United States Courts
Southern District of Texas
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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,	§	
	§	
v.	§	Civil Action No. H-01-3624
	§	Consolidated Lead Case
ENRON CORP., *et al.*,	§	
	§	
Defendants.	§	CLASS ACTION

JEFFERY K. SKILLING'S OPPOSITION TO PLAINTIFF AMALGAMATED BANK'S THIRD SUPPLEMENTAL BRIEF AND APPLICATION FOR PARTICULARIZED EXPEDITED DISCOVERY

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TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Jeffrey K. Skilling, one of the defendants in the above-captioned action, respectfully submits this Opposition to Plaintiff Amalgamated Bank's Third Supplemental Brief ("Amalgamated Brief") and Opposition to Amalgamated's Application for Particularized Expedited Discovery.

I.

INTRODUCTION

The Private Securities Litigation Reform Act ("PSLRA") mandates that "***all*** discovery and other proceedings" in a federal securities suit be stayed until the Court has sustained the legal sufficiency of the complaint. 15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). The only exceptions to the statutory stay are where a party makes the extraordinary showing that: (1) "particularized discovery is necessary to preserve evidence or; (2) to prevent undue prejudice." *Id.* Plaintiffs have not and cannot meet this burden with respect to discovery from Jeffery Skilling for at least three reasons.

First, as to Mr. Skilling, Plaintiffs rely exclusively on the argument that they will suffer "undue prejudice" if the statutory discovery stay is not lifted. However, Plaintiffs have not demonstrated that they would suffer ***any*** prejudice, let alone "undue prejudice" if their extraordinary request is not granted. The only "prejudice" of any sort cited by Plaintiffs is the empty assertion that without expedited discovery assets necessary to satisfy any judgment that ***might*** be obtained sometime in the future ***could*** be dissipated by the time such a judgment, if any, is obtained. (Pls. Br. 6.) There is simply no evidence to support this contention. In fact, this Court has already considered and rejected these same baseless allegations. (Op. at 40-42.) As Judge Rosenthal noted in her January 8 Opinion, "[the] record does not show a substantial risk that Skilling ... will conceal the assets in question." (*Id.*) Moreover, the Plaintiffs have not

come forward with any additional evidence to support this baseless allegation since Judge Rosenthal issued her opinion.

Second, Plaintiffs cannot cite a single case where the PSLRA's mandatory discovery stay has been lifted on a similarly vacuous record. The overwhelming weight of authority holds that "undue prejudice" exists only in extraordinary circumstances where a stay would unfairly shield the defendant from liability and eliminate the plaintiff's ability to pursue the litigation. Nevertheless, Plaintiffs contort and mischaracterize a small handful of cases in an attempt to conjure up support for their request. By any fair reading, the cases put forth by Plaintiffs simply do not support lifting the discovery stay here as to Mr. Skilling.

Third, Plaintiffs' request for expedited discovery must also fail because it is not particularized. Under the PSLRA's plain terms, any discovery before resolution of motions to dismiss must be narrow and strictly limited to the goal of avoiding prejudice or loss of relevant evidence. Here, the Plaintiffs' discovery requests broadly seek each individual defendant to produce all their, their spouse's, former spouse's (if any) and children's financial information. Such a request is hardly "particularized."

Finally, it is important to note that while they have not and cannot level such accusations against Mr. Skilling, Plaintiffs allege that documents have been destroyed by Arthur Andersen and Enron. However, neither allegation is relevant to Mr. Skilling. There is no dispute that the destruction of documents alleged to have occurred at Enron took place more than four months after Mr. Skilling resigned his position at Enron. By Plaintiffs' own admission, Mr. Skilling left Enron in August of 2001. (Amalgamated Compl. ¶ 11(b).) As such, there is absolutely no support for the notion that Mr. Skilling would have known or been involved with any of the

alleged destruction of documents at Enron, which purportedly occurred no earlier than December 2001.

II.

ARGUMENT

The PSLRA provides, in relevant part:

> In any private action arising under this [Act], ***all discovery and other proceedings shall be stayed*** during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). This statutory discovery stay is "mandatory" and "automatic." *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001). "[U]nless exceptional circumstances are present, discovery in securities actions is permitted only after the court has sustained the legal sufficiency of the complaint." *Vacold LLC v. Cerami*, No. 00 Civ. 4024, 2001 WL 167704, at *6 (S.D.N.Y. Feb. 16, 2001). "Exceptional circumstances" does not mean "circumstances that happen in every case filed under the PSLRA." *In re: CFS-Related Sec. Fraud Litig.*, No. 99-CV-825-K(J), 2001 U.S. Dist. LEXIS 22035, at *18 (N.D. Okla. Dec. 27, 2001). Rather, courts have only lifted the discovery stay where there was a substantial likelihood that defendants would be "shielded from liability in the absence of the requested discovery." *Vacold*, 2001 WL 167704, at *6.

A. Plaintiffs Cannot Establish That They Would Suffer Any Undue Prejudice

Plaintiffs offer one reason, and one reason alone, in support of their motion for lifting the discovery stay: they claim that failure to lift the PSLRA discovery stay would result in undue prejudice because the defendants ***could*** dissipate their assets before any judgment ***could*** be obtained. The only support advanced for this wild accusation is that "the Individual Defendants are adept at structuring off-shore entities in known money laundering locales." (Pls. Br. 2-3.)

However, this Court has already rejected the same outlandish allegations:

- Amalgamated alleges that [a defendant's] involvement with these offshore entities shows that [the defendant] knows how to conduct international financial transactions. So do many individuals and entities; that alone is not a sufficient basis for the relief sought. (Op. at 41.)

- A careful review of the record does not disclose the necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury absent an asset freeze. (Op. at 40.)

- [Specifically, the] record does not show a substantial risk that Skilling ... will conceal assets. (Op. at 42.)

Since the December 6, 2001 hearing, the Plaintiffs have not come forward with any additional support for their allegations that Mr. Skilling ***might*** dissipate his assets.[1] Absent new evidence to support Plaintiffs' request, there is no reason for this Court to depart from its prior position.

It remains undisputed that Mr. Skilling poses no flight risk and plaintiffs have offered nothing but rank speculation to support their claim that he ***might*** dissipate his assets. Lacking any factual support for their claims, plaintiffs cannot show exceptional circumstances justifying a lifting of the stay. In fact, the only thing "offshore" here is the deep-sea fishing expedition on which Plaintiffs seek to embark.

B. Plaintiffs Have Cited No Authority That Supports Granting Their Extraordinary Request

The great weight of authority holds that absent the truly exceptional circumstance where a defendant would be "shielded from liability," discovery is a private securities action is permitted only after the court has sustained the legal sufficiency of the complaint. *See, e.g., SG*

[1] Plaintiffs do make the baseless assertion that "[s]ince the December TRO application, additional evidence has been revealed showing Lay and Skilling were intimately aware of the hard facts establishing Enron's accounting fraud." (Pls. Br. at 7.) However, the only support that Plaintiffs offer is Plaintiffs' Third Supplemental Brief in Support of Amalgamated Banks' *Ex Parte* Application. That submission deals entirely with allegations of document destruction at Enron. As discussed above, Mr. Skilling was no longer at Enron when documents were purportedly destroyed.

Cowen Sec. Corp. v. United States Dist. Ct., 189 F.3d 909, 912-13 (9th Cir. 1999) ("The 'Stay of Discovery' provision of the Act clearly contemplates that 'discovery should be permitted in securities class actions *only after the court has sustained the legal sufficiency of the complaint.*") (citation omitted). Nevertheless, Plaintiffs disingenuously suggest to this Court that "[c]ourts have lifted the PSLRA's discovery stay in circumstances much less severe than here," (Pls. Br. at 7), and that "precedent for expedited discovery under similar circumstances is well established under the Fifth Circuit." (*Id.* at 9.) In fact, Plaintiffs have not cited and cannot cite a single case since the enactment of the PSLRA where a court has permitted discovery on a record such as that presently before this Court.

No court has ever lifted the discovery stay because a defendant ***might*** dissipate assets, rendering uncollectable whatever judgment the plaintiffs ***might*** eventually obtain. While Plaintiffs suggest that the discovery stay will give defendants time to hide their assets, they do not explain how that delay is different from the same delay in every other case to which the PSLRA applies. Plaintiffs' alleged "undue prejudice" is mere delay, and that is simply not enough:

> Prejudice caused by the delay inherent in the PSLRA's discovery stay cannot be "undue" prejudice because it is prejudice which is neither improper nor unfair. Rather, it is prejudice which has been mandated by Congress after a balancing of the various policy interests at stake in securities litigation, including a plaintiff's need to collect and preserve evidence.

In re: CFS-Related Sec. Fraud Litig., 2001 U.S. Dist. LEXIS 22035, at *17 (denying discovery).

In fact, Plaintiffs have only cited three cases, governed by the PSLRA, where the statutory stay on discovery has been lifted against defendants: *Vacold*, 2001 WL 167704, at *6; *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, No. 99 Civ. 342, 1999 WL 223158 (S.D.N.Y. Apr. 16, 1999); and *In re Websecure, Inc.*, Sec. *Litig.*, No. 97-10662-GAO, 1997 U.S.

Dist. LEXIS 19600, at *13 (D. Mass. Nov. 26, 1997).[2] None of these cases involve a situation where the PSLRA's stay was lifted so that fact-finding could be undertaken to determine if any justification might exist for a finding of undue prejudice. In each of the cases, plaintiffs had already come forward with evidence of misconduct or exceptional circumstances justifying expedited discovery. Here, plaintiffs have not come forward with any such evidence. As such, Plaintiffs cannot even clear the first hurdle.

Of the three cases, Plaintiffs rely most heavily on *In re Websecure, Inc.,* Sec. *Litig.*, 1997 U.S. Dist. LEXIS 19600, at *13, claiming that it is "on point." (Pls. Br. at 9.) However, the *Websecure* court found undue prejudice sufficient to justify lifting the discovery stay ***only after*** plaintiffs had come forward with ***actual evidence*** of dissipation of corporate assets. *Id.* at *9-*10. No such evidence exists here. Moreover, the *Websecure* court cited no authority, undertook no "undue prejudice" analysis, and has never been cited approvingly by any other court. *Id.*

In *Global Intellicom*, 1999 WL 223158, the court again found undue prejudice only after plaintiffs came forward with evidence that the defendants, who had acquired stock holdings in the plaintiff Global Intellicom through allegedly fraudulent means, were using those holdings to try "to take over the [plaintiff] company in other forums, raising the possibility that success in those forums will prevent Global from seeking redress in this Court." *Id.* at *2. Because of these highly unusual and time-sensitive circumstances, the Court granted very "limited discovery" into certain trading records and affiliate relationships among defendants. *Id.*

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[2] Plaintiffs also direct the court to *In re Flir Sys., Inc.*, No. 00-360-HA, 2000 U.S. Dist. LEXIS 19391, at *5-*6 (D. Or. Dec. 13, 2000), parenthetically noting that the case "allow[ed] discovery." While the Court in *In re Flir* did permit some discovery, it expressly refused to permit any discovery against the defendants. *Id.* Rather, the *Flir* court only permitted a single deposition of a third-party. *Id.* That third party, the court made clear, "*is not a defendant*, nor is he a current employee of defendant. As a result, the reasons for the PSLRA's stay of discovery are not diminished when discovery is sought only from a single third party, not a defendant." *Id.* (emphasis added)

Finally, *Vacold* is equally inapposite. There, plaintiffs asserted securities claims arising out of allegations that defendants had fraudulently induced plaintiffs to sell their interest in Immunotherapy, Inc. to the defendants. 2001 WL 167704, at *2. The crux of the alleged fraud was that defendants falsely represented to plaintiffs that no third-party companies were interested in investing in their joint venture when, in fact, another company had already made a significant investment in the venture. 2001 WL 167704, at *3. The Court lifted the stay to allow discovery "on the limited issue of the nature and timing of J&J's interest and investment" based on a finding that the absence of such limited discovery "may *unfairly insulate* defendants from liability for securities fraud." *Id.* at *7 (emphasis added). The Court, moreover, was persuaded that the plaintiffs "would suffer improper or unfair treatment in the absence of the requested discovery" because of the defendants' refusal at oral argument "to specify [for the Court] the timing of their negotiations with J&J" concerning the disputed investment. *Id.* In a subsequent decision, another federal court recognized that the only reason the PSLRA's discovery stay was lifted was "[b]ecause of the lack of candor of defendants at oral argument." *Faulkner v. Verizon*, 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001).

The remainder of Plaintiffs' authority is wholly irrelevant to the question before this Court. In fact, as we demonstrate below, the plaintiffs citing of these cases reveals a troubling and disingenuous lack of candor before this Court.

- Eleven of the cases cited by Plaintiffs were decided ***before the PSLRA was enacted.***[3]

Despite the fact that plaintiffs' brief artfully dodges *In re Flir's* facts and legal analysis, plaintiffs cannot be heard to argue that the parties from whom they seek discovery here are not actually the defendants.

[3] *Merrill Lynch Futures, Inc. v. Kelly*, 585 F. Supp. 1245 (S.D.N.Y. 1984); *Kippur v. Bernstein*, No. 90 Civ. 2035 (PKL), 1991 U.S. Dist. LEXIS 9230 (S.D.N.Y. June 10, 1991); *Abu-Nassar v. Elders Futures Inc.*, No. 88 Civ. 7906, 1991 WL 45062 (S.D.N.Y. Mar. 28, 1991); *Melikian v. Corradetti*, 791 F.2d 274 (3d Cir. 1986); *Electromatic (PTY), Ltd. v. Rad-O-Lite of Philadelphia, Inc.*, 90 F.R.D. 182 (E.D. Pa. 1981); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500 (5th Cir. 1982); *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976); *SEC v. Sterns*, No. 91 1303 ER(Tx), 1991 U.S. Dist. LEXIS 13968 (C.D. Cal. Aug. 22, 1991); *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶69,425 (C.D. Cal. 1991); *SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678 (D.D.C. 1991), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992).

The subsequent enactment of the PSLRA renders them inapposite to the present motion.

- Plaintiffs cite *Quilling v. Funding Res. Group*, 227 F.3d 231, 233 (5th Cir. 2000) for the proposition that "district court properly ordered discovery and froze assets." (Pls. Br. at 9.) However, Plaintiffs fail to inform this Court that *Quilling* involved a ***Securities and Exchange Commission civil enforcement action***. 227 F.3d at 233. As Plaintiffs should well know, the ***Private*** Securities Litigation Reform Act does not apply to SEC enforcement actions. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 973 (9th Cir. 1999) ("Congress enacted the PSLRA to deter opportunistic private plaintiffs from filing abusive securities fraud claims . . . .").

- Another two of the cases cited by Plaintiffs are not even securities cases and have no relation to the question of whether the PSLRA's mandatory discovery stay ought to be lifted. *See Ellsworth Assocs. v. United States*, 917 F. Supp. 841 (D.D.C. 1996) (action by a government contractor asserting Maryland state law claims based the alleged denial of the opportunity to compete for a follow-on contract); *Citizens Sav. Bank v. Gli Tech. Servs.*, No. 96-2307-L, 1996 U.S. Dist. LEXIS 19128 (E.D. La. Dec. 20, 1996) (collection action seeking to execute on assets put up as collateral pursuant to a loan agreement).

Plaintiffs' citation to these cases for the proposition they claim these cases support is inexcusable. As a fair and honest reading of these cases makes clear, plaintiffs cannot direct this Court to a single case where the PSLRA's discovery stay was lifted on even remotely analogous facts.

C. Plaintiffs' Request Also Fails Because It Is Not "Particularized"

The Court should also deny plaintiffs' discovery request because it is not "particularized." Plaintiffs have not attempted to show – nor could they – that the broad discovery they seek is the narrowest discovery "necessary" to prevent undue prejudice or preserve evidence, as the PSLRA requires. *See* 15 U.S.C. § 78u-4(b)(3)(B).

The PSLRA plainly requires that, in the rare instance that expedited discovery is permitted, any discovery be narrow and strictly limited to the goal of avoiding prejudice or loss of relevant evidence. 15 U.S.C. § 78u-4(b)(3)(B); *see also In re Tyco Int'l, Ltd. Sec. Litig.*, No. 00-MD-1335-B, 2000 U.S. Dist. LEXIS 11659, at *13 (D.N.H. July 27, 2000); *In re: Carnegie*

Int'l Corp. Sec. Litig., 107 F. Supp. 2d 676, 684 (D. Md. 2000).

Plaintiffs would have this court believe they have propounded "particularized discovery" consisting of "only 9 document requests and 8 interrogatories." (Pls. Br. at 9-10.) Such a characterization is disingenuous at best. In fact, plaintiffs' "particularized discovery" fairly read, including subparts, amounts to more than 20 document requests and a dozen interrogatories covering the entire universe of defendants' personal financial information. This "give me everything you have or have ever had" approach is far from "particularized."

Plaintiffs' claim that the request is particularized because it is "directed at specific persons" and identifies "specific types of evidence" misses the mark. (Pls. Br. at 10.) While Plaintiffs take that language from *In re Tyco Int'l, Ltd. Sec. Litig.*, 2000 U.S. Dist. LEXIS 11659, at *12, that opinion merely listed the foregoing criteria as "***at least*** two dimensions" of particularized discovery and noted that the plaintiffs only met one of the two. *Id.* at *12 (emphasis added). The mere fact that Plaintiffs discovery is "directed at specific persons" and identifies "specific types of evidence" does not mean that it is particularized. *Cf. In re: Carnegie*, 107 F. Supp. 2d at 684 (D. Md. 2000) (declining to lift the PSLRA discovery stay where requests directed at specific persons and identifying specific types of evidence where nevertheless too broad to be "particularized"). In fact, it is difficult to imagine discovery that is not directed at specific persons and identifies specific types of evidence.

Indeed, Plaintiffs' discovery requests starkly contrast with the truly particularized discovery that was permitted in *In re Flir Sys., Inc. Sec. Litig.*, 2000 U.S. Dist. LEXIS at *6, which Plaintiffs cite. There, the Court permitted a *single deposition* of a *single third party* to go forward in order to prevent undue prejudice. Here, it is difficult to see how the discovery requests propounded by Plaintiffs are particularized within the meaning of the PLSRA. *See* 15

U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B) (requiring that any expedited discovery be the narrowest discovery "necessary" to prevent undue prejudice or preserve evidence). The patent overbreadth of plaintiffs' request by itself is a ground to reject it. *See Faulkner*, 156 F. Supp. 2d at 404-05 (denying plaintiff's request for expedited discovery where it was insufficiently "particularized").

III.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion to lift the discovery stay as to Jeffrey Skilling should be denied.

Date: February 8, 2002

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been delivered by United States Mail to counsel of record, as shown on the service list attached, this 8th day of February, 2002.

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