

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

In Re:

CRESCENT RESOURCES, LLC, *et. al.*

Debtors.

Case No. 09-11507-cag

(Chapter 11)

**CRESCENT LITIGATIONS TRUST’S RESPONSE TO
ROBINSON, BRADSHAW & HINSON, P.A.’S
EMERGENCY MOTION FOR CLARIFICATION OR
PARTIAL TEMPORARY STAY (DOC #2291)**

The Crescent Resources Litigation Trust (“the Trust”) files this Response to the Emergency Motion of Robinson, Bradshaw & Hinson, P.A. (“RBH”) for Clarification or Partial Temporary Stay (Doc #2291). In support of this motion, the Trust will show as follows:

1. Contemporaneously with this response, the Trust has filed its response to Duke’s Emergency Motion to Stay (Doc# 2289). In order to obtain the requested relief, RBH must meet the same burdens required of Duke.¹ Rather than restate and further discuss those standards, the Trust adopts its Response to the Duke Motion by reference. This response will focus on the issues related to electronically stored information (“ESI”) which is the subject of RBH’s motion.
2. RBH’s request for clarification is in fact a request for reconsideration. RBH wants to exclude its emails and electronic files from the production. RBH has been aware of its need to provide ESI for over ten months. This issue was initially raised in November of 2010, when the Trust requested the production of RBH’s electronic files. RBH responded by filing an affidavit by Mr. Robert Pallasch, claiming that RBH could only provide ESI at an estimated cost of more

¹ RBH’s emergency motion does not cite to Rule 8005, and does not give any other statutory or procedural authority for the relief sought. The Trust therefore assumes that the relief is sought under the same authorities cited by Duke.

than \$3.5 million.² Mr. Pallasch further estimated that would take over two years to provide the information.³ As discussed below, the Court previously expressed some surprise at RBH's claim of cost and burden, and specifically asked RBH's counsel to explain its position. RBH's counsel, Mr. Landy, could not provide an explanation at the time, and RBH has failed to use the intervening time to do so. RBH has failed to reasonably explain why it cannot comply with the Court's order. Furthermore, the fact that the Court's order imposes a burden on RBH is not grounds for a stay. The Court was well aware of RBH's claimed burden when it entered its order. The order needs no clarification, and should not be delayed. RBH's requested stay should be denied.

3. RBH's claim that the Court intended to exclude ESI is not based on the plain meaning of the Court's order. The Court's order is clear. Rather, RBH claims that because it previously filed a motion for protective order, and the Court did not specifically reference that motion in its order, the Court must have intended to exclude ESI from the scope of the order. RBH's claim that the Court did not consider the burden to RBH is incorrect. In fact, the Court specifically referenced Doc # 1478 – the Motion that references the Pallasch affidavit – in the opinion.⁴ RBH's motion also fails to consider the Court's December 3, 2010 hearing in which RBH argued that ESI should be excluded from production.

4. As the Court correctly noted in the December 3, hearing, excluding electronic files from production makes no logical sense:

THE COURT: ...Would you not agree in today's environment --litigation environment -- that paper files are only part of the process? That everyone keeps

² See, Doc # 1479.

³ *Id.*

⁴ Memorandum Opinion (Doc # 2284) at page 7.

stuff electronically -- e-mail, documents, things of that nature. Wouldn't you agree that that's part and parcel of the process?

MR. LANDY: Of course, your Honor.

THE COURT: All right. So, having acknowledged that, I guess and this is where you're going to have to educate me a little bit, that surely RBH on behalf of other clients in the course of its representation has had to produce electronic documents. Is that a safe assumption?

MR. LANDY: I don't actually have knowledge of that, but I don't think it requires a lot of speculation. I think it's a safe assumption.⁵

The Court correctly observed that in current practice, emails have largely supplanted written correspondence, and RBH has undoubtedly provided electronic communications to other clients. RBH's latest motion fails answer the obvious questions. If RBH uses email to communicate, and has provided the communications to other clients, why can it not do so here? How can RBH use emails to communicate with clients and others, if it cannot reasonable retrieve the communications when required? RBH's motion does not attempt to answer these questions. Instead, it merely restates the claim that RBH cannot provide the requested files to the Trust any time soon, if ever.

5. If emails are excluded from RBH's production, highly relevant communications will not be obtained by the Trust. Therefore, the Trust offered to allow RBH sufficient additional time to comply with the Court's ruling in an orderly and expeditious manner.⁶ The Trust only asked in return that RBH confirm that ESI was expressly included within the scope of the Court's order. At this time, RBH has not responded to the Trust's offer.

6. RBH's motion is essentially premised on a fallacy: that RBH cannot be expected to provide its ESI unless and until it is receives millions of dollars to defray its costs, and is allowed

⁵ December 3, 2010 Transcript at page 35, lines 4 to 17, excerpts attached as Exhibit 1.

⁶ See, July 26, 2011 email from D. Brothers to C. Sileo, attached as Exhibit 2.

many months to assemble the information. In support, RBH relies exclusively on the Pallasch affidavit. RBH's reliance is misplaced. This Court previously expressed some surprise at Mr. Pallasch's conclusions:

THE COURT: So, this is where I'm having a disconnect with you. Why the difficulty? Why the cost in this context? Why is it so difficult, so time-consuming, so expensive to do this? I mean, you've indicated it's a large mass of electronic data. I've got that. Is there no way to refine it or do anything that will be responsive to what the trust needs? Is it just unmanageable?

MR. LANDY: I think that's a fair question, your Honor, obviously, and it leads me to the point that the last modifier is what is critical here, is what is responsive to their need and to their interest? And simply to say, "Turn over every piece of electronically stored information generated for 345 different matters over a six-year period," is in no [sic] tethered to a purported need or interest of the trust...⁷

7. RBH has not offered further testimony from Mr. Pallasch, or anyone else, explaining this logical incongruity. More significantly, it has not provided any authority for the proposition that a rejected claim of burden or cost warrants the entry of a stay. RBH has failed to establish that the Court did not intend to order the production of all file materials, and has failed to establish that it cannot or should not be required to promptly provide those materials to the Trust. RBH's motion should be denied.

8. WHEREFORE, for the reasons stated above, the Crescent Resources Litigation Trust respectfully requests that this Court deny the Emergency Motion of Robinson, Bradshaw & Hinson, P.A. for Clarification or Partial Temporary Stay, and grant the Trust all relief to which it may be justly entitled.

⁷ *Id.*, at page 35, line 18 to page 36, line 7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice has been forwarded to all counsel of record as set forth below by via electronic service on this 27th day of July 2011.

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/s/

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:)	CASE NO: 09-11507-CAG
)	CHAPTER 11
)	
)	
CRESCENT RESOURCES, LLC,)	Austin, Texas
)	
)	
)	Friday, December 3, 2010
Debtor.)	(1:34 p.m. to 5:41 p.m.)

#1257 - MOTION OF CRESCENT RESOURCES LITIGATION TRUST TO COMPEL
TURNOVER OF CLIENT FILES (STATUS HEARING);

#1472 - MOTION FOR ENTRY OF ATTACHED ORDERS

BEFORE THE HONORABLE CRAIG A. GARGOTTA,
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: See page 2

Courtroom Deputy: Jennifer Lopez

Court Reporters: Anita Chapman, Sherri Miiller; FTR

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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1 Austin, Texas; Friday, December 3, 2010; 1:34 p.m.

2 (Call to Order)

3 THE COURT: In Crescent Resources, there are two
4 matters according to the docket that we have set this
5 afternoon. This is in Case Number 09-11507. The first one is
6 Docket Entry 1257, motion of Crescent Resources Litigation
7 Trust to Compel Turnover of Client Files; and the second is
8 Motion for Entry of Attached Orders filed by Mr. Lewis on
9 behalf of Crescent Resources Litigation Trust.

10 May I have announcements, please?

11 MR. BROTHERS: Your Honor, Doug Brothers with Jim
12 McCarthy and Joe Martinec on behalf of the litigation trust,
13 with a slight clarification on what is before the Court.

14 THE COURT: Did I misstate something?

15 MR. BROTHERS: Your Honor stated that the motion
16 itself for turnover was before the Court.

17 THE COURT: It's a status hearing.

18 MR. BROTHERS: Yes, sir.

19 THE COURT: You're right. I just didn't pick up on
20 that. Thank you for the clarification, Mr. Brothers.

21 Who else, please, would like to enter an appearance?

22 MR. SPEARS: Good afternoon, your Honor, Berry Spears
23 on behalf of Duke Energy.

24 THE COURT: Thank you. Anyone else? Yes?

25 MR. SILEO: Yes, your Honor, Chris Sileo and Jon

1 we have the right -- the law firm has the right -- to review
2 its documents to withhold information that is either not
3 responsive in some way, is related to a different client by
4 mistake, for example, or that is otherwise protected
5 information of the firm. The firm has attorney work product
6 rights that do not convey to the client in the file. And we
7 have the right to search and to review all of the potentially
8 responsive materials. That data then has to be produced.

9 That's what is estimated to be a two-year undertaking
10 that will cost millions and millions of dollars. The Federal
11 Rules do not, to our understanding, do not require RBH to
12 undertake the burden and the expense of that process.

13 And I will note that the litigation trust agreement
14 has a provision for the trust to bear the expense of the cost
15 of the debtor and its advisors to produce documents that are
16 requested pursuant to that agreement. We can invoke that
17 provision. We can inform the trust in advance of what the
18 projected costs will be and if they will commit to bear that
19 cost, then I suspect we'll be in a place where we have a more
20 narrowed approach to the collection and the production of this
21 information.

22 **THE COURT:** Let me stop you for a minute and I have
23 tried -- and I want to do this for the benefit of all the
24 speakers initially this afternoon -- to let you go through your
25 presentation, but every once in a while when I'm sitting up

1 here, there's just something that's just nagging at me and I
2 can't let it go because it affects my focus of what the speaker
3 has to say.

4 Would you not agree in today's environment --
5 litigation environment -- that paper files are only part of the
6 process? That everyone keeps stuff electronically -- e-mail,
7 documents, things of that nature. Wouldn't you agree that
8 that's part and parcel of the process?

9 **MR. LANDY:** Of course, your Honor.

10 **THE COURT:** All right. So, having acknowledged that,
11 I guess and this is where you're going to have to educate me a
12 little bit, that surely RBH on behalf of other clients in the
13 course of its representation has had to produce electronic
14 documents. Is that a safe assumption?

15 **MR. LANDY:** I don't actually have knowledge of that,
16 but I don't think it requires a lot of speculation. I think
17 it's a safe assumption.

18 **THE COURT:** So, this is where I'm having a disconnect
19 with you. Why the difficulty? Why the cost in this context?
20 Why is it so difficult, so time-consuming, so expensive to do
21 this?

22 I mean, you've indicated it's a large mass of
23 electronic data. I've got that. Is there no way to refine it
24 or do anything that will be responsive to what the trust needs?
25 Is it just unmanageable?

1 **MR. LANDY:** I think that's a fair question, your
2 Honor, obviously, and it leads me to the point that the last
3 modifier is what is critical here, is what is responsive to
4 their need and to their interest? And simply to say, "Turn
5 over every piece of electronically stored information generated
6 for 345 different matters over a six-year period," is in no
7 tethered to a purported need or interest of the trust.

8 And that particularly relates to the exercise we're
9 undergoing here, which is to prepare for an evidentiary hearing
10 concerning who is the client for these matters. Where is the
11 showing that this electronically stored information is relevant
12 to that determination or is reasonably necessary to that
13 determination?

14 We have given them access to 342 of the matters. The
15 other three are being reviewed by Duke and those documents that
16 are non-privileged or that Duke is not asserting a privilege
17 over, they are going to produce to the trust in advance of the
18 evidentiary hearing. They have the invoices for those matters.
19 They know who was identified on the invoice as the recipient of
20 the invoice. They have seen internal -- the schedule that we
21 prepared and provided to the parties indicating what the client
22 number was and what the client matter was, associated with
23 which entities.

24 There is more than enough and certainly by the time
25 Duke produces the information it has indicated it will produce,

1 there will be more than enough information to facilitate a
2 determination of who was the client for these matters.

3 **THE COURT:** All right. And let's -- and again, I
4 want you to go back to your presentation to the Court, but
5 there is really a function of my questions. Let's assume
6 you're right, that it's just too unwieldy. I guess then what
7 you have to explain to me is, if you've investigated this, is
8 there a protocol -- for lack of a better word this afternoon,
9 I'm sorry -- mechanism in place that you could implement that
10 would somehow gather the information -- only the information
11 that either the Court finds or you agree with the trust to
12 provide it to the trust?

13 Is there some way to do that and implement it and do
14 it in a fairly quick fashion? Or if it's still unwieldy at
15 this point -- if, indeed, we're talking about all this
16 electronic data, is there any way to manage it and produce it
17 in a way that is responsive to what the trust ultimately needs?

18 **MR. LANDY:** I apologize, your Honor, I'm not
19 particularly expert in these matters. I could not go back and
20 fashion an approach that would target a subset of the
21 information that the trust can narrowly identify. But I'm
22 certain that that's a much more manageable approach than simply
23 saying, "Give us everything that's ever been generated by 151
24 people within your law firm over a six-year period concerning
25 345 matters."

1 For example, if they said, "We think these five
2 people are particularly relevant to the work we're doing and we
3 have reason to believe that they have documents that are
4 relevant to the inquiries currently being undertaken and we
5 want to narrow our focus to electronic information concerning
6 this matter or that matter or this transaction or that
7 transaction," then I think that is something we can much more
8 reasonably attempt to identify and to work through an agreement
9 with the parties to produce.

10 Similarly, if they said, "We want," for example,
11 "documents on the RBH system as opposed to, you know, millions
12 of e-mails, and we want documents related to this matter or
13 this transaction or this time period or drafted by this
14 person," then I think we have the ability to search for that
15 stuff and it's a lot more manageable both from a time and a
16 cost perspective.

17 **THE COURT:** Now, you touched -- again, I apologize,
18 but this is obviously critical to everyone's concern. Isn't
19 that one of the problems we're dealing with is, I suspect, and
20 Mr. Brothers will correct me when he gets a chance at the
21 podium again, e-mails would be some indicative of the level or
22 whether or not RBH was representing Crescent or was
23 representing Duke or was representing both of them?

24 Do you know? If you don't, that's fine. But do you
25 know, was there any protocol in place by RBH in terms of

1 segregating e-mails as they represented the client matters? In
2 other words, if Attorney A came in a day and did work on behalf
3 of a variety of files and maybe one was Crescent and the other
4 one was something completely unrelated, is there any way to
5 track those e-mails? Because I suspect, and Mr. Brothers will
6 correct me if I'm wrong, he might want to see those because
7 that may go to the ultimate issue of who is the client.

8 **MR. LANDY:** In response to that, I don't know the
9 practice. I'm not aware of a firm-wide practice for the
10 maintenance of e-mails or folders or the like, but Mr. Brothers
11 has indicated and actually had noticed before he withdrew them,
12 had indicated that he was going to take the depositions of the
13 four lawyers at RBH whom they apparently think have the most
14 relevant knowledge concerning these matters; the partners at
15 the firm whom they believe have the most to say about this and
16 are most probative of the question of who's the client.

17 They'll have the opportunity to ask those questions,
18 but to say that we need to produce this mountain of data that
19 could not conceivably be processed and reviewed and collected
20 and produced and reviewed by Mr. Spears for a privilege
21 determination in advance of this hearing. There's no way to do
22 that, putting aside the cost of it.

23 **THE COURT:** All right. Go ahead with your
24 presentation. Thank you.

25 **MR. LANDY:** I think, your Honor, that's sort of the

1 principal point we have here today is as it relates to the 342
2 files. We're not aware that that issue has been resolved; and
3 relating to the electronically stored information.

4 Again, we're not saying that it can never be obtained
5 or would never be produced by RBH. I want to be clear about
6 that. But for purposes of facilitating this evidentiary
7 hearing, our position is it hasn't been shown either that
8 there's an entitlement to it or that there's a reasonable need
9 for it with an arrangement about who's going to bear the cost
10 of that. So, those are sort of the main points I wanted to
11 make today.

12 There were some additional issues that Mr. Brothers
13 raised. I apologize for consulting my notes, but I've jotted
14 some down as I listened. He talked about invoices versus
15 billing statements. As we've made clear, we understood that we
16 had been ordered on October 15th to provide the invoices for
17 the 342 matters to the trust and to Duke. And the invoices for
18 the other three matters to Duke. We have done that.

19 A billing statement, I personally do not understand
20 the difference between a billing statement and an invoice. I
21 think of them as the same.

22 **THE COURT:** I'll share this with you. That's kind of
23 what I thought. It's maybe a poor usage by my part and maybe
24 it's semantical and maybe it isn't, but I viewed them as the
25 same thing.

1 **MR. LANDY:** As did I, which is why I understood that
2 we were going to produce the invoices. We did -- more than
3 10,000 pages of them. They set out the work that was done, by
4 whom and what amount, at what price, and to whom the bills were
5 sent. That seems like a whole lot of information to me.

6 Mr. Brothers has at times referenced this category of
7 billing records and I think he talked today about account or
8 matter of set-up documents. Again, I don't fully understand
9 what that is meant to encompass, but to the extent there's an
10 account or a matter of set-up document, our view is that's an
11 internal administrative matter. It's the possession of
12 Robinson Bradshaw and Hinson. It's not the property of a
13 client.

14 They have seen to whom bills were addressed and to
15 whom bills were sent. They have seen our schedule where we
16 identify the company in whose name the matter was maintained.
17 They know that there were different client numbers for
18 accounting purposes for Duke Energy as opposed to Crescent.
19 They have seen all that. So, that's on that point.

20 And Mr. Brothers referenced -- again, I didn't follow
21 this -- irregularities about the production of invoices made by
22 Duke Energy this week and some discrepancies. I don't have any
23 idea what that means. And to the extent it's something we need
24 to address, I'd ask for clarification or more information of
25 that, but otherwise I don't want to leave it out there that we

CERTIFICATION

I certify that the foregoing is a correct transcript from the
electronic sound recording of the proceedings in the above-
entitled matter.



December 8, 2010

TONI HUDSON, TRANSCRIBER

Doug Brothers

From: Doug Brothers
Sent: Tuesday, July 26, 2011 1:04 PM
To: csileo@scottdoug.com
Subject: RBH Turnover Proceeding -- Motion to Stay

Chris:

It is my understanding that your client is asking the Trust to agree to a stay so that RBH can contest whether the order issued Friday compels the production by RBH of its e-mails and other ESI. The Trust is not willing agree to that request for a stay.

As I stated on our call, however, the Trust is amenable to discussing an orderly process for the production of ESI that would extend actual production for a reasonable time past the current date specified by the order (i.e. this Friday), but only if RBH makes an unequivocal, and unconditional, agreement to make full production as required by the order, including of all ESI.

Thanks,

Doug

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7/27/2011