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

United States Courts  
Southern District of Texas  
**FILED**  
**MAY 29 2003**  
**Michael N. Milby, Clerk**

In re ENRON CORPORATION SECURITIES )  
LITIGATION )  
This Document Relates To: )  
 )  
MARK NEWBY, *et al.*, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
ENRON CORP., *et al.*, )  
 )  
Defendants. )  
 )  
THE REGENTS OF THE UNIVERSITY OF )  
CALIFORNIA, *et al.*, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
KENNETH L. LAY, *et al.*, )  
 )  
Defendants. )

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

**JOSEPH M. HIRKO'S MOTION TO  
DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT**

Joseph M. Hirko hereby moves, pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing the First Amended Consolidated Complaint for Violation of the Securities Laws ("Complaint") as it pertains to him. The Complaint should be dismissed for two separate and independent reasons. First, the claims against Mr. Hirko are barred by the doctrine of *res judicata*. Second, even if those claims were not otherwise barred, the Complaint—which, on its face contains no new allegations against Mr.

1948

Hirko—still fails to satisfy the stringent pleading requirements of the PSLRA, fails to aver fraud with particularity, and otherwise fails to state a claim upon which relief can be granted.<sup>1</sup>

### **BACKGROUND**

On May 8, 2002, Mr. Hirko moved this Court to “dismiss with prejudice all claims against [him]” in the *Newby* case. See Memorandum in Support of Defendant Joseph M. Hirko’s Motion to Dismiss the Consolidated Amended Complaint at 17. The Court, by Order dated April 24, 2003 (“Order”), granted Mr. Hirko’s motion without qualification. That Order was “an adjudication on the merits for purposes of *res judicata*.” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 n.8 (5th Cir. 1993); see also *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (dismissal for failure to state a claim is “judgment on the merits”); *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996), cert. denied, 520 U.S. 1168 (1997) (same); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996) (same).<sup>2</sup>

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<sup>1</sup> Mr. Hirko incorporates by reference the “Standards for Pleading Fraud with Particularity as to Each Individual Defendant,” as set forth at pages 3-4 of the Memorandum in Support of Joseph M. Hirko’s Motion to Dismiss the Consolidated Amended Complaint.

<sup>2</sup> There can be little doubt that the Court’s dismissal was “with prejudice.” As noted previously, Mr. Hirko expressly sought dismissal “with prejudice” and the Court granted his motion without qualification. Furthermore, “it is well established that a dismissal is presumed to be with prejudice unless the order explicitly states otherwise.” *Fernandez-Montes*, 987 F.2d at 284 n.8. The Court’s intention to dismiss Mr. Hirko with prejudice is also apparent from the fact that the discovery stay was lifted in this matter. The Court presumably would not have lifted the stay if it contemplated that Plaintiffs might attempt to resurrect their claims against dismissed parties, which would raise the possibility of those parties filing new motions to dismiss. See 15 U.S.C. § 78u-4(b)(3)(B) (“In any private action arising under this chapter, *all* discovery and other proceedings shall be stayed during the pendency of *any* motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” (Emphasis supplied.))

Approximately one week later, in response to Plaintiffs' stated intention to file an amended complaint in which additional defendants might be named, the Court ordered Plaintiffs to "file a brief but adequately informative summary of the parties Lead Plaintiff wishes to add [to its amended complaint] and the claims it wishes to assert against them, and [to] send a copy to all counsel." *In re Enron Corp. Secs., Derivative & ERISA Litig.*, Civ. Action No. H-01-3624 (S.D. Tex. May 2, 2003). In response, Plaintiffs represented to the Court that they would "*add no defendants* other than the subsidiaries of bank defendants in the complaint to be filed on May 14, 2003." *See* Lead Pls.' Resp. to Order Entered May 2, 2003 (emphasis supplied).

Nevertheless, on May 14, 2003, Plaintiffs filed their latest Complaint, adding Mr. Hirko as a defendant in *precisely* the same counts that the Court had previously adjudicated on the merits in his favor. On its face, the Complaint contains *no* new allegations against Mr. Hirko. Instead, it purports to "incorporate[] by reference" an indictment ("Indictment") returned against Mr. Hirko on April 29, 2003. *See* Complaint at 76.<sup>3</sup>

### ARGUMENT

#### **I. THE CLAIMS AGAINST MR. HIRKO ARE BARRED BY THE DOCTRINE OF RES JUDICATA.**

As previously noted, the Court's April 24 Order was "an adjudication on the merits for purposes of *res judicata*." *Fernandez-Montes*, 987 F.2d at 284 n.8. Consequently, to revive their claims against Mr. Hirko, Plaintiffs would first have to satisfy the stringent requirements of Rule 60(b) of the Federal Rules of Civil Procedure ("Relief from Judgment or Order"). *See, e.g., Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976). Plaintiffs

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<sup>3</sup> The Indictment was attached as Exhibit B to the Exhibit Appendix filed with the Complaint.

have not even attempted to do so.<sup>4</sup> As a result, their claims against Mr. Hirko must be dismissed.

## II. THE COMPLAINT DOES NOT ALLEGE FRAUD WITH THE REQUISITE PARTICULARITY TO SATISFY RULE 9(b) OR THE PSLRA.

Even if the claims against Mr. Hirko were not otherwise barred by the doctrine of *res judicata*, the Complaint must nevertheless be dismissed because it fails to plead fraud against Mr. Hirko with the requisite degree of particularity. The Court's April 24 Order dismissed Plaintiffs' § 10(b), § 20(a), and § 20(A) claims on the grounds that Plaintiffs failed to satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4 *et seq.* The latest Complaint suffers from the same fatal infirmities.

On its face, the Complaint alleges *nothing* new against Mr. Hirko. Instead, it merely purports to "incorporate[] by reference" the Indictment returned against Mr. Hirko on April 29, 2003. *See* Complaint at 76. But Plaintiffs' defective claims cannot be cured simply by stapling a copy of the Indictment to their otherwise deficient Complaint.

As an initial matter, to survive a motion to dismiss, a complaint brought by a class alleging civil violations of the federal securities laws must be pled with far greater particularity than an indictment alleging analogous criminal violations. *Compare* 15 U.S.C. § 78u-4(b)(1), (2) (civil class action securities fraud complaint must "specify each statement alleged to have been misleading, [and] the *reason or reasons* why the statement is misleading," and must "state with *particularity facts* giving rise to a *strong* inference that the defendant acted with the required state of mind") with Fed. R. Crim. P. 7(c) ("The indictment . . . shall be a *plain*,

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<sup>4</sup> Indeed, notwithstanding the clear language in the Court's May 2 Order directing Plaintiffs to file and serve a summary of the parties it intended to add to the Complaint, Plaintiffs did not even inform the Court of their intention to add Mr. Hirko.

*concise* and definite written statement of the *essential* facts constituting the offense charged.”) (Emphasis supplied.) Furthermore, unlike a civil complaint, an indictment need not even allege conduct giving rise to a direct violation of the securities laws; a party may be convicted merely for aiding and abetting others in their commission of securities fraud, even though that same conduct would *not* give rise to civil liability. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). Indeed, in Mr. Hirko’s case, the Indictment’s securities fraud count relies on 18 U.S.C. § 2 (aiding and abetting provision of federal criminal code) as one theory of wrongdoing. *See* Indictment at 18.

In this case, the conclusory allegations set forth in the Indictment do not cure the defects that led the Court to dismiss Plaintiffs’ claims against Mr. Hirko. Specifically, in its April 24 Order, the Court emphasized the following points:

- “The complaint does not allege that Hirko attended the meetings of the Management Committee in Houston.” Order at 18. The Indictment contains no such allegation either.
- “The complaint makes no allegations that Hirko received any bonuses.” Order at 18. Similarly, the Indictment does not allege that Mr. Hirko received any bonuses.
- “Nor does the complaint assert that Hirko participated in the preparation of any of Enron’s financial statements or accounting decisions.” Order at 18. The Indictment similarly fails to allege that Mr. Hirko participated in those activities.
- “Hirko emphasizes that he was CEO of EBS only ‘in its very early stages,’ because Kenneth Rice was named co-CEO in June 1999 and then became the sole CEO in June 2000, when Hirko left EBS and Enron.” Those facts are consistent with the facts alleged at page 2 of the Indictment.
- “Moreover, the sale of Hirko’s Enron stock, constituting only 19.87% of his Enron holdings, occurred in the spring of 2000, just prior to his separation from EBS and Enron, and he continued to hold over 80% of his Enron investments.” Order at 18. The Complaint

and the Indictment contain substantively identical allegations with respect to Mr. Hirko's trading activity. *Compare* Complaint at 76 with Indictment at 12-13.

In short, even considering the allegations set forth in the Indictment, Plaintiffs have still failed to "state with particularity *facts* giving rise to a strong inference that [Mr. Hirko] acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2) (emphasis supplied), *i.e.*, that he acted with knowledge or severe recklessness in making any alleged misrepresentations. *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407 (5th Cir. 2001); *In re Securities Litig. BMC Software, Inc.*, 183 F. Supp.2d 860, 865 n.15 (S.D. Tex. 2001). The Indictment's conclusory allegations do not cure that defect.

#### CONCLUSION

For the reasons set forth herein, the Court should dismiss with prejudice all claims against Joseph M. Hirko.

Respectfully submitted,



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Dated: May 29, 2003

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all counsel of record on the Service List on May 29, 2003 *via* posting to [www.esl3624.com](http://www.esl3624.com) in compliance with the Court's Order Regarding Service of Papers and Notice of Hearing Via Independent Website.

A handwritten signature in black ink, appearing to read 'D. H. Angeli', written in a cursive style.

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David H. Angeli