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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO. H-01-3624
	§	AND CONSOLIDATED CASES
vs.	§	
	§	
ENRON CORPORATION, KENNETH	§	
L. LAY, JEFFREY K. SKILLING, and	§	
ANDREW S. FASTOW	§	
	§	
Defendants.	§	

DEFENDANT ANDREW FASTOW'S MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER OF JANUARY 8, 2002

On January 8, 2002, Judge Lee H. Rosenthal issued a Memorandum Opinion and Order ("Opinion"), that a federal district court had authority, to issue an order for a prejudgment seizure of alleged insider trading profits in order to secure a money judgment. Because the Opinion and Order are contrary to precedent, Defendant Andrew Fastow respectfully asks the Court to reconsider the Opinion for these reasons:

- As the Supreme Court held in the *Grupo Mexicano* case, the Court has the power to order a prejudgment asset freeze only if the plaintiffs have asserted a valid claim for equitable relief. They have not and cannot do so here.

- First, Plaintiffs have no equitable remedy under Rule 10b-5 in this class action securities fraud case. The fraud-on-the-market theory, on which Plaintiffs must rely to prosecute this case as a class action for their Rule 10b-5 claims, only permits money damages based on Plaintiffs' stock purchase price. Without fraud-on-the-market, Plaintiffs' class action fails for the need to prove individual reliance.

- Second, Section 20A of the 1934 Securities Exchange Act, by its plain language, does not give rise to an equitable remedy. Rather, it provides for only money damages calculated by reference to a Defendant's insider trading profits. A private plaintiff, who is limited to a damages remedy by the language of the statute, cannot seek a prejudgment seizure of assets as a means to secure the ultimate relief available under § 20A.

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- As for Plaintiffs' state-law claims, the Opinion recognized that Plaintiffs had not stated a claim for constructive trust. Moreover, Plaintiffs cannot assert their other equitable claim – equitable accounting – in an individual capacity. Plaintiffs can only assert that claim in a derivative capacity, as the duty of officers and directors to render such an accounting runs to the corporation, not to individual shareholders. Furthermore, the Securities Litigation Uniform Standards Act of 1998 preempts any state-law equitable remedy that Plaintiffs might assert. Being thus pre-empted, a state-law equitable remedy cannot provide the basis for an asset freeze.

1. Argument & Authorities

1.1 The Memorandum Opinion is contrary to applicable precedent.

Prejudgment seizure of a defendant's assets prior to judgment is a draconian remedy. In a real sense, it assumes guilt before a trial. For this reason, the United States Supreme Court in *Grupo Mexicano de Desarrollos, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999), called it a "nuclear weapon" and held that, in a securities case, a prejudgment asset freeze is available only in an extremely limited circumstance, one not present here. Neither the Opinion nor the Plaintiffs' brief cites a single post-*Grupo* case in which a district court found it had authority to order a pre-judgment asset freeze in a class action securities fraud case.[1]

[1] Plaintiffs cite three unpublished district court opinions from California in which they claim the Court granted the relief of prejudgment asset sequestration. Closer examination reveals that none of those decisions stand for the proposition cited by Plaintiffs. All were decided before *Grupo Mexicano*, and thus, the Courts deciding those cases lacked the guidance of that Supreme Court decision holding that only when equitable claims are asserted could a court enter a prejudgment sequestration of assets. In addition, one of the cases was brought derivatively on behalf of shareholders. The true plaintiff, the corporation, would have had equitable remedies that the Plaintiffs in this case, suing in their individual capacities, do not. *See Neomonitis v. Blackie*, No. SACV-94-379-AHS; In United States District Court for the Central District of California. (Plaintiffs' Application, Jaconette Decl., Ex. 10). Furthermore, the Court granted "essentially such relief as defendants were willing to stipulate to in earlier communications among the parties." *Id.* Two other cases, *In re California Micro Devices Sec. Litig.*, No. C-94-2817-VRW; In the United States District Court for the Northern District of California (Jaconette Decl., Ex. 12) and *Miller v. Telios Pharmaceuticals, Inc.*, No. 94-1554-IEG; In the United States District Court for the Central District of California (Jaconette Decl., Ex. 11), were also pre-*Grupo Mexicano* cases, and the decisions did not specify whether Plaintiffs were seeking equitable or monetary remedies. Without that information, those cases provide no aid in deciding this post-*Grupo* proceeding.

Grupo Mexicano held that the Court has the authority to order prejudgment sequestration only when a plaintiff seeks an equitable remedy, not a claim for damages.[2] Plaintiffs here have no equitable remedy. Plaintiffs sued 29 individuals for insider trading. The securities laws provide that those are damage, not equitable, claims. *See* Parts 1.2-1.4 below. Neither state law nor the federal securities laws permit an equitable claim against directors and officers by individual shareholders for breach of fiduciary duty.

The arguments below explain why Plaintiffs cannot plead any claim for equitable relief and thus cannot meet the requirement of *Grupo Mexicano*.[3] Absent a valid claim for equitable relief, the district court lacks the authority to freeze this Defendant's alleged insider trading profits prior to judgment under the *Grupo* standard.

1.2 Plaintiffs have no equitable claim under Rule 10b-5.

Plaintiffs' First Amended Complaint purports to bring claims of securities fraud under Section 10(b) and Rule 10b-5 on behalf of an entire class pursuant to Rule 23. As the Eleventh Circuit recognized in *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1526 (5th Cir. 1994), Plaintiffs' class action complaint pleads a damages case, one that does not give rise to an equitable remedy. Thus, the Eleventh Circuit found that the district court had no authority to order an asset freeze because the claims at issue involved money damages, not equitable relief.[4]

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[2] A Court may, in appropriate circumstances, have the ability to order provisional, prejudgment relief, including seizure of property, under Fed. R. Civ. P. 64. Plaintiffs have not sought relief under this provision, but rather have sought to carve out an alternative, non-statutory remedy of prejudgment asset seizure.

[3] The cases cited by Plaintiffs in which they claim a prejudgment asset seizure was permitted involved the government as plaintiff, not private individuals suing in a fraud-on-the-market class action. *See* Plaintiffs Ex Parte Application filed December 5, 2001, at 12.

[4] The Court's Memorandum states that the plaintiff in *Rosen* did not seek equitable remedies as an alternative for the causes of action stated. That is because, however, as the Eleventh Circuit held, "[T]he

Plaintiffs' inescapable reliance on the fraud-on-the-market theory underscores the non-equitable nature of their claims. Plaintiffs cannot prosecute this case as a class action if they have to prove individual reliance. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000). Thus, they employ the fraud-on-the-market theory to satisfy the reliance element of their Rule 10b-5 claim. Fraud on the market, however, is not an equitable theory. That theory depends on the assumption that the purchase price a plaintiff paid for a security was higher than what it would have been in the absence of a misstatement or omission of material fact. *See Basic v. Levinson*, 485 U.S. 224, 254 (1988). In general, a plaintiff can recover the difference between the price he or she paid for the security and what the price would have been if all material information had been disclosed. *Id.* This "price difference" is a damages remedy. *Id.* at 254 n.5 (White, J. concurring and dissenting) (citing Richard Posner, Economic Analysis of Law, § 15.88 at 423-24 (3d ed. 1986)). In this class action, where Rule 10b-5 limits Plaintiffs to recovery of money damages, Plaintiffs and the class have no equitable remedy.

1.3 Section 20A of the 1934 Act does create an equitable remedy.

The Court stated in its Opinion that "Defendants argue that because section 20A specifically provides for disgorgement of insider trading proceeds, it is a statutory measure of damages, rather than an equitable remedy." In fact, Defendants have argued that Section 20A **does not** provide a disgorgement remedy for private plaintiffs. Rather, it expressly provides for only a damages remedy.

Section 20A(b) of the 1934 Act provides:

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federal securities claims against Moses [the defendant] give the appellees causes of action for damages only . . . " *Rosen,* 21 F.3d at 1526.

"The amount of **damages** imposed against any person under subsection (a) shall not exceed the profit gained or the loss avoided in the transaction or transactions that are the subject of the violation." (emphasis added). The statute, in subsection (c), expressly distinguishes between the "amount of damages" available to a private plaintiff and "amounts, if any, that such person may be required to disgorge pursuant to a court order obtained at the instance of the [Securities Exchange] Commission." §20A, 1934 Securities Act, 15 U.S.C. §78t-1. Disgorgement as a remedy is thus expressly limited to the SEC. Had Congress intended to create a private equitable remedy of disgorgement, it would not have used the term "damages" to describe a private plaintiff's remedy. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." (quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994))). Indeed, the statute expressly distinguishes between damages for private plaintiffs and disgorgement as a remedy available to the SEC– further evidence of Congress' intent not to create an equitable remedy for private plaintiffs.[5]

1.4 Plaintiffs cannot assert a state-law claim for equitable accounting in their individual capacities.

The Court's conclusion that Plaintiffs have stated a claim for equitable accounting rests on the theory that individual shareholders may seek an "accounting for profits" as "an equitable remedy for breach of fiduciary duties." Hornbook law provides that

[5] *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 734 F.Supp. 1071 (S.D.N.Y. 1990), cited in the discussion of Section 20A in the Opinion was actually decided under Rule 10b-5, not Section 20A, and it was not a class action. As explained in Part 1.2, Plaintiffs' class action pleading would not allow for an equitable remedy on its claims under Rule 10b-5.

corporate officers and directors do not owe fiduciary duties to individual shareholders: "a director's fiduciary duty runs only to the corporation, not to individual shareholders or even to a majority of the shareholders." *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App. – Houston [14th Dist.] 1997, review denied). Only the corporation has standing to assert that claim, because the director or officer's fiduciary duty runs only to the corporation. As the Court's Opinion acknowledges, fiduciary duty is a prerequisite to any claim for equitable accounting. Opinion, at 36. Without a fiduciary duty owed to them in their individual capacities, Plaintiffs cannot construct a claim for equitable accounting.

The Court's Opinion acknowledges that a prejudgment restraint on assets, to the extent it is permitted, can only secure a final equitable remedy.[6] Opinion at 39. Even if an individual shareholder had a right to sue for an equitable accounting from an officer or director, that claim would only entitle the shareholder to an accounting; not an actual turnover of assets. *Cf. Hutchings v. Chevron U.S.A.*, 862 S.W.2d 752, 762 (Tex. App. – El Paso 1993, writ denied) (equitable accounting appropriate only when *information* cannot be obtained through standard discovery procedures). Given that the Plaintiffs could not recover on any assets on an equitable accounting claim even after judgment, that claim cannot possibly provide the basis for a prejudgment restraint on assets; to do so would allow the prejudgment restraint to provide greater relief than the actual remedy.

Moreover, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), pre-empts any state-law remedies in this case. *See* 78 U.S.C. §78bb(f). That law provides for the preemption of any claims in a class action "based upon the statutory or

[6] As the Court stated: "Amalgamated must show that each defendant is likely to dissipate the assets *that may satisfy the equitable remedies Amalgamated has asserted* . . . ." Opinion, at 39.

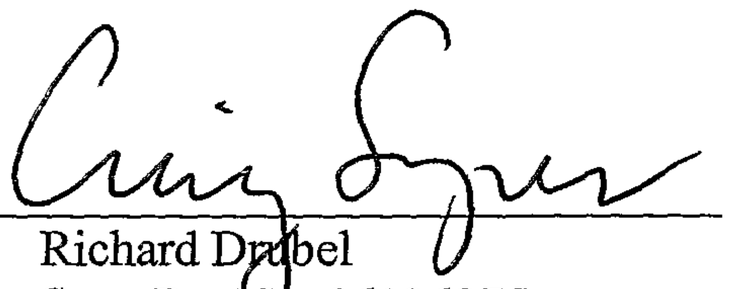
common law of any State" where the Plaintiff alleges a "misrepresentation or omission of a material fact in connection with the purchase and sale of a covered security" or the use or employment of "any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." *Id.* Plaintiffs indisputably allege claims based on misrepresentations and/or omissions in this class action. Accordingly, whatever claims of equitable accounting or constructive trust Plaintiffs may assert would have to arise under the common law of some state, presumably Texas. By its express terms, SLUSA therefore pre-empts such a claim.

CONCLUSION

For all of the foregoing reasons, Defendant Andrew S. Fastow respectfully requests that the Court vacate the Memorandum Opinion and Order of January 8, 2002.

Respectfully submitted,

BOIES, SCHILLER & FLEXNER, L.L.P.

By: 

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This is to certify that on **February 8th, 2002** a true and correct copy of the above and foregoing instrument was served on all counsel of record by facsimile transmission and/or by U.S. mail, and in accordance with the Federal Rules of Civil Procedure.

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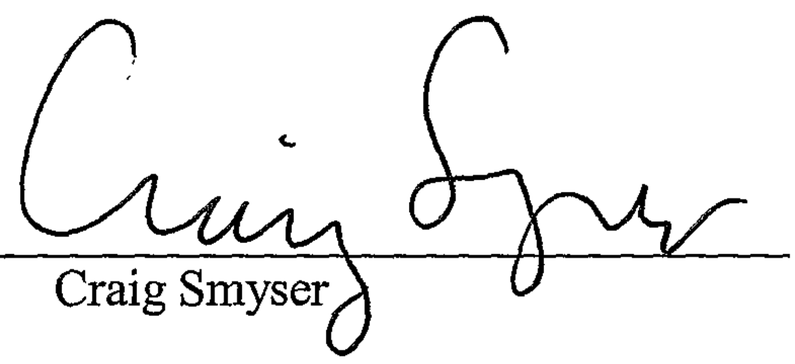

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