UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK		Not For Publication
In re	:	Chapter 11
ENRON CREDITORS' RECOVERY *et. al.*, Reorganized Debtors.	:	Case No. 01-16034 (AJG) (Confirmed Case)
ENRON CREDITORS' RECOVERY *et. al.*, Plaintiff, v. GOLDMAN SACHS & CO., *et al*. Defendants.	:	Adv. Pro. No. 03-92677

OPINION AND ORDER REGARDING MOTION OF DnB NOR ASSET MANAGEMENT, INC. AND DnB NOR ASSET MANAGEMENT, LTD. FOR RELIEF FROM DECISION OF DEFENDANT'S NOMINATING COMMITTEE AND SCHEDULING COMMITTEE

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The issue before the Court is whether the Court should grant the motion on behalf of DnB Nor Asset Management, Inc. ("DnB US") and DnB Nor Asset Management Ltd. ("DnB UK") for relief from the decision of the Defendant's Nominating Committee and the Scheduling Committee (the "Motion for Relief") in accordance with the procedures set forth in the Deposition Protocol Order entered by the Court on June 15, 2006 (the "DPO"). Upon consideration of the pleadings and the arguments of the parties, the Court denies the Motion for Relief and permits DnB to submit contention interrogatories consistent with this opinion within ten (10) days of the entry of this order to the extent it wishes to do so.

I. Jurisdiction

The Court has subject matter jurisdiction over this matter under sections 1334(b) and 157(a) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for

the Southern District of New York. This is a core proceeding within the meaning of section 157(b)(2) of title 28 of the United States Code.

II. Background

a. General Procedural History

Commencing December 2, 2001 (the "Petition Date"), Enron and certain of Enron's direct and indirect subsidiaries (collectively, the "Debtors" or "Debtor," referencing a single entity) each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' chapter 11 cases were procedurally consolidated for administrative purposes. During the chapter 11 cases, the Debtors operated their businesses and managed their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004, and the Debtors emerged from chapter 11 as reorganized debtors (the "Reorganized Debtors"). Effective March 1, 2007, Enron changed its name to Enron Creditors Recovery Corp. Thereafter, on April 4, 2007, an order was entered authorizing the change of the caption of the Reorganized Debtors' cases.

b. Adversary Proceeding 03-92677

On November 6, 2003, the Debtors filed a complaint, Adversary Proceeding 03-92677, wherein they named DnB US as a defendant. On February 14, 2007, the Reorganized Debtors filed its second amended complaint adding several new defendants, including DnB UK (hereinafter, DnB US and DnB UK will be collectively referred to as

"DnB"). On June 15, 2006, the Court entered the Deposition Protocol Order (the "DPO"). In accordance with the DPO, on July 24, 2006, DnB submitted its first nomination to the Defendants' Nominating Committee (the "DNC") for the examination of a witness from Enron under Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)")[1] and, subsequently, the DNC declined to nominate DnB's proposed witness to the Scheduling Committee (the "SC"). On July 2, 2007, the deadline for contention interrogatories, as set forth in the Amended Discovery Procedures Order, expired. On July 19, 2007, DnB made a similar request for the Rule 30(b)(6) examination of an Enron witness, and, subsequently, the DNC declined to nominate DnB's proposed witness.

Under the DPO, "[a]ny part (including any member of the Scheduling Committee) may apply to the Court for relief with respect to any decision or failure to act by the Scheduling Committee or the Defendants' Nominating Committee." Section V.U. of the DPO provides

> Requests for relief by a party regarding decisions of the Scheduling Committee or the DNC or disputes within the Scheduling Committee shall be presented for hearing by the Court on the Thursday in the off-week immediately preceding the start of the cycle with respect to which the challenged decision pertains or on such other date as close thereto as the Court deems appropriate. The party requesting such relief shall give notice thereof to all parties not less than five days prior to the date when the request will be heard by the Court, and any response will be due one day prior to the date of the hearing.

[1] Federal Rule of Civil Procedure 30(b)(6) provides

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

On August 22, 2007, DnB filed the Motion for Relief in accordance with the DPO. On August 29, 2007, the Reorganized Debtors filed a memorandum in opposition to the Motion for Relief. The Court held a hearing on August 30, 2007 (the "Hearing").

III. Discussion

DnB contends that the Court should order the Rule 30(b)(6) examination of DnB's proposed witness before the close of fact discovery. In addition, DnB argues that the decision to pursue factual discovery through a Rule 30(b)(6) examination instead of contention interrogatories was a strategic decision that they were entitled to make. DnB states that the DNC's basis for declining to nominate DnB's proposed 30(b)(6) witness was that the DNC and other defendants agreed that nominating a witness from Enron was not a "wise tactical decision" at the time.

The Reorganized Debtors argue that DnB's request for an order directing the DNC to nominate their requested Rule 30(b)(6) witness is contrary to the provisions of the DPO for nominating and scheduling depositions. Furthermore, the Reorganized Debtors argue that DnB's requested deposition seeks discovery about the Reorganized Debtors' contentions relating to its claims against DnB, which is not properly conducted through a Rule 30(b)(6) deposition. Further, the Reorganized Debtors contend that if DnB's request for a 30(b)(6) deposition were granted, it would result in the disclosure of work product. The Reorganized Debtors note that DnB could have used properly framed contention interrogatories to inquire about the basis of the Reorganized Debtors' contentions. However, the Reorganized Debtors state that they would have objected to contention interrogatories if they were framed in a manner similar to DnB's Rule 30(b)(6) request.

Although the Reorganized Debtors argue that the Motion for Relief is contrary to the provisions of the DPO, the Court disagrees. Under the abovementioned provisions of the DPO, DnB was entitled to apply to the Court for relief with respect to any decision or failure to act by the SC or the DNC. Therefore, the Court finds that the Motion for Relief is properly before the Court.

"While a party is generally free to choose its method of discovery, it does not have an absolute right so to do and upon a showing of good cause the court may alter the manner or place of discovery as it deems appropriate." *Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514, 518 (D.Conn.1961)(citations omitted).

Although DnB contends that their decision to go forward with a request for a Rule 30(b)(6) examination instead of contention interrogatories was a choice it was entitled to make, for the reasons set forth herein, the Court finds that a Rule 30(b)(6) deposition is not warranted and contention interrogatories are more appropriate under the circumstances presented.

To the extent that DnB is seeking factual information relating to the claims in the litigation, the use of a Rule 30(b)(6) deposition is wholly appropriate and there would be no need for DnB to serve contention interrogatories to discover the facts underlying the Reorganized Debtors' legal contentions. *See Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 1993 WL 34678, *3 (S.D.N.Y. 1993).

However, as evidenced by Exhibits B, C and E of the Motion for Relief, each request made by DnB for the Rule 30(b)(6) deposition contains topics that went beyond the scope of mere factual information. Instead, the topics addressed the Reorganized Debtors' conclusions, opinions, and legal theory, and not solely facts. *See JPMorgan*

Chase Bank v. Liberty Mut. Ins. Co., 209 F.R.D. 361, *363(S.D.N.Y. 2002). Thus, a Rule 30(b)(6) examination is not warranted under the particular circumstances of the instant matter. However, the Court has determined that properly framed contention interrogatories are a more appropriate and efficient vehicle to address the topics submitted by DnB.

Contention interrogatories, as permitted by Federal Rule of Civil Procedure 33(c), serve "to discover the theory of the responding party's case." *Sheehy v. Ridge Tool Co.*, 2007 WL 1020742, *1 (D.Conn. 2007)(quoting *Salter v. I.C. Sys., Inc.*, 2005 WL 3941662, at *1 (D.Conn. 2005)). Such interrogatories "may ask another party to indicate what it contends, to state all the facts on which it bases its contentions, to state all the evidence on which it bases its contentions, or to explain how the law applies to the facts." *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, *233 (E.D.N.Y.,2007)(quoting *McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450 (D.Conn.1996)).

The Court acknowledges that Rule 30(b)(6) is an alternate discovery vehicle to address such issues. However, in this case, in light of the Rule 30(b)(6) request as proposed, there is a likelihood that the Court will have a significant level of involvement if a deposition were to proceed, where contention interrogatories are a more efficient means of achieving DnB's articulated purpose, and thus, the Court finds, as stated above, that the use of contention interrogatories is the appropriate form of discovery.

Although the deadline for contention interrogatories has passed, based on (i) DnB's contention that the decision to pursue a Rule 30(b)(6) deposition instead of contention interrogatories was a strategic decision, and (ii) the absence of any indication that DnB knowingly allowed the deadline for contention interrogatories to use to its

advantage in seeking a Rule 30(b)(6) deposition, the Court will allow DnB to submit the discovery requests in the form of contention interrogatories within ten (10) days of the entry of the order – to the extent it wishes to do so. Regarding any concern that extending the deadline for DnB would create a "floodgates" issue of subsequent requests by other defendants, the Court notes that, at the Hearing, the Reorganized Debtors recognized that allowing contention interrogatories at this time may be an appropriate resolution of the issue. However, the Reorganized Debtors dismissed contention interrogatories as a solution based on the Rule 30(b)(6) request as drafted, not based on potentially opening any "floodgates," because it would also result in protracted involvement of the Court. The Court addresses the Reorganized Debtors' concerns by directing DnB to draft any contention interrogatories consistent with this opinion and DnB's purpose, as stated the Hearing.

IV. Conclusion

Therefore, the Court finds that the Motion for Relief is denied to the extent it seeks to conduct a Rule 30(b)(6) deposition. However, the Court will grant DnB relief from the original deadline for contention interrogatories, and allow DnB to submit any of its discovery requests in the form of contention interrogatories within ten (10) days of the entry of this order to the extent it wishes to do so.

Dated: New York, New York
September 6, 2007

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE