UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAY 01 2002

Michael N. Milby, Clerk of Court

01-3913

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

MARK NEWBY, ET AL., Plaintiffs,	}	
vs	}	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	}	

MEMORANDUM AND ORDER

Pending before the Court are Arthur Andersen's Emergency Motion to Stay Discovery and to Enjoin Fleming from Seeking a Temporary Injunction in *Bullock v. Arthur Andersen LLP* (Instrument No. 493) and Jeffrey K. Skilling's Motion for Emergency Injunctive Relief Staying Discovery in *Bullock v. Arthur Andersen, LLP, et al.* (Instrument No. 504). Andrew S. Fastow has joined in Andersen's motion to enjoin Fleming from seeking a temporary injunction in *Bullock* (Instrument No. 536); Defendant Kenneth L. Lay has joined Andersen's request for stay and injunction (Instrument No. 544), and Defendants LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper have joined in the motions to stay discovery filed by Andersen and by Skilling and have moved to quash a discovery subpoena filed by the *Bullock* plaintiffs in that case (Instrument No.548). The *Bullock* plaintiffs have responded by filing motions to quash Andersen's and Skilling's emergency motions and motions to delay consideration of Andersen's and Skilling's motions (Instruments No. 509 and No. 535). In addition the plaintiffs in the *Odam* case, consolidated in the *Newby* case, have filed a response to Fastow's motion to enjoin the *Bullock* plaintiffs from seeking relief in state court. (Instrument No. 550)

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INTRODUCTION

In order to understand what and why the Court is being urged to take action in these motions it is necessary to look back to what has gone before. The law firm of Fleming & Associates has brought at least seven lawsuits in various counties in Texas on behalf of approximately 80 different plaintiffs. [1] These lawsuits allege substantially the same facts and make virtually the same claims against almost the same group of defendants. Five of those seven cases *(Rosen, Odam, Ahlich, Pearson,* and *Delgado* are currently pending before this Court and are subject to a stay of discovery under the Private Securities Litigation Reform Act ("PSLRA") until a motion to dismiss is decided. *Cf.* 15 U.S.C. Sections 77z-1(b)(1), 78u-4(b)(3)(B). In many of the state court actions Fleming & Associates has sought *ex parte* injunctive relief against the defendants. On February 12, 2002 Defendants Skilling, Lay, Fastow, and David Duncan moved this Court to enjoin Fleming & Associates from continuing to go from state court to state court filing lawsuits and obtaining *ex parte* temporary restraining orders. The parties originally sought the injunction in the *Bullock* case, in which Fleming & Associates had obtained an *ex parte* TRO, but the case was removed to federal district court in the Western District of Texas. On March 5, 2002 the Honorable Henry Lee Hudspeth remanded the *Bullock* case to state district court in Washington County, Texas. The state judge, the Honorable Terry Flenniken set a pretrial conference for March 28, 2002 to address scheduling, Alternative Dispute Resolution, pretrial activities, trial date, length of trial, any anticipated discovery problems and any other matters of concern. Although Judge Flenniken was

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[1] The seven suits filed to date are: *Ahlich v. Arthur Anderson LLP*, No. 02-0347 (S.D. Tex.); *Jose v. Arthur Andersen LLP*, NO. 02-187 (W.D. Tex); *Odam v. Enron Corp.*, No. 01-3914 (S.D. Tex); *Pearson v. Fastow*, No. H-02-670 (S.D. Tex.); *Rosen v. Fastow*, No. 02-0199 (S.D. Tex.); *Delgado v. Fastow*, No. H-02-3624 (S.D. Tex.); and *Bullock.*

asked by defense counsel to set a schedule that would co-ordinate with the schedule set in this Court, he granted Fleming & Associates' request to set a more accelerated schedule leading to a trial in March 2003. Transcript of *Bullock* Pretrial Hearing held March 28, 2002 before the Honorable Terry Flenniken, In the District Court of Washington County, 21st Judicial District, Cause No. 32,716 (*Bullock* Transcript), pp 9, 13-14, 20, 22, 24, 29-31, 36.

The next day, March 29, 2002 Fleming & Associates attorney G. Sean Jez wrote Andersen informing it that it was "eager to begin discovery" in the *Bullock* action and requested the deposition of a number of a Andersen employees and the production of all documents Andersen has provided to Congress. Letter of G. Sean Jez, March 29, 2002, attached to Declaration of Andrew Ramzel, Exhibit A. to Instrument No. 494.

Fleming & Associates has filed a series of subpoenas on LJM2 Capital Management, L.P., culminating in a subpoena filed on April 15, 2002 in the *Bullock* case requiring LJM2 Capital Management to appear on May 13, 2002 and produce "Any and all records in your possession or under your control related to LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southampton Place L.L.P., and LJM Partnerships." Tab B to Instrument No. 548

On April 18, 2002, Fleming & Associates served Skilling with a subpoena duces tecum that purported to require him to appear at a May 3rd, 2002 hearing on a proposed temporary injunction and to bring with him seven categories of documents, including all records of any sales by Skilling of his Enron stock since August 1, 2002 and the ultimate distribution of those proceeds. Exhibit 3 to Instrument No. 504.

On April 22, 2002 Defendant Lay was served with a subpoena duces tecum similar to that served upon Skilling . Exhibit 2 to Instrument No. 544.

STAY OF DISCOVERY

Fleming & Associates has undertaken a massive amount of discovery in the *Bullock* case, the same discovery that will be sought in the *Newby* consolidated cases if the motion to dismiss is denied. If *Bullock* or any other state court actions proceed independent of the *Newby* litigation, any co-ordinated efforts to resolve this litigation prior to a trial on the merits of these claims will be fruitless.

The Securities Litigation Uniform Standards Act of 1998 provides, in relevant part:

> [A] court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

15 U.S.C. Sec. 78u-4(b)(3)(D)

The legislative history behind section 78u-4(b)(3)(D) tells us that Congress intended the provision to be used to stay discovery in situations in which state court proceedings are used to get around the automatic discovery stay provisions of the PSLRA.

> [Section 78u-4(b)(3)(D)] amends Section 27(b) of the Securities Act of 1933 to include a provision to prevent plaintiffs from circumventing the stay of discovery under the Reform Act by using State court discovery, which may not be subject to those limitations, in an action filed in State Court. This provision expressly permits a Federal court to stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments. . . .Because circumvention of the stay of discovery of the Reform Act is a key abuse that this legislation is

> designed to prevent, the Committee intends that courts use this provision liberally, so that the preservation of State court jurisdiction of limited individual securities fraud claims does not become a loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act.
> H.R. Rep. 105-640.

In addition to this clear jurisdiction given by the United States Congress, the Court notes that in the *Newby* and *Tittle* cases the parties are laboring under an optimistic schedule that requires responses to hundreds of pages of consolidated complaints. The need to make extensive document production requested by the *Bullock* plaintiffs in the state case would interfere with the ordered adjudication of those consolidated cases. Although the *Bullock* plaintiffs repeatedly characterize their cases as grounded in representations made by Kenneth Lay at a meeting in Brenham, Washington County, Texas, in October 2000, the breadth of the discovery requested from Andersen, Lay, and the others seeking to stay that discovery, reveals that the case may begin with a meeting in Brenham, but certainly does not end there. In fact, the facts underlying their case and the relief sought by the *Bullock* plaintiffs fall squarely within the cases consolidated into *Newby*. The *Bullock* plaintiffs acknowledge that they are in fact covered by the consolidated class action alleged in *Newby*. In light of these circumstances, the Court finds that it is necessary in aid of its jurisdiction, and to protect and effectuate its judgments it is necessary to enjoin all discovery in *Bullock et al. v. Arthur Andersen L.L.P., et al.*, No. 32,716, in the 21st Judicial District Court, Washington County, Texas until this court has ruled on a motion to dismiss in the *Newby* cases. The Court takes this action with full knowledge of the holdings in two district court cases, *Lapicola v. Alternative Dual Fuels, Inc.*, 2002 WL 531545 (N.D. Tex. April 5, 2002) and *In re Transcrypt Int'l Secs. Litig.*, 57 F. Supp. 2d 836 (D. Neb. 1999). The Court does not find these cases persuasive.

Instead the Court finds that the Eighth Circuit in *In re Bankamerica Corporation Securities Litigation*, 263 F. 3d 795, 802-803 (8th Cir. 2001) has the better reasoning and relies upon that case.

MOTIONS TO ENJOIN TEMPORARY INJUNCTION IN STATE COURT

Defendants Andersen, Fastow, and Lay seek, in addition to an injunction barring discovery in *Bullock*, an injunction to prevent Fleming & Associates from seeking a temporary injunction in *Bullock*. On April 11, 2002 Fleming & Associates moved for a temporary injunction against Andersen prohibiting it from destroying any records and enjoining Andersen from making any distributions or salary payments outside the normal course of business or dissipating its assets prior to the *Bullock* trial. Exhibit F to Ramzel Declaration, Instrument No. 494. [2]This motion, to the extent it would prohibit Andersen from destroying records, duplicates this Court's January 23, 2002 order prohibiting Andersen from destroying records. The additional relief sought is virtually identical to the temporary injunctive relief sought in *Ahlich* and substantially similar to that contained in the temporary injunction Fleming & Associates obtained in *Jose*, which this Court ordered Fleming & Associates to dissolve. Fleming & Associates is also seeking to enjoin defendants D. Stephen Goddard, Jr., David B. Duncan, Debra A. Cash, Roger Willard, Thomas Bauer, Fastow, Lay, and Skilling from

> transferring assets to third parties other than in the ordinary course of business or transferring assets to any entity or country outside the United States and from taking action to hide their assets where they are not reachable by potential judgment creditors without 10-days notice to the Court and Plaintiffs and approval of that proposed transaction by the Court.

"Form Order on Plaintiffs' Temporary Injunction," Exhibit F to Ramzel Declaration, Instrument No. 494

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[2]A hearing on this motion is currently scheduled for May 3, 2002 in Washington County.

The *Bullock* motion largely duplicates the motions currently pending before this Court filed by American National Insurance Company and the Regents of the University of California that request injunctive relief against the transfer of any assets, dissolution or release from non-compete agreements by Andersen. The plaintiffs in *Newby* and *American National*, consolidated with *Newby*, have placed before this Court issues regarding the control of Andersen's assets. Andersen disputes the proposition that this Court has the authority to enter an order affecting Andersen's assets, but the issue is squarely before this Court. Fleming & Associates' actions in Washington County threaten to undermine this Court's ability to maintain control over the consolidated proceedings before it.

Under the All Writs Act federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. Sec. 1651. This broad grant of authority is tempered by the Anti-Injunction Act, which prevents federal courts from staying a state court proceeding except when "expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. Section 2238. The Anti-Injunction Act is an effort to "avoid unseemly conflict between the state and federal courts." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) . "Whether an 'unseemly conflict' disturbs the harmony of the system, however turns on the facts of each case." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F. 2d 84, 91 (5th Cir. 1977). Together the All Writs Act and the Anti-Injunction Act govern whether it is proper to enjoin state court litigation when the state court action is pending at the time injunctive relief is requested.

The Supreme Court has explained that injunctions may be issued "when necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide the case. *Atlantic*

Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs. 398 U.S. 281, 299 (1970). Federal courts have invoked the All Writs Act when the federal action involves complex, multi-district litigation and the parallel state action would derogate the federal court's jurisdiction. *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35(5th Cir. 1981); *Carlough v. American Products, Inc.*, 10 F.3d 189, 197 (3rd Cir. 1993); *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2nd Cir. 1985). *Winkler v. Eli Lily & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) held that "the 'necessary in aid of jurisdiction' exception should be construed 'to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court's jurisdiction nugatory.'" (quoting Martin F. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. Chi. L. Rev. 717, 754 (1977)) Similarly, *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) found that federal courts have the power to enjoin state actions when "conduct which, left unchecked, would have the practical effect of diminishing the court's power to bring the litigation to a natural conclusion."

Fleming & Associates' request for a temporary injunction is an attempt to undermine this Court's ability to control the consolidated litigations. When such actions threaten to diminish the Court's power to exercise its jurisdiction over the litigation brought before it, injunctive relief is proper. *Cf. In re Corrugated Container*, 659 F.2d at 1334-35; *In re Winkler*, 101 F.3d at 1202; *Carlough,* 10 F.3d at 197; *Battle v. Liberty Natl Life Ins.*, 877 F.2d 877, 882 (11th Cir. 1989). The policies of federalism that underlie the Anti-Injunction Act are not offended when parties or their attorneys "have taken, and manifested an intention to continue to take, actions threatening this court's exercise of its proper jurisdiction and the effectuation of its judgments, by filing and threatening to file duplicative harassing litigation" in the courts of various states . . . ." *In Re Corrugated Container,* 659 F.2d at 1335 (quoting the district judge). Fleming & Associates'

repeated attempts on other occasions to obtain duplicative temporary injunctions threaten to frustrate proceedings and disrupt the orderly resolution of this federal litigation.

In the first place the seeking of the temporary injunction threatens to interfere with this Court's determinations as to whether or not injunctions should issue. The effort appears to be a deliberate one designed to taunt the parties and the Court and to flaunt the Court's jurisdiction.

In the second place, there is danger of both duplicate and inconsistent injunctive relief that could expose the defendants in *Bullock* to serious risk. The court in Washington County could issue an injunction that contravenes this Court's ruling on the pending motions or its prior order regarding document preservation.

In the third place, the relief Fleming & Associates seek in *Bullock*, a freeze on various individuals' assets, substantially duplicates relief that this Court, The Honorable Lee H. Rosenthal, district judge, previously denied by order dated January 8, 2002. Thus, Fleming & Associates is collaterally attacking this Court's ruling. Judge Rosenthal concluded that the Court had jurisdiction over the proceeds of various defendants that had been received from allegedly improper Enron share trades; thus she determined that those proceeds constituted a *res*, which the Court had jurisdiction to preserve upon a proper showing. Under the All Writs Act, 28 U.S.C. Sec. 1651, this Court has the duty and the right to protect from dissipation the *res* over which it has jurisdiction. *Cf. James v. Bellotti,* 733 F.2d 989, 993 (1st Cir. 1984); *Cayuga v. Fox*, 544 F. Supp. 542, 550 (N.D.N.Y. 1982), *citing Donovan v. City of Dallas*, 377 U.S. 408 (1964).

Finally, on April 16, 2002 the Judicial Panel on Multidistrict Litigation issued an order centralizing in this Court 54 Enron-related federal civil cases, noting that at least 40 or more cases have been designated as tag along cases that will be subject to conditional transfer orders.

Federal courts have invoked their authority under the All Writs Act and Anti-Injunction Act in complex multi-district litigation where parties to federal court litigation, or their attorneys, have attempted to use the state courts to undermine the federal court's ability to control the proceedings properly before it. *Cf. Winkler*, 101 F.3d at 1202; *Carlough*, 10 F3d at 197; *In re Baldwin*, 770 F.2d at 336. Jurisdiction is often invoked in complex Multidistrict Litigation that is the "virtual equivalent of a res." *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d at 882 (quoting *In re Baldwin*, 770 F.2d at 337). Accordingly, it is hereby

ORDERED that Arthur Andersen's Emergency Motion to Stay Discovery and to Enjoin Fleming from Seeking a Temporary Injunction In In *Bullock v. Arthur Andersen LLP* (Instrument No. 493) is GRANTED. It is further

ORDERED that Jeffrey K. Skilling's Motion for Emergency Injunctive Relief Staying Discovery in *Bullock v. Arthur Andersen, LLP, et al.* (Instrument No. 504) is GRANTED. It is further

ORDERED that Andrew S. Fastow's motion to enjoin Fleming & Associates from seeking a temporary injunction in *Bullock* (Instrument No. 536) is GRANTED. It is further

ORDERED that Kenneth L. Lay's motion for stay and injunction in *Bullock v. Arthur Andersen, LLP, et al.*(Instrument No. 544) is GRANTED. It is further

ORDERED that LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper motions to stay discovery and motion to quash a discovery subpoena filed by the *Bullock* plaintiffs in that case (Instrument No.548) are GRANTED. It is further

ORDERED that the *Bullock* plaintiffs' motions to quash Andersen's and Skilling's emergency motions and motions to delay consideration of Andersen's and Skilling's motions (Instruments No. 509 and No. 535) are DENIED. It is further

ORDERED that all discovery in the case captioned *Bullock v. Arthur Andersen LLP, et al.* No. 32,716 (21st Judicial District Court, Washington County, Texas), hereinafter referred to as "*Bullock,*" is stayed until such time as discovery is allowed in the instant *Newby* case. It is further

ORDERED that the *Bullock* plaintiffs and their counsel, Fleming & Associates shall immediately withdraw their motion for temporary injunction currently pending in Cause No. 32,716 in the 21st Judicial District Court, Washington County, Texas, currently scheduled for hearing on May 3, 2002. It is further

ORDERED that the *Bullock* plaintiffs and their counsel, Fleming & Associates are enjoined from seeking a temporary injunction in *Bullock*, currently scheduled for hearing on May 3, 2002, or at any other time without leave of this Court.

SIGNED at Houston, Texas this 1ST day of May, 2002.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE