United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk

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

MARK NEWBY, *ET AL.*,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO: H-01-3624
v.	§	AND CONSOLIDATED CASES
	§	
ENRON CORPORATION, *ET AL.*,	§	
	§	
Defendants.	§	

BULLOCK PLAINTIFFS, _ET AL._'S[1]
RESPONSE TO DEFENDANT KENNETH L. LAY'S
EMERGENCY MOTION TO ENJOIN CERTAIN PLAINTIFFS AND COUNSEL
FROM PROSECUTING STATE COURT ACTION
IN DEROGATION OF THIS COURT'S JURISDICTION AND SUPPORTING BRIEF

TO THE HONORABLE MELINDA HARMON:

COME NOW Plaintiffs Jane Bullock, John Barnhill; Don Reiland; Scott Borchart; Michael Mies; Virginia Acosta; Jim Hevely; Mike Bauby; Robert Moran; Jack & Marilyn Turner; and Hal Moorman and Milton Tate, co-trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan and Trust ("*Bullock* Plaintiffs") and file this their Response to Defendant Kenneth L. Lay's request that this Court enjoin certain plaintiffs and their counsel before it in these consolidated proceedings from proceeding with a state court action and in support there of would show the following:

Introduction

1. Plaintiffs have not attempted nor do they attempt to circumvent this Court's rulings or to undermine its ability to control these consolidated proceedings. Plaintiffs respect

[1] *Bullock* Plaintiffs refers to the individuals who filed suit in Cause No. 32,716; in the 21st Judicial District Court of Washington County, Texas.

the jurisdiction of this Court; however, this Court's jurisdiction does not extend, as Defendant Lay suggests, to enjoin Plaintiffs from proceeding with their state court action.

2. Plaintiffs' Temporary Restraining Order in the *Bullock* litigation is much less restrictive and expansive than the Evidence Order entered in this Court. Defendant Lay's motion to enjoin is premised on the *Bullock* TRO issued in the 21st Judicial District Court of Washington County, Texas restraining Defendant Lay. Defendant Lay mistakenly represents to this Court that the *Bullock* TRO was a deliberate attempt by Plaintiff Moorman & Tate and their counsel to circumvent this Court's power to address and resolve the serious issues in relation to this Court's Order Prohibiting the Destruction of Evidence, Granting Limited Discovery, and Providing Other Relief Regarding Arthur Andersen ("Evidence Order"). This Court's consideration of a briefing schedule on whether Defendant Lay's deposition should be taken in connection with the evidence preservation issues addressed by the Evidence Order is not compromised by the *Bullock* TRO. Plaintiffs' request for the TRO was simply to prevent Defendant Lay "from further destroying, altering, or deleting any records concerning Enron Corporation, its related partnerships or subsidiaries, in connection with Arthur Andersen's audit, reports to the Securities and Exchange Commission, and financial statements of Enron Corporation, its affiliated partnership, and subsidiaries." The order also requires that Defendant Lay shall segregate, preserve and protect all writings, recordings, and electronically stored material (FRE 1001) in [his] possession, custody or control concerning Enron Corporation. . . ."

3. The TRO entered against Defendant Lay is not virtually identical to the Evidence Order as he suggests. The Evidence Order entered by this Court is much more expansive than Plaintiffs' TRO. The Evidence Order not only prohibits the destruction, alteration or deletion of evidence, it also requires Arthur Andersen to provide a report within 20 days of the order, allows

the depositions of 6 Arthur Andersen partners and/or employees, requires Arthur Andersen to update this Court on a periodic basis and requires Arthur Andersen to make its experts available to Plaintiffs. However, the Evidence Order does not address Defendant Lay.

4. Plaintiffs had previously planned to file their state court cause of action against Defendant Lay in Washington County before this Court entered its Evidence Order. Due to revelations at the January 22, 2002 hearing and reports in the media, Plaintiffs requested the TRO out of an abundance of caution, in an attempt to restrain Defendant Lay from destroying, altering or deleting any evidence which may be used in the Washington County action. No order had ever been entered against Defendant Lay to prohibit this destruction, alteration or deletion of evidence in any other court. Plaintiffs fail to comprehend why Defendant Lay would be opposed to an order requiring him not to destroy, alter or delete any documents which may be used as evidence in Plaintiffs' Washington County state cause of action, unless he plans such destruction.

5. Defendant Lay mistakenly suggests that Plaintiffs' temporary injunction hearing, set for January 31, 2002 in the Washington County Court, will conflict with this Court's briefing schedule on whether he should be deposed with regard to the preservation of evidence issues addressed by the Evidence Order. Defendant Lay is mistaken because Plaintiffs have not sought to depose him. Rather, they have only sought a prohibition against his destroying, altering or deleting documents. Plaintiffs' TRO certainly does not interfere with this Court's ability to resolve evidence preservation issues or other important pre-trial issues.

6. The *Bullock* Plaintiffs also state that the *John & Peggy Odam, et al. v. Enron Corp., et al.* (the "*Odam* Litigation") includes only Defendant Arthur Andersen, L.L.P. as a party. Defendant Lay is not a party to *Odam* Litigation and as such, even if Defendant Lay's

argument is correct, which it is not, Plaintiff Moorman & Tate could not have sought relief against Defendant Lay in the federal proceeding. Defendant Lay's contention that Plaintiffs and their counsel are free to leave these consolidated federal proceedings and strike out in state court when they want additional and different relief is disingenuous at best. As will be discussed below, Plaintiffs are free to proceed with individual state causes of action despite similar federal class actions.

Factual Background

7. On November 13, 2001, the *Odam* litigation was filed on behalf of six plaintiffs, including Moorman & Tate. In that matter the Plaintiffs asserted only federal causes of action. No state causes of action were alleged. It is also important to note that the *Odam* Plaintiffs filed their individual claims only; they did not bring any class action allegations. Subsequently, on December 4, 2001, the *Odam* Plaintiffs voluntarily dismissed all Defendants except Arthur Andersen, L.L.P. As stated above, there is no claim against Defendant Lay pending in the *Odam* litigation. In addition, the *Odam* Plaintiffs filed their objection to the order consolidating the *Odam* litigation with the other Enron-related federal court actions. In their objection, the *Odam* Plaintiffs specifically stated that "Plaintiffs' claims have been brought individually and have not been asserted nor will they ever be asserted as a class action."

8. Defendant Lay again insinuates that the *Bullock* Plaintiffs are attempting to depose him by discussing this Court's entertaining Amalgamated Bank's motion to enter a briefing schedule with regard to its request to depose Defendant Lay. Although Plaintiffs' counsel was present at the January 22, 2002 hearing, he did not participate. In any event, the TRO entered against Defendant Lay on January 24, 2002 plainly does not require him to be deposed.

9. The fact that Plaintiff Moorman & Tate is a Plaintiff in this and the *Odam* litigation is irrelevant. In both actions, Plaintiffs have only asserted individual claims rather than class claims. As Defendant Lay correctly points out, the *Odam* litigation is based on federal causes of action while the *Bullock* litigation is based solely on state causes of action which arose in Washington County, not even in this federal district.

10. Defendant Lay also states the *Bullock* TRO was obtained against him without giving notice to Defendant Lay's counsel. Plaintiffs' counsel were able to provide counsel for Arthur Andersen with a draft of the Bullock petition on January 23, 2002 advising him of *Bullock's* intention to file on January 24, 2002. *Bullock's* counsel attempted to notify Defendant Lay's counsel at the same hearing; however, his counsel was not present. In any event, pursuant to Rule 680 of the Texas Rules of Civil Procedure, notice is not required to be given to an adverse party if it is shown by a verified complaint that immediate and irreparable injury, loss or damage will result. Moreover, Plaintiffs filed their petition and were requesting a hearing so they could notify Defendant Lay of the hearing. However, the Washington County district court entered the TRO against Defendant Lay and set a hearing for a temporary injunction.

11. The *Bullock* Plaintiffs' claims arise from a Washington County Chamber of Commerce banquet held in Brenham, Texas when Defendant Lay came to tout and promote stock in Enron. The claims of the *Bullock* Plaintiffs arose in Washington County, the *Bullock* Plaintiffs are residents of Washington County and each of them received false and misleading reports prepared by Arthur Andersen which were mailed to Washington County.

12. Finally, there has been no class certified concerning either Defendants Lay or Arthur Andersen nor has there been proposed class settlement wherein the Defendants could

bootstrap an argument to prevent the *Bullock* Plaintiffs and their counsel from proceeding with their state law claims.

Argument and Authorities

13. Defendant Lay has no basis in law or fact to request that this Court enjoin Moorman & Tate and Fleming & Associates, L.L.P. from taking any further action in prosecution of this litigation. This Court does not have authority under the All Writs Act, 28 U.S.C. § 1651 or the Anti-Injunction Act, 28 U.S.C. § 2283, to enjoin Plaintiffs or Fleming & Associates. The cases cited by Defendant Lay in support of his motion do not apply to the *Bullock* litigation.[2]

14. Congress has expressly forbidden the federal judiciary from interfering with state court proceedings almost since the creation of the lower federal courts. *See* Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335. To that end, the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

15. The Act implements a basic and deeply rooted policy of federal judicial respect for state courts. "[F]rom the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in [the United States Supreme] Court of the federal questions raised in either system." *Atlantic Coast Line R.*

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[2] In the cases cited by Defendant Lay, the courts granted the injunctions only when there was either a pending class settlement in the federal court or a settlement had been reached *and* there was a competing state class action. In addition, those cases granting the injunction concerned federal claims. The injunctions were held invalid in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970), *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1997), and *In re General Motors Corporation Pick-Up Truck Fuel Tank Liab. Litig.*, 134 F.3d 133 (3rd Cir. 1998).

Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970); *accord Jett v. Zink*, 474 F.2d 149, 156 (5th Cir.), *cert. denied*, 414 U.S. 854 (1973).

16. Congress well understood that the overlapping jurisdiction of state and federal judiciaries created the potential for conflict. *Atlantic Coast Line*, 398 U.S. at 286. As the Supreme Court explained:

> The Act, which has existed in some form since 1793, is a *necessary concomitant* of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. *Prevention of frequent federal court intervention is important to make the dual system work effectively.* By generally barring such intervention, the Act forestalls "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court."

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (emphasis added) (citations omitted); *accord Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941) (Frankfurter, J.) (explaining that the bar established a "duty of 'hands off' by the federal courts"); *T. Smith & Son, Inc. v. Williams*, 275 F.2d 397, 407 (5th Cir. 1960); *see also Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 497–98 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

17. The Supreme Court has construed the Anti-Injunction Act as "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of [the] three specifically defined exceptions." *Atlantic Coast Line*, 398 U.S. at 286.[3]

> [S]ince the statutory prohibition against such injunctions in part rests on *the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.* Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."

[3] Injunctions are permitted under the Act only if authorized by statute, to aid federal jurisdiction, or to protect or effectuate a federal court's judgment. 28 U.S.C. § 2283.

Id. at 286-87 (emphasis added). "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state court to proceed in an orderly fashion to finally determine the controversy." *Id.* at 297.

18. The Fifth Circuit has also held that the order in which the federal and state suits are filed is immaterial under the Anti-Injunction Act: "[T]he Act applies regardless of when the federal and state suits were filed. The plain language of the statute contains no exception for a situation in which the federal suit was filed first." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032 (1994). The Fifth Circuit reached this holding by noting the Supreme Court's "consistently narrow interpretation of the Act, the presumption in favor of denying an injunction, and the absence of language in the statute suggesting that its application depends upon the time of filing of the state suit." *Id.* "Any doubts should be resolved in favor of denying the injunction." *Id.*

19. In this case, Defendant Lay's position is squarely foreclosed by the Anti-Injunction Act. The injunctive relief he seeks is a direct assault on state-court litigation. None of the three exceptions permitted by § 2283 could possibly be met here. Defendant Lay does not identify any federal statute authorizing an injunction, nor does he identify any pre-existing federal judgment that this Court would need to protect or effectuate. The existence of a possible federal defense, such as preemption, does not justify an injunction. *See Jackson*, 862 F.2d at 494, 498. A simultaneous in personam state-court action does not interfere with the jurisdiction of a federal court, even if the two suits involve the same subject matter. *Carlough v. American*

Products, Inc., 10 F.3d 189, 202 (3rd Cir. 1993); *see, e.g.*, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (holding that parallel state-court proceedings could not be enjoined); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (same). "[A]ctions derived from the same cause against the same Defendants may be maintained simultaneously in federal and state court." *Carlough* 10 F.3d at 202. The Fifth Circuit has explained that "courts have interpreted the ['in aid of jurisdiction'] language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. In no event may the 'aid of jurisdiction' exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision." *Royal Ins. Co.*, 960 F.2d at 1299 (citation omitted); *see also Northfield Ins. Co. v. Odom Indus., Inc.*, 119 F. Supp.2d 631, 635 (S.D. Miss. 2000) (applying *Royal Ins.* to deny injunction of state court litigation). The Private Securities Litigation Reform Act provision allowing a federal court to stay discovery in a state as necessary to stay jurisdiction refers only to private class actions which this case is not. *See In re Transcrypt Int'l Sec. Litig.*, 57 F.Supp2d 836, 842, 846-47 (D.Neb. 1999).

20. Because none of the exceptions applies, the Anti-Injunction Act absolutely prohibits federal interference with state court proceedings, "regardless of how extraordinary the particular circumstances may be." *Mitchum v. Foster*, 407 U.S. 225, 229 (1972). Defendant Lay's motion must therefore be denied.

WHEREFORE, Plaintiffs Jane Bullock, John Barnhill; Don Reiland; Scott Borchart; Michael Mies; Virginia Acosta; Jim Hevely; Mike Bauby; Robert Moran; Jack & Marilyn Turner; and Hal Moorman and Milton Tate, co-trustees for Moorman, Tate, Moorman &

Urquhart Money Purchase Plan and Trust request that this Court DENY Defendant Kenneth L. Lay's request that this Court immediately enjoin Hal Moorman & Milton Tate, Co-Trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan & Trust, and Fleming & Associates, L.L.P. from taking any further action in the prosecution of the state court action styled *Jan Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 32,716, pending in the District Court of Washington County, Texas, 21st Judicial District, and for any and all further relief, whether in equity or law, to which Plaintiffs may be justly entitled.

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By_____
G. Sean Jez

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing has been provided to all parties as indicated below on this the 30th day of January , 2002:

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

MARK NEWBY, *ET AL.*,	§	
	§	
***Plaintiffs*,**	§	
	§	**CIVIL ACTION NO: H-01-3624**
v.	§	**AND CONSOLIDATED CASES**
	§	
ENRON CORPORATION, *ET AL.*,	§	
	§	
Defendants.	§	

ORDER DENYING DEFENDANT KENNETH L. LAY'S EMERGENCY MOTION TO ENJOIN CERTAIN PLAINTIFFS AND COUNSEL FROM PROSECUTING STATE COURT ACTION

On this date, the Court considered Defendant Kenneth L. Lay's Emergency Motion to Enjoin Certain Plaintiffs and Counsel From Prosecuting State Court Action in Derogation of this Court's Jurisdiction and Supporting Brief; Plaintiffs' response and argument of counsel. After reviewing Defendant's motion, and Plaintiffs' response, and hearing argument of counsel, it is hereby

ORDERED that Defendant Kenneth L. Lay's request that this Court immediately enjoin Hal Moorman & Milton Tate, Co-Trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan & Trust, and Fleming & Associates, L.L.P. from taking any further action in the prosecution of the state court action styled *Jane Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 32,716, pending in the District Court of Washington County, Texas, 21st Judicial District is DENIED.

SIGNED this ___ day of _____, 2002.

_____
The Honorable Melinda Harmon