidence allegedly relevant to establish it (which this emphatically is not) is not reasonably calculated to lead to the discovery of admissible evidence.

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<sup>2</sup> This refers to the Securities and Exchange Act Appendix filed in conjunction with the Motions to Dismiss in *Newby*.

## **II. The Burden of This Production Substantially Outweighs Any Claimed Entitlement by Plaintiffs to This Discovery**

The Outside Directors have made a detailed showing to support their claim that the material they seek to protect is private, constitutionally protected material. Not even the media intervenors disputes that the Directors are entitled to the protection of this information.

No one—other than the *Newby* Plaintiffs—claims the right to discover personal identifying information, confidential income tax returns or private financial information from the directors. Perhaps that is because only the *Newby* Plaintiffs have demonstrated a willingness to seek out, and then abuse, sensitive information about the Outside Directors. Well aware that the Directors were seeking to protect themselves against further harassment, Plaintiffs prepared and published in their response a table containing the home addresses, telephone numbers and email addresses of ten of the Outside Directors. *See* Response at 11-12. They did so despite a standing order requiring parties to litigation to shield such information from public disclosure.

Plaintiffs' proffered sensitivity to the confidentiality of this information is, thus, demonstrated by their actions—which give the Court no assurance that it can entrust to them this confidential, sensitive and irrelevant information.

## **III. The Outside Directors are Individuals Who Have Constitutional Privacy Rights; the Court's Treatment of Enron, a Corporation, Is Not Adequate to Protect the Rights of These Individuals**

It is not disputed in Plaintiffs' response that the Outside Directors have constitutional rights to privacy. Nor is it disputed that no similar protections are afforded to corporations. Plaintiffs blow right by this important difference and assert that the protections afforded to a corporation are adequate to secure the constitutional right to privacy of an individual. That they cite no authority

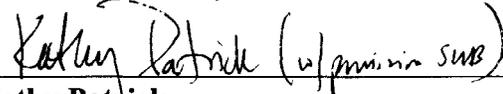
for this proposition is, again, telling. The fact is that abundant law exists indicating that the Court must impose limits on discovery when important constitutional rights are implicated—and the Outside Directors have met their burden to establish their rights, under these cases, to the entry of a protective order.

Plaintiffs also do not dispute that no delay will be caused by the grant of this Order—nor could they. The Directors have already produced their documents in redacted form. These redactions eliminate only the irrelevant, private information the Outside Directors seek to protect. We have also provided Plaintiffs with a detailed log identifying the material that was redacted from the documents, and the reasons supporting its redactions. Plaintiffs are thus able, if they wish to do so, to try to make a particularized showing as to why the redacted material is allegedly relevant to their case. This is their burden to establish, and they have not done so.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Outside Director Defendants' Supplement to Their Motion for Protective Order has been served by sending a copy via electronic mail to serve@ESL3624.com on this the 13 day of June, 2003.

I further certify that a copy of the foregoing Outside Director Defendants' Supplement to Their Motion for Protective Order has been served via Certified Mail/Return Receipt Request on the following parties, who do not accept service by electronic mail on this the 13th day of June, 2003.

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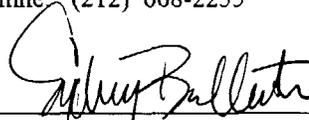
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