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

NEWBY, *ET AL.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-01-3624
	§	& CONSOLIDATED CASES
ENRON CORP., *ET AL.*,	§	
	§	
Defendants.	§	

RESPONSE IN OPPOSITION AND SUPPORTING BRIEF OF THE JOSE PLAINTIFFS/F&A TO KENNETH LAY'S MOTION TO ENJOIN F&A AND HIS MOTION FOR SANCTIONS AGAINST F&A[1]

TO THE HONORABLE COURT:

Fleming & Associates, L.L.P. (F&A), on behalf of Plaintiffs David Jose, James Brister, Peter Maxfield and George Atallah (the *Jose* Plaintiffs and/or F&A), responds in opposition to the motion to enjoin F&A from seeking *ex parte* relief in state court and the motion for sanctions filed by Defendant Kenneth L. Lay (Lay) against F&A. In support of their opposition, the *Jose* Plaintiffs/F&A show the Court the following:

A. DEFENDANT LAY IS NOT ENTITLED TO INJUNCTIVE RELIEF

1. Introduction

Defendants' motions are sought only to inflame this Court's sympathies and unfairly prejudice F&A and its clients before this Honorable Court. F&A has not circumvented, nor does it intend to circumvent any of this Court's prior rulings or orders in an effort to undermine its

[1] To the extent necessary, this opposition also responds to issues raised by Defendant Jeffrey K. Skilling's Motion for Emergency Injunctive Relief under the All Writs Act and Motion for Imposition of Sanctions on F&A. Additionally, Defendant David Duncan has now adopted Lay's and Skilling's motions. The opposition therefore responds to Duncan's motion as well.

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ability to control these consolidated proceedings. Defendants have misstated the facts and the law in an effort to secure this Court's ruling to enjoin F&A from filing individual state causes of action in various state counties in Texas.

To date this Court has not entered any order restraining Ken Lay, Jeff Skilling, David Duncan or Andrew Fastow from destroying documents and/or transferring any property, funds or assets to third parties not in the ordinary course of business, or transferring any property, funds or assets outside the United States without the permission of the Court or notice to Plaintiffs. The mere fact that this Court has entered a briefing schedule relating to Amalgamated Bank's request to depose Mr. Lay in no way interferes with this Court's ability to rule on that motion.[2]

2. The Prerequisites for Preliminary Injunction Have Not Been Met

Defendants Duncan, Lay and Skilling are seeking extraordinary relief from this Court which should be granted only in extreme circumstances. *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1356 (10th Cir. 1972). Such relief should be granted only if they have clearly carried the burden of persuasion on all four prerequisites to the granting of preliminary injunctive relief. *Calhoun v. U.S.D.A. Farm Serv. Agency,* 920 F. Supp. 696, 699 (N.D. Miss. 1996). Defendants Lay, Skilling and Duncan cannot show, and have not even alleged, that they would be irreparably harmed by leaving the Temporary Restraining Order issued in Bexar County in place until February 20, 2002. *See Canal Auth. of Fla. v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). They have not even sworn to their applications for

[2] Defendant Lay states that F&A never gave notice to Defendant Lay regarding the *Ahlich* litigation, which was filed in Brazos County on behalf of 45 Plaintiffs. However, Plaintiffs' counsel left at least two phone messages for James Coleman, lead attorney for Defendant Lay. Coleman never returned Mr. Jez's phone calls.

preliminary injunction or supported their application by affidavit as required by Fed. R. Civ. P. 65.

The fact that the state court action in Bexar County involves similar issues and parties does not give this Court the right to enjoin the foreign proceeding. Duplication of parties and issues alone is not sufficient to justify the issuance of an anti-suit injunction. *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992).

Injunctions against state court proceedings are strongly disfavored. *Wilson v. Schnettler*, 365 U.S. 381, 385 (1961). *Scolaro v. District of Columbia Bd. of Elections and Ethics,* 946 F. Supp. 80, 83 (D.D.C. 1996).

To be entitled to a preliminary injunction the movant must demonstrate his probable success on the merits through evidence and the strong possibility of irreparable injury. *Metro Pub. Ltd. v. San Jose Mercury News*, 987 F.2d 637, 639 (9th Cir. 1993). The likelihood of success factor serves as a threshold requirement and if that factor is not proven by competent evidence, the District Court need go no further in denying preliminary injunction. *O'Conner v. Board of Ed. of Sch. Dist. No. 23*, 645 F.2d 578, 580 (7th Cir. 1981); *Hardin v. Houston Chronicle Pub. Co.*, 572 F.2d 1106, 1107 (5th Cir. 1978).

Evidence clearly establishing the right to a preliminary injunction showing that the movant was likely to succeed on the merits and that the purported harm to the movant could not be measured in money damages must be shown at the hearing. *GMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984); *Foley v. Alabama State Bar*, 648 F.2d 355, 358 (5th Cir. 1981).

3. F&A Has Not Sought To "Freeze" Defendants' Assets

It is true that F&A obtained an *ex parte* temporary restraining order on February 7, 2002, against Defendants Kenneth L. Lay, Jeffrey K. Skilling, Andrew Fastow, and David Duncan in the action filed in the district court of Bexar County, Texas on behalf of the *Jose* Plaintiffs. *See attached Affidavit of G. Sean Jez.* However, the TRO does not grant relief on any issues pending before this Court. The *Jose* Plaintiffs' TRO against those Defendants restrains them only from: 1) destroying, altering or deleting any documents related to their work done in connection with any audits of Enron Corporation; 2) destroying, altering or deleting any of their personal records or minutes of their attendance at Enron board meetings; 3) transferring any property, funds or assets to third parties not in the ordinary course of their business; and 4) transferring any property, funds, or assets outside of the United States without permission of the Bexar County Court and notice to the *Jose* Plaintiffs.

There is not now, nor has there been, a motion seeking or order granting such relief pending in this Court. The order that Defendants Lay and Skilling argue that F&A purportedly violated is the Court's Memorandum Opinion and Order, signed by the Honorable Lee H. Rosenthal on January 8, 2002. That Order denied Plaintiff Amalgamated Bank's request for a temporary restraining order against 29 current and former officers, inside directors, and outside directors of Enron Corporation, "freezing" the proceeds from their sales of Enron securities from October 1998 to November 27, 2001. Specifically, Plaintiff Amalgamated Bank sought to have an order entered "requiring each Individual Defendant to segregate all proceeds from Enron stock sales during the class period, in whatever present form those proceeds may be, and invest them in short-term (6 months or less) United States Treasury Securities" and an order requiring "the Individual Defendants to provide, among other things, the name and account number for all

bank accounts held by the Defendants, every transaction in which any funds or assets were taken from those accounts, and a listing of all transactions involving investments of funds from stock sales." Although the Hon. Lee Rosenthal believed she had authority to issue an order freezing their assets, she declined to do so because Amalgamated Bank had failed to supply sufficient evidence for the freezing of those assets under current law.

The TRO that was granted on February 7, 2002 on behalf of the *Jose* Plaintiffs is much less restrictive than the order presented by Amalgamated Bank. Moreover, the *Jose* Plaintiffs' TRO does not seek to freeze any of the Defendants' assets.

4. Notice is Not Necessary if a Petition is Verified

Defendant Lay's counsel also states that F&A was expressly put on notice on February 1, 2002, that counsel represented Mr. Lay in any Texas litigation and demanded that he receive immediate notice of all applications for TROs. However, the February 1, 2002, correspondence requested that F&A advise Defendant Lay's counsel immediately after the filing of the petition and application for temporary restraining order. F&A notified Defendant Lay's counsel as requested after the filing of the *Jose* Plaintiffs' application for a temporary restraining order on February 8, 2002, via facsimile transmission of the TRO issued against Defendant Lay. Defendant Skilling complains additionally in his motion that he did not receive notice of *Jose* Plaintiffs' hearing on the temporary restraining order.

Rule 680 of the Texas Rules of Civil Procedure specifically provides that a temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate or irreparable injury, loss, or damage will result to the applicant. The *Jose* Plaintiffs met their burden by filing a

verified petition with the Bexar County District Court in request for their application for temporary restraining order.

5. Relief from the TRO Should be Sought in Bexar County

If Defendants believed they were prejudiced or injured by not receiving notice of the TRO or any TRO hearing, Rule 680 specifically provides that the party may appear and move for the dissolution or modification of the TRO that had been in place. Neither Defendant Lay nor Skilling[3] took advantage of this provision of Rule 680 of the Texas Rules of Civil Procedure. Although five days have now passed since the issuance of the TRO against these Defendants who claim to have been irreparably harmed or prejudiced, they have failed to seek any relief from the Bexar County district court. Had Defendants truly been irreparably harmed or prejudiced by this TRO being issued *ex parte*, they had the right to seek relief from the Bexar County Court. Their failure to do so only signifies that their intent is not to claim that they have been irreparably injured or harmed, but rather to ensure that any claim against their clients will be brought in one forum, thereby denying the *Jose* Plaintiffs the right to have their cause of action heard in the county court in which their claim arose. In short, any issues as to the propriety or notice of a TRO should be addressed in the proper court, not this Court.

Defendant Lay states additionally that Texas Rule of Civil Procedure 682 provides that "no writ of injunction shall be granted unless the applicant therefore shall present his petition to the judge, verified by his affidavit . . .". However, Defendant Lay has put the cart before the horse in that the *Jose* Plaintiffs' TRO is not an injunction. This issue should be raised at the February 20, 2002 hearing scheduled on the *Jose* Plaintiffs' request for a temporary injunction.

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[3] Defendants Duncan and Fastow also did not seek a modification.

6. This Court Lacks Jurisdiction to Enjoin F&A or Plaintiffs

Although Defendants claim that F&A has attempted to interfere with this Court's jurisdiction, F&A respectfully believes that this Court does not have jurisdiction over the TRO because the TRO was not issued by this Court. Further, the state court in which the *Jose* Plaintiffs filed their original petition and application for temporary restraining order does not lie within this Court's federal judicial district. As such, any issues as to notice or the validity of the *Jose* Plaintiffs' verified petition should be raised before the Bexar County court.[4]

Whether *Jose* Plaintiffs' counsel, Fleming & Associates, represents 750, 1,000, 2,000, or 50 plaintiffs, is not relevant to this Court's decision on issuing an injunction against F&A.[5] Defendants are once again putting the cart before the horse. It is not until lawsuits are filed and consolidated, if ever, that they would be removable to a federal cause of action and potentially covered under SLUSA.[6]

Defendants Lay or Skilling have no basis in law or fact to request that this Court to enjoin F&A 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. §

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[4] Moreover, the Order of Consolidation signed by the Honorable Lee Rosenthal on December 12, 2001, only requires the consolidation of cases "filed in this district."

[5] F&A is surprised that Defendant Skilling's attorney, Robert Stern, has referenced the *Odom* complaint in an effort to state that Fleming & Associates is filing these state court actions because they were unable to secure a position as lead counsel. As Fleming & Associates stated at the January 30th hearing, Fleming & Associates does not intend, nor does it ever intend, to file a class action petition for these claims.

[6] This issue is addressed below in F&A's response.

2283, to enjoin Fleming & Associates. The cases cited by Defendant Lay in support of his motion do not apply to the *Jose* litigation.[7]

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.

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. 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).

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

[7] In most of the cases cited by Defendants, 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. The remaining cases address different issues and do not involve "security" cases. 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).

> 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).

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.[8]

> [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."

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.

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[8] 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.

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.*

In this case, Defendants' position is squarely foreclosed by the Anti-Injunction Act. The injunctive relief they seek is a direct assault on state-court litigation. None of the three exceptions permitted by § 2283 could possibly be met here. 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.Supp.2d 836, 842, 846-47 (D.Neb. 1999).

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). The motion must therefore be denied.

7. SLUSA Does Not Provide Authority for an Injunction

Defendant Skilling (and Duncan, perhaps) asserts that jurisdiction is proper under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Under SLUSA, certain securities class actions are preempted and removable if all statutory requirements are met. "All four elements are required for preemption." *Denton v. H&R Block Financial Advisers, Inc.*, No. 01C4185, 2001 WL 1183292 at 3 (N.D. Ill., Oct. 4, 2001).

Defendant Skilling incorrectly asserts the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 allows this Court to enjoin F&A. Under SLUSA, certain securities cases are preempted if they meet statutory requirements. Therefore, an action brought by a private party is preempted only if a defendant is able to prove the following:

1. The action is a "covered class action" under SLUSA;

2. the action purports to be based upon state law;

3. the action involves a "covered security" under SLUSA;

4. the defendant is alleged to have misrepresented or omitted a material fact; and

5. the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security.

15 U.S.C. §§ 77p, 78bb (f)(1-2). SLUSA continues by defining a "covered class action" as:

> **(i)** any single lawsuit in which –
>
> **(I)** damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . . predominate . . . ; or
>
> **(II)** one or more named parties seek to recover damages on a representative basis . . . and questions of law or fact common to those persons or members of the prospective class predominate . . . ; or
>
> **(ii)** any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –
>
> **(I)** damages are sought on behalf of more than 50 persons; and
>
> **(II)** the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purposes.

15 U.S.C. § 77 p(f)(2)(A).

Skilling's argument turns on the threshold issue of whether the case qualifies as a "covered class action" under SLUSA. For the *Jose* Plaintiffs to fall within the ambit of the securities statute, Skilling must establish that all elements of SLUSA are satisfied, beginning with its jurisdictional minimum requiring more than fifty plaintiffs. He cannot do so under the statutory provision.

The plain language of SLUSA states unambiguously that a "single lawsuit" must have more than fifty plaintiffs to be a covered class action. Alternatively, a "group of lawsuits filed in or pending in the same court" may qualify under SLUSA if the plaintiffs total more than fifty, and the lawsuits are "joined, consolidated or otherwise proceed as a single action." *See* 15 U.S.C. §77p(f)(2)(A).

An analysis by this Court should begin "by examining the plain language of the relevant statute." *See Matter of Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998) (citations omitted). If a statute's language is plain, a court must "presume that a legislature says in the statute what it means and means in the statute what it says." *Id., citing Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (other citations omitted); *see also Matter of Greenway,* 71 F.3d 1177, 1180 (5th Cir. 1996), *cert denied,* 517 U.S. 1244 (1996) "[W]here the statutory language is plain, the sole function of the court is to enforce it according to its terms." (internal quotation omitted). Because of the wording of SLUSA's class action provision, the Court's inquiry need go no further.

The *Jose* action is brought on behalf of four Plaintiffs. Therefore, preemption and an injunction under SLUSA is improper.

Since Skilling cannot overcome SLUSA's requirements for preemption, he tries another tack. He contends that because Plaintiffs' counsel represents over 750 individuals in connection with potential claims, injunction is proper. From that premise, he concludes that the Court should consider unknown clients in nonexistent cases as a basis for its subject matter jurisdiction.

Defendants Lay and Skilling's counsel both disingenuously attempt to state that Sean Jez of Fleming & Associates acknowledged or implied to the Court on January 30, 2002, that it was not F&A's intent to file any additional state court pleadings. In fact, Robert Stern stated under

the penalty of perjury that it was his understanding that Fleming & Associates would not seek duplicative emergency injunctive relief in other state court actions in the future. ¶3 of Rob Stern's Declaration. Unless Mr. Stern left the January 30, 2002 hearing early, he would have heard Sean Jez specifically state at the hearing: "I never said to this Court or these gentlemen out here that I wasn't going to file any more state causes of action." P. 50, l. 16-17 of the January 30, 2002 hearing transcript. In addition, Mr. Jez also stated "I may have said I think I filed enough; but as far as coming here before this Court and saying I am not going to file any more, that was not my representation and that's not what I meant it to be, Your Honor." P. 50, l. 21-25.[9]

Skilling expects the Court to speculate about future unknown filings for its jurisdiction. First, Plaintiffs are masters of their pleadings. *See, e.g., Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 366. Therefore, they are permitted to advance only state claims on behalf of a limited number of plaintiffs should they so choose. Second, the Court's role is not to engage in speculation about uncertain events such as possible filings, which may occur at some uncertain future date or, alternatively, may never occur. Rather, for purposes of determining if SLUSA applies, the Court should look only to the *Jose* Plaintiffs.

SLUSA made the federal courts the exclusive venue for covered class actions, alleging that a covered security was sold through manipulation, fraud or deceit." *Hinton* at 3. Since Plaintiffs' cause of action is not a covered class action, nor is it a class action by definition, SLUSA does not afford this Court with jurisdiction to enjoin the Plaintiffs from filing a lawsuit in any state court. This would totally obscure the clear language of the legislature in enacting

[9] Counsel made these statements in an effort to clarify earlier comments of defense counsel and Plaintiffs' counsel seeking lead counsel status implications that Mr. Jez stated he would not file any additional state court actions.

SLUSA. Specifically, the Court said: "In order to prevent certain state, private, security class action lawsuits alleging fraud from being used to frustrate federal objectives, congress found it appropriate to enact national standards for securities class action lawsuits involving nationally traded securities. *Prager v. Knight/Trimark Group, Inc.*, 124 F.Supp.2d 229, 223 (D. N.J. 2000).

B. DEFENDANT LAY IS NOT ENTITLED TO SANCTIONS

1. Introduction

In addition to injunctive relief, Lay also seeks sanctions against F&A in the form of an award of attorneys' fees that he incurred in filing his motion. Lay's request for sanctions is based on 28 U.S.C. §1927, or alternatively on the Court's inherent power to impose sanctions.

Stripped of the rhetoric and irrelevant facts in his motion, Lay's complaint concerns the filing of a petition and the entry of a temporary restraining order against him in a state court in Bexar County. Lay's motion is brought in this Court, although he is well aware that the lawsuit he complains of is pending outside the Houston Division of the Southern District of Texas. As shown below, F&A's conduct in filing the petition and applying for a TRO against Lay in Bexar County does not warrant the imposition of sanctions under either §1927 or this Court's inherent power.

2. F&A's Conduct is not Sanctionable

Lay seeks sanctions against F&A initially under 28 U.S.C. §1927, which provides the following:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously, may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions awarded under §1927 are punitive in nature. *See Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1983 (5th Cir. 1979), *aff'd in relevant part sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Therefore, the Fifth Circuit construes §1927 strictly and in favor of the party to be sanctioned. *See, e.g., Procter & Gamble Co. v. Amway Corp.*, ___ F.3d ___, 2002 WL 73222 * 4 (5th Cir. Jan. 17, 2002) (citations omitted) (vacating award of attorneys' fees under §1927); *Edwards v. General Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998) (holding that "because of the punitive nature of §1927 sanctions, and in order not to chill legitimate advocacy, the provision must be strictly construed"; and affirming the imposition of sanctions because "the record was littered with indications that [the attorney] abandoned her suit, but willfully required GM to defend it, and required the court to continue to consider its merits").

The Fifth Circuit has concluded that for a court to find that an attorney "unreasonably" *and* "vexatiously" multiplied proceedings under §1927, there must be "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." *See Edwards v. General Motors Corp.*, 153 F.3d at 246. Section 1927 does not apply, however, when an attorney has represented his client "with vigor." *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 448 (5th Cir. 1992) (holding that a district court abused its discretion in imposing sanctions, including those under §1927).

In addition to its discretionary authority under §1927, a district court also possesses inherent power to sanction attorneys for bad faith conduct in litigation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). But because of "their very potency, inherent powers must be exercised with restraint and discretion." *Id.* at 44 (relying on *Roadway Express*, 447 U.S. at 764).

Therefore, the threshold for the imposition of such sanctions is high. For sanctions to be proper, a court must find specifically that an attorney acted in "bad faith." *See, e.g., Kipps v. Caillier*, 197 F.3d 765, 770 (5th Cir. 1999, *cert. denied*, 531 U.S. 816 (2000)(citations omitted) (finding an abuse of discretion in the imposition of sanctions under the court's inherent power). General complaints about counsel's conduct in litigation are not sufficient to support sanctions. *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (vacating sanctions awarded under court's inherent authority).

The Supreme Court has defined the type of "bad faith" that would allow a court to assess attorneys' fees. The conduct must be egregious, amounting to a situation where a court finds that "fraud has been practiced upon it or that the very temple of justice has been defiled." *See Chambers v. NASCO, Inc.*, 501 U.S. at 46. *Chambers v. NASCO* went on to describe situations where the imposition of sanctions would be proper. One is "the willful disobedience of a court order." *See id.* at 45 (citation omitted).

Shortly after the Supreme Court handed down *Chambers*, the Fifth Circuit limited its application in *Matter of Case,* 937 F.2d 1014 (5th Cir. 1991). *Case* held that a bankruptcy court had erred in sanctioning a party for bad faith conduct that had occurred in a separate state court proceeding. *Id.* at 1023. The opinion distinguished *Chambers* by observing the following:

> The state court proceeding in [*Case*] is completely collateral to the proceedings in bankruptcy court. The conduct of the parties in the state action cannot be said to affect the exercise of the judicial authority of the bankruptcy court, or limit the bankruptcy court's power to control the behavior of parties and attorneys in the litigation before it. Inherent power must rise from the litigation before that court. Although the substantive issue in a state court proceeding is the same, the conduct of the parties in that suit is unconnected to the present action.

See Connor v. Travis County, 209 F.3d 794, 800 (5th Cir. 2000), citing *Case*, 937 F.2d at 1023-24.

Given the case law cited above, it is understandable that Lay's motion for sanctions contains little authority. He is forced to cite *Case*, however, despite the fact that it presents an insurmountable obstacle to his argument for sanctions. Therefore, Lay attempts to defuse the opinion in a footnote. *See* motion at 14-15, n. 1. He contends that *Case* does not apply because F&A's state court filing, "if successful, would eviscerate the federal court's ability to control the proceedings before it." Lay's argument fails; he omits a critical element of the holding from *Chambers* because it destroys his position. In fact, as the Fifth Circuit noted later, the conduct at issue in *Chambers* warranted sanctions because it:

> not only **directly violated the district court's order to maintain the status quo pending the outcome of the litigation,** but also, if successful, would have eviscerated the court's ability to enforce specific performance if it so ordered.

See Connor v. Travis County, 209 F.3d at 800, relying on *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 794 (5th Cir. 1993), which discussed *Chambers* (emphasis supplied).[10]

In short, the imposition of sanctions under either sanctioning power is the exception rather than the rule. *See Connnor v. Travis County*, 209 F.3d at 799. And Lay does not come close to meeting the stringent standards required before sanctions may be properly imposed on F&A. F&A's conduct in filing suit in Bexar County does not evidence bad faith or improper motive or reckless disregard of any duty owed to this Court. Rather, F&A wishes to diligently represent its clients, all of whom reside in Bexar County, to the best of its ability. And that representation entails obtaining an early trial setting, which is highly unlikely in the Houston Division of the Southern District of Texas, given the procedural posture of the litigation.

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[10] For some reason, Lay also cites *CJC Holdings*. It, too, obviates his argument. In *CJC Holdings*, the District Court for the Western District of Texas had relied on the *Case* decision to conclude that it lacked power to sanction conduct that took place before a New Jersey district court.

The *sine qua non* for the imposition of sanctions is a blatant violation of a court's order, fraud upon the court, or some equally egregious actions on the part of counsel. *See, e.g., Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950 (5 Cir. 2001) (affirming sanctions based on counsel's deliberate disregard of a confidentiality agreement and the exposing of settlement terms to the public.) Lay, of course, can argue no such conduct. It is undisputed that no order has been entered prohibiting the filing of lawsuits or the application for temporary restraining orders in state court. Therefore, F&A has contravened no orders. And it has not been suggested, nor could it, that F&A has perpetrated fraud upon the Court, or anything close to such conduct.

Additionally, assuming without conceding that the TRO was in any way problematical to Lay, any relief should be sought in the forum where suit was filed, *i.e.*, the Bexar County court. Lay had — and still has — the opportunity to oppose the entry of a temporary injunction by that court, whether at the hearing or before the hearing takes place.

Next, as discussed at length above, the relief F&A sought on behalf of its clients is less restrictive than this Court's order. Further, it relates to different parties.

Finally, this Court now has before it a number of cases consolidated from actions pending in the Southern District of Texas, Houston Division. Its jurisdiction is limited to cases filed in this District and Division, and to any other actions that have been properly removed to the Court. The filing of an action in a state court in Bexar County on behalf of four Plaintiffs does not interfere with the Court's limited jurisdiction, absent either multidistrict litigation proceedings in which this Court is the transferee court, or a non-opt-out class action.

CONCLUSION

For all reasons above, the motion to enjoin Fleming & Associates, L.L.P. from seeking *ex parte* relief in state court, against it, filed by Defendant Kenneth L. Lay, should be denied.

Respectfully submitted,

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By: _____
G. Sean Jez

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing has been provided to all parties via facsimile or hand delivery on this the 13th day of February, 2002:

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G. Sean Jez

AFFIDAVIT OF G. SEAN JEZ

STATE OF TEXAS §
§
COUNTY OF HARRIS §

On this day G. Sean Jez appeared before me, the undersigned Notary Public, and after I administered an oath to him, upon his oath, G. Sean Jez said:

"My name is G. Sean Jez. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

On February 7, 2002, at approximately 2:45 p.m. I presented to the District Clerk for Bexar County, a copy of Plaintiffs' Original Petition, Application for Temporary Restraining Order and Temporary Injunction in the *David Jose, et al v. Arthur Andersen, et al* matter which later became styled as Cause No. 2002-CI-01906 in the 57th Judicial District Court of Bexar County.

After presenting the petition and application for temporary restraining order and temporary injunction to the District Clerk for filing, I thereupon requested that the Clerk set the application for temporary restraining order for hearing.

After the Clerk completed assigning it a cause number and court, I was instructed to take the file to the second floor of the courtroom to the presiding judge who would handle my request. Upon entering the presiding judge's courtroom on the second floor of the Bexar County Courthouse, I was informed by the Court's clerk that the presiding judge had left the courtroom to return to his courtroom and that I should wait for his return.

After approximately 10 to 15 minutes, the Court clerk informed me that Judge Pat Boone on the fourth floor of the courthouse would be available to entertain my requested relief since the presiding judge had not returned to the bench. I went to Judge Pat Boone's courtroom on the fourth floor, and upon entering the courtroom the bailiff asked me why I was there. I informed him that I was there with an application for a temporary restraining order and handed him the file. He informed me that Judge Boone was on the telephone and that he would take the file back to the Judge and present it to the Judge. After waiting approximately 10 to 15 minutes, the bailiff returned the file to me with the requested TRO signed by Judge Pat Boone.

At no time was I allowed to communicate with Judge Boone concerning the relief we sought, nor did the Judge inquire as to our pleadings or the TRO that we sought. After leaving the courtroom, I had a copy of the TRO made on the third floor and then returned to the presiding judge on the second floor, returned the file and began my return trip to Harris County, Texas. I instructed my legal assistant, Terri Raybourn, to fax a copy of the TRO that had been signed by Judge Boone to counsel for Defendants Skilling, Lay, Duncan and Fastow the next

morning. Since I was in San Antonio and would not return to the office until approximately 8:00 to 8:30, I advised Ms. Raybourn that I would leave a copy of the order in her chair.

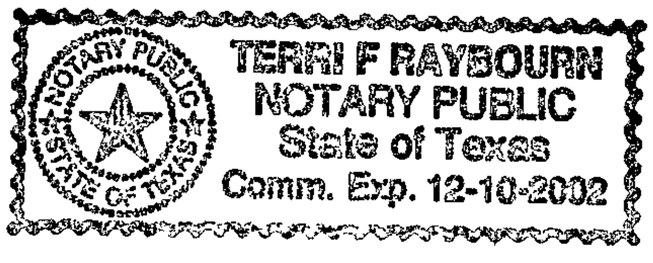
I was not in the office on Friday, February 8 through Monday, February 11, 2002. I was informed on late Friday afternoon that the District Clerk's office would not issue citation as to the petition because the Judge had failed to set a bond in the matter and as such we were unable to receive a citation on this matter. It was my intention to serve a copy of the Plaintiffs' original petition along with the citations once they were issued.

On Friday, February 8, I traveled to Oakland, California. During my flight, Mr. Stern apparently left a message on my voicemail. Upon receiving Mr. Stern's voicemail, I called and left him a message at his office and advised him that if he would like to discuss the TRO, that he was welcome to call me. On Saturday morning, February 9, I received a call from Mr. Stern in which we discussed Plaintiffs' TRO in the *Jose* matter."

FURTHER AFFIANT SAYETH NAUGHT.

G. Sean Jez

Sworn to and subscribed before me by G. Sean Jez on February 13, 2002.



Terri F. Raybourn
Notary Public In and For the State of Texas

My Commission Expires: 12/10/02