

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

MAR 11 2002

BC

Michael N. Milby, Clerk

MARK NEWBY,

Plaintiff,

VS.

ENRON CORP., et al.,

Defendants,

CIVIL ACTION NO.H-01-3624  
(Consolidated)

**RESPONSE OF CERTAIN INDIVIDUAL DEFENDANTS  
IN OPPOSITION TO PLAINTIFFS' MOTION FOR  
PARTICULARIZED DISCOVERY REGARDING DOCUMENT PRESERVATION**

Jeffrey McMahon, Robert H. Butts, Richard B. Buy, Richard A. Causey, Mark E. Lindsey, and Rodney L. Faldyn file this response to Amalgamated Bank's and Regents' Motion For Particularized Discovery From Certain Enron Executives and would show the Court as follows:

**I. Summary**

Plaintiffs seek to avoid the automatic stays imposed by the PSLRA and Enron's bankruptcy by arguing that they must take depositions to preserve evidence. There is no need for the depositions to preserve any evidence. The F.B.I. has interviewed the witnesses, seized the documents, and copied the hard drives. The F.B.I. is preserving the evidence and any discovery in this case would only interfere with the F.B.I.'s investigation of whether there was any improper document destruction at Enron.

**II. Background**

On January 21, 2002, plaintiff Amalgamated Bank filed a third supplemental brief in support of its motion for particularized discovery from Arthur Andersen ("Third Supplemental Brief"). In

that brief Amalgamated for the first time also sought to depose Enron's CEO (Kenneth Lay) and its Chief Financial Officer and Chief Accounting Officer. Two weeks later, plaintiffs filed their Memorandum In Support Of Amalgamated Bank's And Regent's Motion For Particularized Discovery From Certain Enron Executives ("2/8/02 Memorandum"). In that paper plaintiffs expanded the list of people they want to depose from three to eight and included several current Enron employees who are not sued in this action.

Plaintiffs' stated purpose in seeking to lift the PSLRA stay and obtain immediate discovery is to preserve evidence. In its Third Supplemental Brief, Amalgamated asked that "the Court take control of Enron's documents" and that the Court order "the company auditors and Enron's CEO, CFO and CAO to make available all relevant electronic evidence, including documents and e-mails from individual computers and Andersen computer servers, for recordation by an independent forensic computer data-recovery and preservation specialist, who will provide electronic back-ups to the Court for storage in the Court's registry." (Third Supplemental Brief at 6). At the January 22, 2002, hearing plaintiffs' counsel told the Court that even for him it was "infeasible" to "move Enron's corporate headquarters into the courthouse . . . But I will tell you something. You can put a couple of U.S. Marshal [sic] over there until these documents are segregated, and we will help pay for that." (1/22/02 Hearing Tr. 22 (excerpts attached as Ex. A)).

Amalgamated's request was answered before it was made. At that same January 22, 2002, hearing, Enron's counsel explained that "company officials had security guards placed on both the 19th and the 20th floor of the Enron building. The access to those floors, both by elevator and by stairs were shut down so that no one could get to those floors during the [preceding] evening. . . . [O]utside counsel for the company then immediately began interviewing Enron employees who work

on or have responsibility for supervising those who work on the 19th floor.” (1/22/02 Hearing Tr. 60). Enron also invited “the Justice Department to participate in any investigation of the origin of these materials, their nature, how they came to be, and what they are.” (1/22/02 Hearing Tr. 60-61). Enron’s counsel related to the Court his understanding that the Justice Department “dispatched F.B.I. personnel to the Enron building and that they will secure the material that we located last night, that they will conduct interviews of Enron employees beginning today, and that the Justice Department will completely cooperate with the company in the investigation of this matter.” (1/22/02 Hearing Tr. 61). Enron also called the Securities & Exchange Commission and reported to the Court that the head of the SEC investigation had “a strong preference that this matter be handled by the Justice Department.” (1/22/02 Hearing Tr. 61).

The undersigned counsel understand from counsel for Enron that the F.B.I. interviewed scores of witnesses, seized hundreds of boxes of documents, imaged numerous computer hard drives, and even sought the box of shreds that plaintiffs’ counsel carried with him to various television interviews and to the January 22, 2002, hearing. In some cases the F.B.I. took the original documents out of respondent’s offices and has yet to return the originals or copies of the documents.

### **III. Argument**

#### **A. Plaintiffs’ Requested Discovery Is Prohibited By The PSLRA And The Bankruptcy Stay.**

The Private Securities Litigation Reform Act provides that the mandatory stay may only be lifted where “particularized discovery is necessary to preserve evidence or prevent undue prejudice.” 15 U.S.C. §78u-4(b)(3)(B). Discovery against Enron is also stayed by Enron’s bankruptcy.<sup>1</sup> That

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<sup>1</sup> The bankruptcy court has lifted the stay only for limited purposes not applicable here.

stay is supposed to, *inter alia*, allow Enron's directors and officers to concentrate on reorganizing the company. See *In re Penn-Dixie Industries, Inc.*, 6 B.R. 832 (Bankr. N.Y., 1980) (denying request for discovery and noting that the automatic stay is "one of the fundamental protections provided by the bankruptcy law," and is designed to stop "all harassment."). Among those people that plaintiffs seek to depose is Jeffrey McMahon, the President and Chief Operating Officer and a member of the Office of the Chief Executive of Enron. The bankruptcy stay would be meaningless, if despite the stay, plaintiffs could still depose Enron's officers and employees about actions they undertook at Enron. Certainly, depositions of current Enron officers about Enron is discovery from Enron that is automatically stayed.<sup>2</sup>

**B. Plaintiffs' Requested Discovery Will Do Nothing To Preserve Evidence.**

The plaintiffs who initially sought "a couple of U.S. Marshal[s]" and three depositions, instead received a full-blown investigation by the Department of Justice and the F.B.I. The actions

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<sup>2</sup> Plaintiffs ignore the bankruptcy stay and argue that the PSLRA stay should be disregarded for two reasons. First, plaintiffs argue that the PSLRA was designed to prevent the unnecessary imposition of discovery costs on defendants and "a number of individuals from whom plaintiffs seek discovery are *not* defendants or are *former* employees of Enron." (2/8/02 Memorandum at 6 (emphasis in original)). This argument is flawed in at least two respects. First, the fact that plaintiffs may be seeking to depose former employees does not mean that Enron would not have to bear the expense of providing counsel for the witnesses and attending the depositions. Second, to the extent that plaintiffs seek to depose former employees, those people are not in a position to preserve (or destroy) evidence at Enron in any event.

Plaintiffs also argue that "those individual defendants identified herein who currently work at Enron can hardly complain about the minimal burden of providing the discovery sought by plaintiffs" at least in part because, "it is the directors' and officers' insurance carrier – and not the individual defendants - that will bear the cost of responding to the particularized discovery plaintiffs seek." (2/8/02 Memorandum at 6-7, n. 2). Plaintiffs *assume* that the only burden imposed by the discovery is the cost of defense counsel and plaintiffs further *assume* that the insurance carrier will pay for any necessary representation. Plaintiffs' first assumption is clearly incorrect and plaintiffs' second assumption is not necessarily true. However, it is certain that the burden of any such discovery (no matter who bears it) outweighs its utility in light of the actions of the Department of Justice and the F.B.I.

of the F.B.I. and the Justice Department would appear to render plaintiffs' request moot, but plaintiffs continue to press for depositions despite the stays imposed by the PSLRA and Enron's bankruptcy. (2/8/02 Memorandum).

Plaintiffs' proposed discovery adds nothing to the investigation the F.B.I. is already conducting and runs the risk of interfering in the F.B.I.'s investigation. Some of the people plaintiffs seek to depose, including Messrs. Causey and Buy, are no longer employed at Enron. Even when they were at Enron, they did not office on the nineteenth floor, where the shredding is alleged to have occurred. Some of those that are still at Enron also did not work on those floors. Some of those that did work on those floors no longer have the documents whose destruction plaintiffs claim to fear, because the F.B.I. seized their documents and to date has not returned copies of those documents.

#### **IV. Conclusion**

The discovery plaintiffs seek would violate the automatic stay of the PSLRA and the bankruptcy. It is also unnecessary because the evidence plaintiffs seeks to preserve is already being preserved by the F.B.I.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on March 11, 2002, I caused to be delivered a copy of the foregoing pleading to counsel herein (listed on the attachment hereto) by fax.



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