

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

United States Courts
Southern District of Texas
FILED

JUL 01 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)

**MEMORANDUM IN SUPPORT OF JOSEPH M. HIRKO'S MOTION TO STRIKE
AND REPLY MEMORANDUM IN SUPPORT OF JOSEPH M. HIRKO'S MOTION TO
DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT**

Apparently recognizing that they cannot satisfy the stringent requirements of FRCP 60(b) ("Relief from Judgment or Order"), Plaintiffs attempt to circumvent that rule simply by filing an amended complaint naming Mr. Hirko as a defendant, as if he had never been dismissed from this case. To make matters worse, Plaintiffs have not even bothered to take the time actually to amend the Complaint to include any new allegations against Mr. Hirko.

1543

Instead, they merely stapled to their earlier defective complaint a copy of a recent indictment which, based on a bare-bones factual recitation, purports to charge Mr. Hirko with various offenses relating to his tenure at Enron Broadband Services (“EBS”). Continuing that piggy-backing strategy, Plaintiffs’ memorandum opposing Mr. Hirko’s present motion to dismiss (“Opposition”) attaches an SEC complaint recently filed against Mr. Hirko. Despite the fact that Plaintiffs’ Complaint does not even allude to, much less incorporate the SEC’s allegations, Plaintiffs ask the Court to “take judicial notice of” the SEC complaint, and go on to rely primarily—and in some cases exclusively—on the allegations set forth therein to respond to the arguments raised in Mr. Hirko’s motion.

The issue at hand, however, is not whether the *SEC* properly pled its claims. There are only two questions before the Court: (i) may *Plaintiffs’* claims survive despite the fact that this Court previously dismissed the identical claims, based on a complaint that was (with respect to Mr. Hirko) facially identical to the First Amended Consolidated Complaint?; and (ii) does *Plaintiffs’* Complaint satisfy the PSLRA’s onerous pleading requirements? Notwithstanding the Opposition’s rhetoric and its frequent citations to the SEC Complaint, the simple fact remains that the answer to both questions is “no.”¹

¹ Plaintiffs erroneously assert that Mr. Hirko’s motion did not address Plaintiffs’ §§ 20A and 20(a) claims. Mr. Hirko’s motion expressly seeks to dismiss the Complaint in its *entirety* as it pertains to him. The same arguments support the dismissal of all of the claims, *i.e.*, each of the claims is barred by the doctrine of *res judicata* and the allegations relating to each are not pled with the requisite degree of particularity.

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

As set forth in greater detail in Mr. Hirko's opening memorandum ("Memorandum" or "Mem."), the Court's April 24, 2003 Order dismissing Mr. Hirko was an adjudication on the merits for purposes of *res judicata*. See Mem. at 2. Rule 60(b) of the Federal Rules of Civil Procedure provides the mechanism by which those claims could be revived, assuming that Plaintiffs could make the difficult showing required by that rule. They have not even attempted to do so.

Instead, Plaintiffs contend—contrary to Fifth Circuit law and this Court's own orders—that the Court's dismissal of Mr. Hirko was without prejudice to the Plaintiffs' ability to cure the defects in their original complaint. Plaintiffs cite the Court's Orders of April 24 and June 5, 2003 in support of their argument that the Court's dismissal of Mr. Hirko was without prejudice. In fact, each of those Orders lends support to Mr. Hirko's argument that the dismissal was with prejudice.

A. The Court's April 24 Order Dismissed Mr. Hirko with Prejudice.

Plaintiffs first argue that the Court's April 24 Order dismissing Mr. Hirko "clearly contemplated Lead Plaintiff would have an opportunity to amend and therefore the decision dismissing claims against Hirko was not a dismissal with prejudice." Opp'n at 6. However, far from "clearly contemplating" that Plaintiffs might amend to include Mr. Hirko, the plain language of the Order strongly implies otherwise. Where, in that Order, the Court contemplated that Plaintiffs might cure their pleading deficiencies by amending the Complaint, the Court expressly said as much. See, e.g., Order at 13 (granting leave to amend Texas

Securities Act claims (none of which involve Mr. Hirko)); *id.* at 16 (“In the interests of justice the Court grants leave to Lead Plaintiff to amend/supplement its complaint to add” certain allegations against defendant Richard B. Buy). In its April 24 Order, the Court did not, as Plaintiffs suggest, give Plaintiffs unfettered discretion to amend. Rather, the Court specifically directed Lead Plaintiff to “supplement or amend its complaint *as indicated in this and prior orders.*” *Id.* at 46 (emphasis supplied). Neither the April 24 Order nor any prior order granted Plaintiffs leave to amend their complaint with respect to Mr. Hirko. Quite to the contrary, the Court, without qualification, granted Mr. Hirko’s motion to dismiss the original complaint with prejudice.

Furthermore, as discussed in Mr. Hirko’s opening Memorandum, “it is well established that a dismissal is presumed to be with prejudice unless the order explicitly states otherwise.” Mem. at 2 (quoting *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 n.8 (5th Cir. 1993)). In their Opposition, Plaintiffs contend that “*Fernandez-Montes* is not on point,” Opp’n at 7, but fail to offer any convincing basis upon which to distinguish the cited language. In *Fernandez-Montes*, the defendant moved to dismiss the plaintiff’s complaint, and the motion was denied. 987 F.2d at 282. The case was subsequently transferred to a different judge who, at the pretrial conference, “stated his intention to ‘withdraw’ [the previous] denial of the [defendant’s] earlier motion to dismiss the original complaint, and to grant the motion.” *Id.* There was a question as to whether the dismissal order, which “did not say whether the dismissal was with prejudice,” *id.*, amounted to a “final decision” as required to confer jurisdiction on the Court of Appeals pursuant to 28 U.S.C. § 1291. See *Fernandez-Montes*,

987 F.2d at 282 & n.6. The court held that the order was appealable because, *inter alia*, “it is well established that a dismissal is presumed to be with prejudice unless the order explicitly states otherwise.” *Id.* at 284 n.8. That holding directly supports the notion that the Court’s April 24 Order was a final adjudication on the merits, particularly in light of the fact that Mr. Hirko expressly sought dismissal with prejudice. *See Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 655 n.26 (5th Cir. 2002) (“The district judge technically did not specify whether he was dismissing the case with or without prejudice, however, a dismissal is presumed to be with prejudice unless the order explicitly states otherwise. Furthermore, the [defendant’s] motion, which the district court granted, requested that [plaintiff’s] claims be dismissed with prejudice.” (Quotation marks and citation omitted.)).

B. The Court’s June 5 Order is Inapposite to Mr. Hirko’s Motion.

Plaintiffs also seek refuge in this Court’s June 5, 2003 Order granting Plaintiffs leave to file their First Amended Consolidated Complaint on June 16, 2003. *See* Opp’n at 6. In that Order, the Court referenced “a letter from counsel for Deutsche Bank AG” objecting to Plaintiffs’ desire to file an amended complaint naming Deutsche Bank as a defendant. In its June 5 Order, the Court noted that the earlier dismissal of Deutsche Bank “was without prejudice” and that, in any event, “Deutsche Bank AG [could] move to dismiss any new claims asserted against it once [the amended complaint had] been served.” Plaintiffs seize on that snippet from the Court’s June 5 Order to argue that Mr. Hirko’s dismissal must also have been “without prejudice.”

The June 5 Order, however, is inapposite to Mr. Hirko's situation. First of all, the June 5 Order makes no reference whatsoever to Mr. Hirko or any defendant other than Deutsche Bank. Moreover, and unlike Mr. Hirko, Deutsche Bank never requested to be dismissed with prejudice. *See* Mot. of Def. Deutsche Bank AG to Dismiss the Consolidated Am. Compl. (May 8, 2002 (Docket Entry # 716)); Mem. of Law in Supp. of Def. Deutsche Bank AG's Mot. to Dismiss & proposed Order Granting Deutsche Bank AG's Motion to Dismiss (Docket Entry # 717). As the Fifth Circuit has recognized, the presumption that a dismissal is with prejudice unless otherwise stated is particularly strong where a defendant expressly seeks dismissal with prejudice, as Mr. Hirko did here. *See Nationwide*, 283 F.3d at 655 n.26.²

In short, Fifth Circuit law and this Court's previous orders establish that the claims against Mr. Hirko were dismissed with prejudice. Accordingly, Plaintiffs' attempt to revive those claims is barred by the doctrine of *res judicata*.

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

Even if Plaintiffs' claims were not otherwise barred, they should nevertheless be dismissed for failing to state a claim upon which relief may be granted. It is undisputed that (i) the Court dismissed Plaintiffs' original Complaint as it pertained to Mr. Hirko because it failed to satisfy the PSLRA's pleading requirements, and (ii) that the First Amended

² Additionally, the issue of whether Deutsche Bank was dismissed with prejudice was never actually briefed or argued to the Court. At the time the Court issued its June 5 Order, it had before it only a letter from Deutsche Bank's counsel suggesting that it might raise *res judicata* arguments in a future motion.

Consolidated Complaint, on its face, contains *no* new allegations regarding Mr. Hirko.

Nevertheless, Plaintiffs erroneously assert that they have met their pleading burden simply by attaching to the Complaint a copy of the recently filed Enron Task Force Indictment, and attaching the SEC Complaint to their Opposition memorandum.

A. The Court Should Strike—or at the Very Least Disregard—the SEC Complaint and the Opposition Memorandum’s References to It.

Plaintiffs complain that “noticeably absent from Hirko’s motion is any reference to claims the SEC pleaded against him in its First Amended Complaint dated May 1, 2003 [attached as Exhibit A to the Opposition].” Opp’n at 1. The reason Mr. Hirko’s Motion did not mention the SEC Complaint is quite obvious: the Motion was directed at Plaintiffs’ Complaint, which does not reference, incorporate, or even hint at the allegations set forth in the SEC Complaint. Notwithstanding that fact, Plaintiffs ask the Court to “take judicial notice of the SEC’s First Amended Complaint,” Opp’n at 1, and rely primarily on that complaint to respond to the arguments raised in Mr. Hirko’s motion. *See, e.g.*, Opp’n at 3, 4, 5, 6, 8, 9, 10, and 11 (more than 40 cites to the SEC Complaint).

But the question here is not whether the SEC adequately pled one or more causes of action against Mr. Hirko—the question is whether *Plaintiffs* did and, more precisely, whether Plaintiffs’ *Complaint* does. In that regard, “[i]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *see also Morgan Dist. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989). The Fifth Circuit agrees that “[n]ormally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to the

facts stated in the complaint and in the documents either attached to or incorporated in the complaint.” *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).

Here, the SEC complaint was neither attached to nor incorporated in the Complaint. Nevertheless, Plaintiffs misleadingly rely on an exception to the general rule cited in *Lovelace* to argue that the Court, in deciding Mr. Hirko’s motion, should nevertheless consider—and indeed “take judicial notice of”—the allegations set forth in the SEC Complaint. In *Lovelace*, the Fifth Circuit adopted the Second Circuit’s “public disclosure” exception to the general rule limiting the Court’s inquiry to the four corners of the complaint. Pursuant to that exception, “[w]hen deciding a motion to dismiss a claim for securities fraud on the pleadings, a court may consider the contents of relevant *public disclosure documents* which (1) are *required to be filed* with the SEC, and (2) are *actually filed* with the SEC.” *Lovelace*, 78 F.3d at 1018 (emphasis supplied). Relying on *Lovelace*, courts deciding motions to dismiss in this district regularly consider the contents of prospectuses, quarterly financial statements, and other documents that defendants were required to file and did file with the SEC. *See, e.g., In re Azurix Corp. Secs. Litig.*, 198 F. Supp.2d 862 (S.D. Tex. 2002); *In re Secs. Litig. BMC Software, Inc.*, 183 F. Supp.2d 860 (S.D. Tex. 2001).³ The *Lovelace* court placed the following strict limitation on

³ The *Lovelace* court cited three factors supporting that narrow exception to the general rule: (i) “the documents are required by law to be filed with the SEC, and no serious question as their authenticity can exist”; (ii) “the documents are the very documents that are alleged to contain the various misrepresentations or omissions”; and (iii) “relevant public disclosure documents required to be filed with the SEC” are appropriate for judicial notice as facts “‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *Lovelace*, 78 F.3d at 1018 n.1 (quoting Fed. R. Evid. 201(b)(2)). The SEC Complaint does not satisfy any of those three criteria.

its holding: “*We stress that our holding relates to public disclosure documents required by law to be filed, and actually filed, with the SEC*” *Id.* (Emphasis supplied.)

Notwithstanding the Court of Appeals’ explicit limitation on its holding in *Lovelace*, Plaintiffs ask the Court to “take judicial notice of the SEC’s First Amended Complaint.” Opp’n at 1. But the *Lovelace* public disclosure exception obviously has no relevance or applicability here. The SEC’s allegations are just that: allegations. Neither the SEC Complaint nor the allegations contained therein are “facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b)(2), which might be appropriate for judicial notice in certain circumstances. Furthermore, at the risk of stating the obvious, complaints filed by the SEC are not “public disclosure documents which (1) are required to be filed with the SEC, and (2) are actually filed with the SEC.” *Lovelace*, 78 F.3d at 1018. As such, the *Lovelace* exception is wholly inapplicable, and the Court’s inquiry on the present motion is thus limited “to the facts stated in the complaint and in the documents either attached to or incorporated in the complaint.” *Lovelace*, 78 F.3d at 1017. Because the SEC Complaint was neither attached to nor incorporated in the Complaint, the Court should strike from the record—or at the very least disregard—the SEC Complaint and the Opposition’s many references to it.

B. The Complaint—Which on its Face Contains Precisely the Same Allegations that this Court Previously Dismissed as Insufficient—Does Not Satisfy Plaintiffs’ Onerous Pleading Burden.

In his opening Memorandum, Mr. Hirko argued that Plaintiffs cannot save their Complaint—which is essentially a carbon copy of the complaint this Court previously

dismissed—simply by attaching a copy of the related criminal indictment. As pointed out in the opening Memorandum, 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.

In response, and without citing any authority, Plaintiffs baldly assert that “[a]ny argument that *civil* fraud standards, even under the PSLRA, are more stringent than those faced by a criminal defendant simply will not wash.” Opp’n at 10 (emphasis in original). But the point is really beyond any serious dispute. “[A]lthough an indictment ‘must allege that the defendant committed each of the essential elements of the crime charged so as to enable the accused to prepare his defense and to invoke the double jeopardy clause in any subsequent prosecution for the same offense,’ ‘[i]t is not necessary for an indictment to go further and to allege in detail the factual proof that will be relied upon to support the charges.’” *United States v. Caldwell*, 302 F.3d 399, 412 (5th Cir. 2002) (quoting *United States v. Crippen*, 579 F.2d 340, 342 (5th Cir.1978)); see also *United States v. Williams*, 679 F.2d 504, 508 (5th Cir.1982) (stating that Federal Rule of Criminal Procedure 7(c) “does not mean that the indictment must set forth facts and evidentiary details necessary to establish each of the elements of the charged offense”). The PSLRA, in stark contrast, requires civil plaintiffs to “specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading,” and to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(1), (2). In

short, incorporating the allegations set forth in a criminal indictment is no substitute for the particularized pleading requirements of the PSLRA.⁴

CONCLUSION

For the reasons set forth herein, the Court should dismiss with prejudice all claims against Joseph M. Hirko, and should strike from the record the SEC Complaint and each of the Opposition's references to it.

⁴ Furthermore, as discussed in Mr. Hirko's opening Memorandum, Mr. Hirko may be found liable in the SEC and criminal proceedings merely for aiding and abetting others in committing fraud. Thus, the pleadings in those cases would survive motions to dismiss even if they alleged conduct amounting merely to aiding and abetting. The same cannot be said for civil complaints filed by private litigants. Plaintiffs' Opposition does not even address that point.

Respectfully submitted,



Barnes H. Ellis (Bar No. 30599)
David H. Angeli (Bar No. 30926)
STOEL RIVES LLP
900 SW 5th Avenue, Suite 2600
Portland, Oregon 97204
(503) 224-3380 (phone)
(503) 220-2480 (fax)

Jacks C. Nickens (Bar No. 1501 3800)
Paul D. Flack (Bar No. 00786930)
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.
600 Travis, Ste. 7500
Houston, TX 77002
(713) 571-9191 (phone)
(713) 571-9652 (fax)

Attorneys for Defendant Joseph M. Hirko

Dated: July 1, 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 July 1, 2003 *via* posting to 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 'David H. Angeli', written in a cursive style.

David H. Angeli