

United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
(Consolidated)

CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT
KEN L. HARRISON'S RENEWED MOTION TO DISMISS**

1570

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15 U.S.C.
 §78j(b) 1, 5, 7
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I. INTRODUCTION

Although defendant Ken. L. Harrison styles his motion as one to dismiss, it is in fact a motion to reconsider the Court's denial of his first 12(b)(6) motion.¹ Selectively parsing only certain allegations (and injecting his own version of the facts), Harrison proffers a nonsensical amalgam of rhetorical questions, and compares the allegations against him with the allegations against James Derrick, Joseph Hirko and Rebecca Mark-Jusbasche. This "analysis" is compared yet again with the Court's prior rulings. And it is clear that Harrison does not otherwise bring the Court a compelling reason that would justify the extraordinary step of overruling the Court's prior order.

Harrison's Rule 12(b)(6) motion was denied based on the *totality* of the circumstances pleaded in Lead Plaintiff's Complaint, including Harrison's years of service on Enron's Management Committee and Enron's Board, his attending meetings where he approved the fraudulent LJM transactions and authorized Fastow's conflicted transaction, and Harrison's \$75 million in illicit insider trading proceeds. Harrison says *nothing* about Lead Plaintiff's allegations concerning his false statements to the market via Enron's false registration statements and SEC filings he signed – and which the Court has ruled satisfies §10(b).

On two occasions the Court has denied reconsideration motions similar to Harrison's because:

[T]he totality of circumstances in the complaint detailing the alleged Ponzi scheme hammers home a very different message through recurrence, frequency, scope, and timing.... [I]t is very significant that these Defendants sat on the key Management Committee for *years*.... Moreover, contemporaneously these Defendants were pocketing exceptional compensation, inflated bonuses, and stock options tied to the size of [the] bubble they were creating The Court cannot help but find that a strong inference exists of actual knowledge or reckless disregard on the part of these Defendants arising from Lead Plaintiff's complaint.

April 22, 2003 Order at 6-8 (emphasis in original). Just three weeks later, the Court denied two more reconsideration motions, noting that Lead Plaintiff's allegations concerning Enron's Management Committee "made such a role highly significant" and, in denying the underlying

¹ See Motion at 1 ("we effectively ask the Court to reconsider" its denial of Harrison's first motion to dismiss).

motions to dismiss, the Court reiterated it had considered the "totality of the circumstances." May 15, 2003 Order at 2.

Harrison fails in his attempt to equate himself to defendants Derrick, Hirko and Mark-Jusbasche, for none of these defendants compares to Harrison and his involvement in the Enron fraud.² Sitting on the Enron Board of Directors and Enron's Management Committee for years, Harrison was either aware, or recklessly disregarded, the "deceptive devices and contrivances" at the heart of the Enron fraud. April 24, 2003 Order at 7 (denying Harrison's 12(b)(6) motion). Despite these "repetitive patterns of fraud constituting red flags," Harrison repeatedly rubber-stamped fraudulent deals. *Id.* at 8. Moreover, "because Harrison's service on the Management Committee and the Board and his voting in those positions demonstrate that he had the power to control Enron's policies and actions," Lead Plaintiff has sufficiently alleged control person liability. *Id.* at 9. Harrison's reconsideration motion is without merit and should be denied.

II. STANDARD OF REVIEW

Harrison asks the Court to take the exceptional step of overruling its April 24, 2003 Order. But a "judge should hesitate to undo his own work." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (citation omitted). Reconsideration is an "extraordinary remedy which should be used sparingly and should *not* be used to relitigate old matters, raise new arguments" *LaFargue v. Jefferson Parish*, No. 98-3185, 2000 U.S. Dist. LEXIS 1538, at *1 (E.D. La. Feb. 10, 2000). *Accord Vincent v. Dillard Dep't Store*, No. 99-74, 2000 U.S. Dist. LEXIS 3885, at *3 (E.D. La. Mar. 23, 2000) (reconsideration "is an extraordinary remedy that should be used sparingly"); *Grafton v. Sears Termite & Pest Control, Inc.*, No. CA 3:98-CV-2596-R, 2000 U.S. Dist. LEXIS 7754, at *1 (N.D. Tex. June 1, 2000) ("[m]otions for reconsideration are permitted only in limited situations"). Harrison provides no compelling reason for the Court to grant such an "extraordinary remedy." *See Vincent*, 2000 U.S. Dist. LEXIS 3885, at *3.

² Although Harrison seeks solace in Joseph Hirko's dismissal, on April 29, 2003 a grand jury indicted Hirko for, among other things, securities fraud, insider trading and money laundering. *See* Appendix of Exhibits to First Amended Consolidated Complaint, Ex. B. In addition, the SEC has filed a complaint against Hirko for securities fraud. *See* Ex. A to Plaintiffs' Opposition to Hirko's Motion to Dismiss filed June 18, 2003.

III. THE COURT'S APRIL 24, 2003 ORDER DENIED HARRISON'S MOTION TO DISMISS BASED ON THE TOTALITY OF CIRCUMSTANCES

The Court's March 25 and April 24, 2003 Orders, together with its denial of certain directors' reconsideration motions, makes clear the *totality* of the circumstances, rather than any *single* averment, led the Court to deny Harrison's (and other Insiders') motion to dismiss. In denying certain of the Insider Defendants' 12(b)(6) motions, the Court held: "Viewing the circumstances of the full scale, expansive, long-term scam detailed in the complaint as a whole, the Court finds that the motions to dismiss should be denied." March 25, 2003 Order at 6. The Enron fraud was "so pervasive, so extensive in scope, so frequent, and involved such huge dollar sums ... that those working within the company for years had to be aware of the enormous gap between the ... sham public facade ... and contrary reality." *Id.* at 7.

The Court similarly denied Harrison's motion to dismiss because "persistent patterns" of fraud were "unmistakable." April 24, 2003 Order at 7. Harrison was "repeatedly asked to approve these deceptive devices and contrivances," and Harrison was either "aware" or "recklessly disregarded the warning signs." *Id.* As the Court found, the Consolidated Complaint (and now First Amended Complaint) adequately alleges Harrison "actively and knowingly" participated in a "corporate culture of brazen ambition toward the appearance of ever increasing success."³ *Id.*

Harrison selectively challenges Lead Plaintiff's allegations but fails to address his false and misleading statements to the market. Harrison signed Enron's Reports on Form 10-K and Registration Statements filed with the SEC in 3/98, 4/98, 1/99, 2/99, 3/99, 7/99, and 3/01. *See*

³ In denying certain officer defendants' motions for reconsideration, the Court found:

[T]he outstanding feature of the alleged Ponzi scheme was regular, and soon all too predictable, reinforcing patterns of methods effecting the purported deceit and fraud; the very regularity of the scheme, which merely duplicated or imitated again and again the models initially developed in the establishment and funding of Chewco-JEDI-LJM1 and 2, the cumulative structured financing, the recurrent and increasing abuse of mark to market accounting described in such detail in the complaint, the reiterated use of snowballing, the repeated waivers of conflicts of interest regarding Fastow in contravention of Enron's Code of Conduct without any effort of the Committee to check up on the unvarying promised safeguards, the repetitive sham hedging, and the replay of loans disguised as sales. Also critical was the timing of such recurrent contrivances, repeatedly around vital deadlines for SEC reports.

April 22, 2003 Order at 6-7.

¶¶109-110, 126, 134, 141, 164, 292. Those documents included false financial statements, ¶¶215-221, and materially false disclosures about Enron's related-party transactions, which Harrison knew to be false because he personally approved waiving Enron's conflict-of-interest policy to allow CFO Fastow to control LJM2.

Harrison makes improper factual assertions, including his claim he "did *not* manage Enron's daily business operations," and Harrison intimates he was unaware as to what transpired at Enron meetings. Motion at 4, 10, 16 (emphasis in original). Congressional records show otherwise. Harrison attended a crucial 10/99 Enron Board meeting in Houston where he approved the creation of LJM2 and waived Enron's conflict-of-interest policies as to Fastow. *See* Ex. 24 to Appendix in Support of Plaintiffs' Oppositions to Motions to Dismiss, filed June 10, 2002. Knowing Fastow controlled LJM2, Harrison still signed and endorsed Enron's false Form 10-Ks and registration statements. Harrison also was present at the 5/1/00 Finance Committee meeting at the Enron building in Houston when Fastow reported on LJM2 and when McMahon presented a liquidity report and discussed Enron's guarantee portfolio (which included Enron's guarantees to the Raptors) and Enron's need for additional borrowing capacity. *Id.* at Ex. 26. Contrary to his claims, Harrison attended crucial Enron meetings and had intimate knowledge of Enron's guarantees to the various SPEs referred to in the First Amended Complaint and the significance of those guarantees to Enron's financial condition.

Harrison had specific knowledge that Enron's financial statements were false and misleading because they inflated Enron's revenues, earnings, assets, and equity, and concealed billions of dollars of debt that should have been shown on its balance sheet. ¶¶121(a), 155(a), 214(a), 300(a), 339(a), 418-611. Harrison knew accurate disclosure of these related-party transactions would reveal the scheme to hide Enron's massive debt. ¶¶505-516. Accordingly, Harrison was intimately involved in the day-to-day operations of Enron and it is inconceivable he was unaware of the massive, sophisticated fraud being perpetrated.

Based on the substantial allegations against him, Harrison's original motion to dismiss was denied. The Court also denied reconsideration motions similar to Harrison's because the "Court cannot help but find that a strong inference exists of actual knowledge or reckless disregard on the

part of [officer defendants] arising from Lead Plaintiff's complaint." April 22, 2003 Order at 8. A similar result is warranted here.

IV. THE APRIL 24, 2003 ORDER IS CONSISTENT WITH THE COURT'S PRIOR AND SUBSEQUENT RULINGS

Like other failed reconsideration motions, Harrison claims the Court's April 24, 2003 Order conflicts with the partial dismissal of Rebecca Mark-Jusbasche. Motion at 4, 8-9, 17. Harrison ignores the fact he was an Enron director from 7/97 to 5/01 – almost four times as long as Mark-Jusbasche. Mark-Jusbasche, on the other hand, "left Enron International *before the Class Period commenced* to become CEO of Azurix." Mark-Jusbasche March 25, 2003 Order at 4 (emphasis added). Harrison, meanwhile, joined Enron's Board before the Enron fraud shifted into overdrive – and remained a director until just before Enron imploded.

Unlike Mark-Jusbasche, Harrison was in attendance at the crucial meetings concerning LJM2's approval, waiver of conflict-of-interest rules, and the Raptor Transactions and related debt issues. Thus, Harrison "actively and knowingly" participated in a corporate culture of fraud, and, despite "repetitive patterns of fraud," Harrison rubber-stamped deceptive devices and contrivances. April 24, 2003 Order at 7-8. In addition, Harrison signed Enron's Forms 10-K and registration statements filed with the SEC from 1998 to 2001, ¶¶109-110, 126, 134, 141, 164, 292, which included false financial statements, ¶¶215-221, and materially false disclosures about Enron's related-party transactions, which Harrison knew to be false because he personally approved waiving Enron's conflict-of-interest policy to allow CFO Fastow to control LJM2. As the Court found:

[A]n individual who signs an SEC filing at a time when he knows, or exhibits reckless disregard toward warnings, that it is false or misleading, has "made" a statement for purposes of a primary violation of §10(b). *Lead Plaintiff has stated such claims against Harrison.*

April 24, 2003 Order at 8 (emphasis added). Harrison says *nothing* about any of these distinguishing features or his primary §10(b) violation for "making" false statements to the market.

Harrison analogizes himself to Mark-Jusbasche because his duties purportedly "'centered on operations of a subsidiary'" of Enron. Motion at 4, 10, 17. In sharp contrast to Mark-Jusbasche, who worked at an Enron "*affiliate* during the Class Period," Harrison's fiduciary duties as a director of Enron for almost four years and his years of service on the key Management Committee always

centered on Enron itself. Mark-Jusbasche March 25, 2003 Order at 14 (emphasis added); ¶88. As the Court noted, Lead Plaintiff's "complaint reflects the prevalent awareness among the Enron workforce of wrong doing in its numerous quotations of statements by non-defendant employees involved [in] various Enron departments and ventures for whom the sham was not only a normal topic of conversation, but at times a matter for satiric jokes." March 25, 2003 Order at 7. The Enron fraud was "unmistakable," and any executive like Harrison "sitting for a length of time on the Management Committee" knew or recklessly disregarded the red flags. April 24, 2003 Order at 7.

Harrison argues the dismissals of defendants Hirko and Derrick also support his reconsideration motion. Motion at 5, 7-8, 10. But neither Hirko nor Derrick were directors of Enron. And like Mark-Jusbasche, neither Derrick nor Hirko were present at key Enron meetings. Harrison, in sharp contrast, served as an Enron director for years and actually attended the critical meetings – and approved the fraudulent deals – as Enron's minutes reveal.

Harrison likens himself to Hirko, who purportedly was in Portland and had little involvement in the Enron fraud. *Id.* But on April 29, 2003, a grand jury indicted Hirko for, among other things, securities fraud, insider trading and money laundering, and the SEC filed suit against Hirko for securities fraud – calling into serious question Harrison's contention that his purported presence in Portland *ipso facto* means Harrison was not involved in the Enron fraud. *See* n.2, *supra*. And given the totality of the circumstances alleged against Harrison, the Court found otherwise. *See* April 24, 2003 Order.

Similarly, the Court dismissed Derrick because, "unlike with most of the other insiders," Lead Plaintiff failed to "make any specific allegations showing that he was involved in any way in the day-to-day business operations of Enron or with the individuals alleged to have been at the heart of the Ponzi scheme and violating §10(b)." April 24, 2003 Order at 33-34. Harrison, by contrast, was aware of Enron's repetitive patterns of fraud, was repeatedly asked to approve deceptive devices and contrivances, sanctioned their use at "critical SEC-reporting times" when Enron was in danger of not making its numbers, all which constituted red flags that Harrison was aware or recklessly disregarded, all while Harrison made false statements to the market. *Id.* at 6-9. "There are also no allegations of false statements against Derrick," *id.* at 33, whereas Harrison is alleged to have made

numerous false statements to the market over a period of years. ¶¶109-110, 126, 134, 141, 164, 215-221, 292. Harrison's attempt to compare himself to Hirko and Derrick fails.

V. LEAD PLAINTIFF ADEQUATELY ALLEGES CONTROL PERSON AND INSIDER TRADING

Harrison states the §20(a) control person claims against him must be dismissed because Lead Plaintiff fails to plead predicate §10(b) violations against him. Motion at 18. Harrison misstates the law concerning control person liability. The §10(b) claims against Harrison have no bearing on his control over persons who violated the federal securities laws – like Enron. What is more, Lead Plaintiff can maintain control person claims against Harrison even if the principal perpetrator is not identified. *See Kemmerer v. Weaver*, 445 F.2d 76, 78-79 (7th Cir. 1971) (individual defendants properly found guilty as control persons where company found "not liable" for violations of Rule 10b-5 because of lack of jurisdiction); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978) ("[i]t is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint"); *In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988) ("the liability of the primary violator is simply an element of proof of a section 20(a) claim, and that liability need not be actually visited upon the primary violator before a controlling person may be held liable for the primary violator's wrong").

Control person claims are properly pleaded where a plaintiff alleges: (i) a violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §§15 or 20(a). *See In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, Order at 11 n.14 (S.D. Tex. Feb. 20, 2001) (attached to Lead Plaintiff's Appendix of Exhibits in Support of Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint filed herewith). This Lead Plaintiff has done especially since heightened pleading requirements do not apply to control person allegations. *See In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *42 (S.D. Tex. Jan. 28, 2003) (Rule 9(b)'s heightened pleading requirements do not apply to control person allegations and instead "Rule 8's notice pleading standard would better effect" the remedial legislative history behind §§15 and 20(a)). Harrison's motion says nothing to the contrary.

Harrison requests Lead Plaintiff's §20A claims for insider trading be dismissed because a predicate Exchange Act violation is absent. Motion at 18. The Court has already found otherwise and, for the reasons stated herein, Lead Plaintiff has sufficiently alleged Harrison's repeated violations of the 1933 and 1934 Acts. Harrison also requests the §20A "claims relating to" Harrison's May 11 and May 16, 2000 insider selling be dismissed because the plaintiffs who traded contemporaneously with Harrison did so one day before Harrison sold his Enron shares. Motion at 18-19. Section 20A encompasses defendants' entire scheme. *In re Am. Bus. Computers Corp. Sec. Litig.*, MDL No. 913, 1994 U.S. Dist. LEXIS 21467, at *10-*11 (S.D.N.Y. Feb. 24, 1994). Moreover, Harmon's argument is otherwise premature.

VI. LEAVE TO AMEND

Harrison states dismissal should be granted with prejudice because Lead Plaintiff has "not taken advantage" of the "ample opportunities" to correct purported "deficiencies" of which Lead Plaintiff was put on "plain notice." Motion at 19-20. Nonsense. Harrison's motion to dismiss was *denied*. And several reconsideration motions nearly identical to Harrison's also were denied. It is *Harrison* who was put on notice Lead Plaintiff's allegations are sufficient and Court and litigant resources should not be wasted with frivolous reconsideration motions. In any event, leave to amend, if necessary, should be granted. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.").

VII. CONCLUSION

For the reasons stated herein, in addition to the Court's reasoning in its April 24, 2003 Order denying Harrison's 12(b)(6) motion, and the Court's March 25, April 22 and May 15, 2003 Orders, defendant Harrison's motion to reconsider denial of his first motion to dismiss should be denied and, if necessary, leave to amend granted.

DATED: July 17, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT KEN L. HARRISON'S RENEWED MOTION TO DISMISS has been served by sending a copy via electronic mail to serve@ESL3624.com on this 17th day of July, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT KEN L. HARRISON'S RENEWED MOTION TO DISMISS has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 17th day of July, 2003.

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/s/ Mo Maloney

Mo Maloney