UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	MDL Docket No. 1446
This Document Relates to: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated	§	Civil Action No. H-01-3624 (And Consolidated Cases)
Plaintiffs, vs. ENRON CORP., et al., Defendants.	§	CLASS ACTION
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated	§	
Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§	

United States Court
Southern District of Texas
FILED
NOV 2 [illegible]
Michael N. Milby, Clerk

OPPOSITION OF FINANCIAL INSTITUTIONS TO LEAD PLAINTIFF'S MOTION TO COMPEL THE BANKS TO PRODUCE THE TRANSCRIPTS OF THE SWORN STATEMENTS OF THEIR CURRENT AND FORMER EMPLOYEES

The undersigned Financial Institutions[1] respectfully submit this memorandum in opposition to Lead Plaintiff's Motion to Compel the Financial Institutions to produce transcripts

[1] For purposes of this opposition, "Financial Institutions" refers to Bank of America Corporation, Bank of America Securities LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated.

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of sworn statements provided by their current and former employees to the Enron Corp. Bankruptcy Examiner (the "Examiner").

Introduction

On October 28, 2003, Bank of America Corporation, Bank of America Securities LLC, Barclays Bank PLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith, Incorporated filed a motion in the bankruptcy court for a protective order barring the Newby Plaintiffs from obtaining the transcripts of sworn private statements provided to the Examiner by the Financial Institutions' current and former employees. After that motion was filed, and clearly in response to it, Lead Plaintiff filed its motion here. The motion pending before Judge Gonzalez is scheduled to be heard on December 4, 2003.[2] The Financial Institutions respectfully submit that this issue is properly before Judge Gonzalez. The confidentiality orders at issue in the motion for a protective order and the sworn statements themselves were generated under the auspices of the bankruptcy proceedings. Moreover, the Financial Institutions believe that Judge Gonzalez is in the best position to determine whether allowing discovery of the sworn statements would have a chilling effect on the willingness of parties to cooperate with future bankruptcy examiners. Judge Gonzalez also may want to consider whether production of the transcripts to Lead Plaintiff will lead to further demands by civil litigants for documents and testimony obtained by the Examiner during the course of this investigation.

[2] The Financial Institutions provided this Court with a courtesy copy of their Motion for Protective Order contemporaneously with the filing of the Motion in Bankruptcy Court. A copy of the Motion is attached as Exhibit A. Many of the points in this opposition are discussed in more detail in the Motion filed in the Bankruptcy Court. For the sake of brevity, the Financial Institutions incorporate that Motion by reference.

Lead Plaintiff does not need discovery of the sworn statements given in the bankruptcy proceedings. Counsel for Lead Plaintiff routinely litigates securities claims without the benefit of a bankruptcy examiner as a stalking horse. Lead Plaintiff is in exactly the same position as every other civil plaintiff that litigates in the absence of a parallel bankruptcy proceeding. To the extent that the transcripts contain information and testimony that are relevant to the matters alleged in Lead Plaintiff's Complaint, Lead Plaintiff can obtain that information and testimony by conducting depositions in this case in accordance with the Federal Rules of Civil Procedure. Thus, in the event that this Court decides to entertain Lead Plaintiff's motion, we respectfully submit that the motion should be denied.

Discussion

I. The Bankruptcy Court Is the Appropriate Forum To Determine Whether Lead Plaintiff Should Receive Access to the Transcripts of the Sworn Statements.

As the Financial Institutions explained in their Motion for Protective Order before Judge Gonzalez, Lead Plaintiff's demand for the transcripts will affect the orderly conduct of the Enron bankruptcy proceedings as well as future bankruptcy proceedings. Judge Gonzalez should therefore decide whether Lead Plaintiff receives access to the sworn statements offered under the auspices of the Enron bankruptcy proceeding.[3]

The Bankruptcy Court has an institutional interest in promoting cooperation between bankruptcy examiners and witnesses that may have information relevant to bankruptcy proceedings. For that reason, witnesses usually provide testimony, as was the case in the Enron bankruptcy, in reliance on the terms of a confidentiality agreement or protective order that

[3] Lead Plaintiff suggests that the Financial Institutions were required to present their Motion for Protective Order to this Court under Fed. R. Civ. P. 37's provision that "An application for an order to a party shall be made to the court in which the action is pending." (Motion to Compel at 1 n.1.) However, the language of FRCP 37 refers only to applications for an order *compelling* discovery.

ensures that the testimony will be used only for the purposes of the Examiner's investigation. Courts routinely deny access to the fruits of an Examiner's investigation under such circumstances. See, e.g., In re Ionosphere Clubs, Inc., 156 B.R. 414, 431-36 (S.D.N.Y. 1993); cf. In re Baldwin United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985). In addition, the Examiner's examination of the Financial Institutions presumably was informed by information that he obtained through the course of examinations of witnesses that are not defendants in the Newby action. Most, if not all, of these witnesses cooperated with the Examiner based on confidentiality agreements. In order to prevent the potential disclosure of protected information to civil litigants outside the bankruptcy proceedings, the Examiner's investigation should remain separate from the discovery being conducted in the civil litigation.

In addition to the chilling effect on investigations by future court-appointed bankruptcy examiners, allowing unfettered access to the Financial Institutions' sworn statements is likely to generate an avalanche of requests to this Court for access to Rule 2004 discovery materials by a variety of civil plaintiffs. The Enron Bankruptcy Examiner already has filed a motion with the Bankruptcy Court seeking relief from the escalating discovery demands imposed by the countless civil litigants. (See Motion of Neal Batson, The Enron Corp. Examiner, with Respect to Certain Procedural Issues in Connection with the Termination of the Enron Corp. Examination, dated November 4, 2003, at 13-16 (attached as Exhibit B).)[4] In addition, the Examiner has expressed to this Court his position that "bankruptcy examiners are not subject to discovery and therefore should not voluntarily provide the materials referenced in [the] interim

[4] The Examiner also seeks (among other things) authorization to destroy all of his copies of transcripts from interviews and sworn statements. (See Motion of Neal Batson, Proposed Order ¶ 3.) The pendency of this related motion before Judge Gonzalez makes it even more appropriate for Judge Gonzalez to decide whether the Financial Institutions should be forced to provide Lead Plaintiff with the transcripts of the sworn statements of their current and former employees.

reports."[5] (Letter from J. Grant to J. Harmon, dated May 27, 2003.)

II. Lead Plaintiff Does Not Need—And Is Not Entitled To—The Transcripts.

For the reasons cited above, the Financial Institutions believe that Judge Gonzalez rather than this Court should decide whether Lead Plaintiff receives access to the transcripts of the sworn statements. Nevertheless, to the extent this Court wishes to consider this motion, the Court should deny the motion for the reasons set forth in the Motion for Protective Order pending before Judge Gonzalez.

Lead Plaintiff offers no compelling reasons why it needs the transcripts. If Judge Gonzalez grants the Financial Institutions' Motion for Protective Order, Lead Plaintiff will be in exactly the same position as every other civil plaintiff. Indeed, the Financial Institutions are not trying to limit Lead Plaintiff's discovery or shield relevant testimony, and the Financial Institutions already have produced in the aggregate millions of pages to the Enron depository. Lead Plaintiff already has the benefit of the Examiner's extensive public reports. To the extent Lead Plaintiff believes that the Financial Institutions have relevant information that is not reflected in the Examiner's reports, Lead Plaintiff is free to seek that information through discovery in the civil litigation. Moreover, there is no reason to believe that the Financial Institution employees who gave sworn statements to the Examiner will be unavailable for depositions in this case. In short, there is nothing to prevent Lead Plaintiff from full and fair discovery in the Newby litigation.

In truth, Lead Plaintiff's motion is merely the latest in a series of attempts by the Regents to get access to Rule 2004 discovery for use in the civil litigations. Judge Gonzalez already has

[5] The Bankruptcy Examiner's motion and letter cast serious doubt on Lead Plaintiff's assertion that "Mr. Batson or other examiners will [not] be hampered from their efforts if the statements at issue here are produced." (Motion to Compel at 2.)

denied one such request. See In re Enron Corp., 281 B.R. 836, 844 (Bankr. S.D.N.Y. 2002); cf. Newby v. Enron Corp., No. H-01-3624, slip op. at 2 (S.D. Tex. Dec. 12, 2002).[6]

Finally, Lead Plaintiff's suggestion that compelling discovery of the sworn statements will "streamline" the discovery process is disingenuous. Although Lead Plaintiff states that "[t]here is no need to ask the same witnesses the same questions again" (Motion to Compel at 2), Lead Plaintiff's attorneys have suggested that they plan to take approximately 500 depositions in this lawsuit, many of which will be of current and former employees of the Financial Institutions. If the Court grants Lead Plaintiff's motion, it should hold Lead Plaintiff to its word and order Lead Plaintiff not to ask any of the deponents the same questions that they were asked during their sworn statements. (Id.)

Conclusion

For the reasons set forth above, this Court should deny Lead Plaintiff's Motion to Compel and defer to Judge Gonzalez to determine whether the confidential discovery taken by the Enron Bankruptcy Examiner is discoverable.

Respectfully submitted,

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[6] As courts repeatedly have observed, Rule 2004 discovery is not a proxy for civil discovery. For example, the Bankruptcy Rules specifically allow Rule 2004 examinations that "are broad and unfettered and in the nature of fishing expeditions". In re Enron Corp., 281 B.R. at 840.

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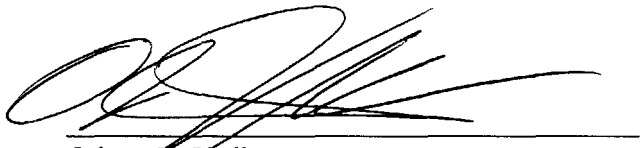
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on counsel electronically via the www.esl3624.com website pursuant to the United States District Court's order in Civil Action No. H-01-3624, *Newby v. Enron Corp. et al.* (Consolidated) on this 20th day of November 2003.



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