United States Courts
Southern District of Texas
ENTERED

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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 AND "ERISA" LITIGATION	}	MDL 1446
MARK NEWBY, ET AL., Plaintiffs v. ENRON CORPORATION, et al., Defendants	}	CIVIL ACTION NO H-01-3624
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, et al., Plaintiffs v. ENRON CORP., an Oregon Corporation, et al., Defendants	}	Civil Action No. H-01-3913 CONSOLIDATED CASES

ORDER ON OUTSIDE DIRECTORS' MOTIONS FOR PROTECTIVE ORDER

The "Outside Directors," Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charles E. Walker, and Herbert S. Winokur, Jr. (*Newby* Instrument Nos. 1374, 1380) , joined by individual defendants Lou L. Pai (*Newby* Instrument No. 1390), Paulo V. Ferraz Pereira (*Newby* Instrument No. 1435), Jeffrey McMahon (*Newby* Instrument No. 1427), Lawrence Greg Whalley (*Newby* Instrument No. 1426), Cindy K. Olson (*Newby* Instrument No. 1429), Mark E. Koenig (*Newby* Instrument No.

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1428), Steven J. Kean (*Newby* Instrument No. 1430), Mark A. Frevert (*Newby* Instrument No. 1431), Joseph W. Sutton (*Newby* Instrument No. 1443), Richard Causey (*Newby* Instrument No. 1433), and Richard Buy (*Newby* Instrument No. 1432) have filed a motion for protective order to shield from discovery four categories of information. John A. Urquhart has filed a similar motion for protective order (*Newby* Instrument No. 1415). All of these moving parties will be referred to as the "Outside Directors." They ask the Court to allow them to redact the information cited, which they characterize as "private," from any documents they produce pursuant to requests for production filed by the plaintiffs in the *Newby* and *Tittle* putative class actions. The categories are:

1. Account statements, including the account numbers, of

(a) securities and banking accounts belonging to these individuals' spouses or minor children;

(b) securities and banking accounts belonging to the individuals themselves, unrelated to Enron securities.

2. Individual federal income tax returns and related schedules.

3. Social Security numbers, home telephone numbers, home addresses and personal electronic mail addresses.

4. Personal telephone calls within telephone records.

Category One

The Outside Directors argue that the discovery called for in the first category is "irrelevant and impermissible pre-judgment asset discovery." Outside Director Defendant's Motion for Protective Order (*Newby* Instrument No. 1374) at 3. Moreover, they maintain that

disclosure of such information would amount to invasion of these defendants' personal privacy. The Outside Directors note that Information concerning trades in Enron-related securities are available in publicly filed SEC Forms 4s and 5s.

Lead Plaintiff's Memorandum of Law in Opposition to the Outside Director Defendants' Motion for Protective Order (*Newby* Instrument No. 1434) responds that the outside directors' business dealings have resulted in "significant financial conflicts," and that their Affirmative Defenses of good faith and due care make their personal, Enron-related financial information highly relevant." *Newby* Instrument No. 1434 at 6. [1] The Lead Plaintiff is amenable to the Outside Directors' representation that they will produce "discovery of their trades in Enron securities, or other Enron-related financial documents" and "produce documents containing Enron trading entries or related documents" (*Newby* Instrument No. 1374 at 7) if the Outside Directors are agreeing to the production of "***all*** financial documents and account statements, account numbers, and current amounts and current locations of proceeds or distributions arising from ***any*** business or personal relationship or affiliation with any defendant in this case, Enron, or any of Enron's SPEs, subsidiaries, affiliates or other Enron-controlled or sponsored entities." *Newby* Instrument No 1434 at 5-6, emphasis in original. Lead Plaintiff are adamant that they are not seeking discovery of the Outside Directors' financial status or ability

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[1]The *Tittle* Plaintiffs have responded (*Tittle* Instrument No. 591) to an Outside Directors' Motion for Protective Order (*Tittle* Instrument No. 579), which is virtually identical to the Outside Director's motion filed in the *Newby* case. Information sought from the Outside Directors in the *Tittle* case fall only into Categories One and Three. The *Tittle* Plaintiffs have responded that they do not object to the redactions proposed by the Outside Directors in Categories One and Three so long as the Outside Directors are not intending to require other persons and entities to redact the information from relevant documents they produce. The reply (*Tittle* Instrument No. 595) of the Outside Directors to the *Tittle* Plaintiffs' response indicates that the documents have already been produced.

to pay a judgment, but of the bank, securities, brokerage and similar financial account information in any way related to Enron.

Category Two

The Outside Directors cite 26 U.S.C. Sec. 6103 for their argument that federal law requires tax returns to be maintained in confidence between the taxpayer and the government, including the judicial branch. They cite *Natural Gas Pipeline Co. v. Energy Gathering, Inc.* 2 F.3d 1397, 1411 (5th Cir. 1993) for its holding that "Income tax returns are highly sensitive documents; [and] courts are reluctant to order their routine disclosure as part of discovery." *Newby* Instrument No. 1374 at 3. The Lead Plaintiff responds that the Fifth Circuit has also held that "Tax returns are not privileged." *FDIC v. LeGrand*, 43 F.3d 163,172 (5th Cir. 1995). If they are relevant to the litigation they are discoverable. *Halperin v. Berlandi*, 114 F.R.D. 8, 11 (D. Mass. 1986); *Powell v. Merrimack Mut. Fire Ins. Co.,* 80 F.R.D. 431, 433 (N.D. Ga. 1978). Lead Plaintiff argues that the affirmative defenses of reasonable care and diligence (Answer at 28) and good faith (Answer at 31) pled by the Outside Directors make the income tax returns relevant to these defenses as well as to their credibility. Lead Plaintiff agrees that information about income unrelated to either Enron or these law suits is properly to be redacted.

Category Three

The Outside Directors wish to withhold from production their social security numbers, home telephone numbers, home addresses and personal email addresses because they maintain that these could lead to "significant personal harassment." *Newby* Instrument No. 1374 at 3. They cite instances in which two of the Outside Directors have already received harassing emails at their places of employment. The Outside Directors argue that they do not wish to

withhold the production of the content of relevant emails, but they do wish to withhold the personal email addresses as well as home addresses and home telephone numbers because they are not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

Lead Plaintiff responds that by concealing the personal email addresses, telephone numbers and home addresses they are attempting to "prevent the discovery of the true nature and extent of their participation in the Enron fraud." *Newby* Instrument No. 1434 at 10. The argument is that the fraud that is alleged is one that was known by persons both inside and outside Enron, in the work setting and in social settings. Lead Plaintiff also points out that many of the Outside Directors' home addresses and telephone numbers have already been disclosed either in SEC filings, telephone directories, or through internet search engines. Lead Plaintiff points out that there is no authority cited for the Outside Directors' request to conceal their email addresses. Lead Plaintiff argues further that social security numbers are necessary to identify "bank, stock, or brokerage account ownership, offshore accounts, wire transfers, or instances in which a defendants' social security number is an identifying piece of information within a document." *Newby* Instrument No. 1434 at 113

Category Four

The Outside Directors wish to protect from disclosure "non-Enron related telephone calls" as irrelevant to the subject matter of the suit. *Newby* Instrument No. 1374 at 4. They argue that disclosure of such calls would amount to an invasion of their own and their families' privacy. Lead Plaintiff responds that the plaintiffs have not requested "personal phone calls wholly unrelated to Enron." *Newby* Instrument No. 1434 at 13. They are, however, interested in "records concerning Enron-related telephone calls and ***all*** telephone calls to or from

any defendant or any defendants' employees, agents or representatives, even if, in their opinion, a telephone call was 'personal'" *Newby* Instrument No. 1434 at 13-14, emphasis in the original. Plaintiffs are fearful that they cannot rely upon the "Outside Director's determination whether a particular telephone call to a defendant (or a defendant's employee or representative) was business or personal in nature." *Newby* Instrument No. 1434 at 14.

The Court has already addressed the issue of protective orders on at least two previous occasions. The standard of review is provided by Federal Rule 26, which indicates that "for good cause shown, the court . . . may make any order which justice requires to protect a party from annoyance, oppression, undue burden, or expense, including . . . . that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." Fed. R. Civ. P. 26(c)(4).

Outside Directors obviously have a privacy interest in the matters for which they seek protection, and the Plaintiffs have an interest in full disclosure of relevant information and materials that are likely to lead to relevant information. This case is a document intensive one that will necessitate careful and detailed analysis. The plaintiffs have set for themselves the task of assembling a gigantic jigsaw puzzle. There is no question that they will need all the pieces if they have any chance for success. In balancing the legitimate interest in privacy against the need of the plaintiffs, this Court finds that need outweighs privacy interests. This is especially true in light of the procedures already in place to protect the use of personal information. Those with access to the document depository may not disclose personal information and are prohibited from placing social security numbers, account numbers, home addresses and similar information in public pleadings. *cf. In the Matter of Protecting Personal Privacy in Public Case Files*, General

Order No. 2002-9 (S.D. Tex. July 22, 2002) and this Court's March 28, 2003 Order (Instrument No. 1307). The plaintiffs are required to and have assured the Court that they will "treat the Outside Directors' personal information confidentially in accordance with the Court's previous orders." *Newby* Instrument No. 1434 at 2, note 4.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that the Motion for Protective Order filed by The "Outside Directors," Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charles E. Walker, and Herbert S. Winokur, Jr. (*Newby* Instrument Nos. 1374, 1380), Lou L. Pai (*Newby* Instrument No. 1390), Paulo V. Ferraz Pereira (*Newby* Instrument No. 1435), Jeffrey McMahon (*Newby* Instrument No. 1427), Lawrence Greg Whalley (*Newby* Instrument No. 1426), Cindy K. Olson (*Newby* Instrument No. 1429), Mark E. Koenig (*Newby* Instrument No. 1428), Steven J. Kean (*Newby* Instrument No. 1430), Mark A. Frevert (*Newby* Instrument No. 1431), Joseph W. Sutton (*Newby* Instrument No. 1443), Richard Causey (*Newby* Instrument No. 1433), Richard Buy (*Newby* Instrument No. 1432), and John A. Urquhart (*Newby* Instrument No. 1415) are DENIED. It is further

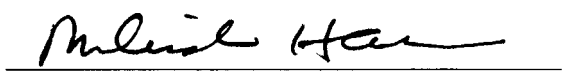
ORDERED, ADJUDGED, and DECREED that the Motion for Protective Order filed by The "Outside Directors," Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charles E. Walker, and Herbert S. Winokur, Jr. (*Tittle* Instrument Nos. 579,580) and Lou L. Pai (*Tittle* Instrument No. 581) are MOOT.

ORDERED, ADJUDGED, and DECREED that production responsive to Request for Production Nos. 19, 36, 37, 43, 44, 45, 46, 47 in the *Newby* case may be limited to bank, securities, brokerage and similar financial account information in any way related to Enron, including, but not limited to all financial documents and account statements, account numbers, and current amounts and current locations of proceeds or distributions arising from any business or personal relationship or affiliation with any defendant in these MDL 1446 cases, Enron, or any of Enron's SPEs, subsidiaries, affiliates or other Enron-controlled or sponsored entities. It is further

ORDERED, ADJUDGED, and DECREED Outside Directors may, in responding to Request for Production No. 48 in *Newby,* redact information about income unrelated to either Enron or the MDL 1446 lawsuits. It is further

ORDERED, ADJUDGED, and DECREED that the personal information produced by the "Outside Directors" in response to discovery requests in the *Newby* case will be treated by the plaintiffs as confidential in accordance with General Order No. 2002-9 (S.D. Tex. July 22, 2002) and this Court's Order of March 28, 2003 (Instrument No. 1307) at 3, paragraph 4, as it dealt with Enron personnel records.

Signed at Houston, Texas this 9th day of July, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE