United States Courts
Southern District of Texas
FILED
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, on behalf of himself and a class of persons similarly situated, Plaintiffs, v. ENRON CORP., *et al.*, Defendants.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. H-01-3624 and consolidated cases (Securities Cases)
PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, derivatively on behalf of ENRON CORPORATION, Plaintiffs, v. KENNETH L. LAY, *et al.*, Defendants.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. H-01-3645 and consolidated cases (Derivative Cases)
PAMELA M. TITTLE, *et al.*, on behalf of themselves and a class of persons similarly situated, Plaintiffs, v. ENRON CORP., *et al.*, Defendants.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. H-01-3913 and consolidated cases (ERISA Cases)

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OPPOSITION OF ERISA DEFENDANTS TO MOTION OF THE *TITTLE, RINARD*, AND *KEMPER* PLAINTIFFS FOR A PRELIMINARY ORDER FREEZING AND IMPOSING A CONSTRUCTIVE TRUST OVER INDIVIDUAL DEFENDANTS' ASSETS AND LIMITED EXPEDITED DISCOVERY INTO THOSE ASSETS

Defendants James S. Prentice and Mary K. Joyce, both of whom have been named as defendants in this action because of their service on the Administrative Committee of various Enron pension plans, hereby oppose the Motion of the *Tittle, Rinard and Kemper* Plaintiffs ("ERISA Plaintiffs") for a Preliminary Order freezing, and permitting limited discovery concerning, certain of their assets.[1] As demonstrated below, just as in the case of the similar motion filed in the *Newby* cases, the ERISA Plaintiffs have failed to demonstrate the imminent threat of asset dissipation by any defendant that is essential to the relief they seek. More importantly, unlike the *Newby* case, the ERISA Plaintiffs have failed to establish that the "extraordinary remedy" of a pre-judgment asset freeze is available even as a theoretical matter with respect to these defendants. Nor could they since there is absolutely no nexus between the ERISA claims they have asserted and the assets they seek to freeze. Accordingly, the ERISA Plaintiffs' motion should be denied.

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[1] The ERISA Plaintiffs also seek preliminary relief against Rod Hayslett, Tod Lindholm Sheila Knudsen, and Mikie Rath, who also have been identified as members of the Administrative Committee and/or plan fiduciaries. These individuals, however, are not properly before the Court. None of them has been named as defendants in the previously filed ERISA cases. And it is our understanding that none has been served in the recently filed ERISA Derivative action in which they were named as defendants for the first time. *See* First Amended Derivative Complaint For the Enron Corp. Savings Plan and Complaint for the Enron Corp. Stock Ownership Plan For Violations of Federal Securities Law, the Employment Retirement Income Security Act of 1974 ("ERISA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and Texas Common Law ("Derivative Complaint"). Nonetheless, the arguments made here on behalf of Defendants Joyce and Prentice apply with equal force to these individuals.

BACKGROUND

On February 14, 2002, the ERISA Plaintiffs moved (a) to conduct discovery into the assets of specific individuals who are defendants in "their cases" and (b) after an evidentiary hearing, for an order freezing the proceeds from any sales of Enron stock made by those defendants pending final resolution of their claims.[2] The ERISA plaintiffs assert that this motion is patterned after the similar "freeze" motion filed by the securities plaintiffs in the *Newby* case,[3] which sought "to freeze the ill-gotten assets of certain Enron officers who profited by selling their Enron stock while they were in possession of materially adverse nonpublic information concerning the true (and disastrous) state of Enron finances." ERISA Pl Mem at 2.

The ERISA Plaintiffs premise their motion on their recently filed Derivative Complaint which they maintain "asserts claims for equitable relief such that the prejudgment freeze of certain named defendants' assets is proper." *Id.* at 4. That complaint asserts three claims against Defendants Prentice and Joyce, each of which seeks to hold them "liable to restore the losses to the Savings Plan" caused by their alleged violation of their ERISA "fiduciary duties."[4] Significantly, the Derivative Complaint does *not* assert that these defendants possessed "insider"

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[2] Memorandum of Law in Support of the Motion of the *Tittle*, *Rinard*, And *Kemper* Plaintiffs For A Preliminary Order Freezing And Imposing A Constructive Trust Over Individual Defendants' Assets And Limited Expedited Discovery Into Those Assets ("ERISA Pl Mem") at 2-3.

[3] That motion was filed in *Amalgamated Bank, et al. v. Kenneth L. Lay, et al.*, Civ. Action No. H-01-4198 (S.D. Tex.), which has been consolidated under the *Newby* caption. *See* Plaintiffs' Ex Parte Application for (1) a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should not be Entered Freezing and Imposing a Constructive Trust Over Insider Trading Proceeds, (2) Accounting of Insider Trading Proceeds, and (3) Limited Discovery.

[4] *See* Derivative Complaint at ¶¶ 200, 209 and 222.

information, engaged in any "insider" trading in Enron stock or profited personally from their alleged breach of ERISA fiduciary duty.

ARGUMENT

I. THIS COURT SHOULD DENY THE ERISA PLAINTIFFS' FREEZE MOTION FOR THE SAME REASON THAT IT DENIED THE SECURITIES PLAINTIFFS' MOTION

As noted above, in its Memorandum Opinion and Order dated January 9, 2002 ("Jan 9 Order"), this Court denied the securities plaintiffs' request to "freeze" the profits from sales of Enron securities realized by 29 current and former officers and directors of Enron Corporation. In so doing, the Court emphasized that a temporary restraining order or preliminary injunction is "an extraordinary equitable remedy."[5] Jan 9 Order at 37. It went on to explain that

> [i]n the cases in which such a prejudgment asset-freezing injunction is granted, the courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of post-judgment collection, or were dissipating the assets. *Id.* at 38.

Thus, the Court concluded that to be entitled to such extraordinary relief, the securities plaintiffs had to demonstrate "that *each* defendant is *likely* to dissipate the assets that may satisfy the equitable remedies [that plaintiffs have] asserted, absent intervention by this court." *Id.* at 39 (emphasis supplied).

After examining the evidence submitted by the securities plaintiffs on this issue, the Court found that they had failed to make the "necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury . . . ." *Id.*

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[5] As such, it can only be granted where a party establishes: (1) substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause the defendants, and (4) that the injunction will not disserve the public interest. *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999).

at 40. As the Court explained, that evidence, which consisted of an affidavit from a securities law professor and former enforcement attorney at the SEC, failed to "distinguish among the individual defendants on the basis of their current activities or present or future risk of asset concealment or dissipation." *Id.* Accordingly, the Court denied the motion.

The ERISA plaintiffs likewise have failed to make the requisite showing of threatened irreparable injury. Unlike the securities plaintiffs, they have offered *no* evidence whatsoever suggesting any risk that Defendants Joyce and Prentice will dissipate profits earned from Enron trading. In addition, they fail to show that Defendant Joyce made any profits from Enron trading or that any profits made by Mr. Prentice occurred when he was privy to "materially adverse nonpublic information." ERISA Pl Mem at 1.[6] Thus, with a showing poorer than that made by the securities plaintiffs, the ERISA plaintiffs' motion must also be denied.

II. THE ERISA PLAINTIFFS HAVE FAILED TO DEMONSTRATE THE REQUIRED NEXUS BETWEEN THE PRELIMINARY AND ULTIMATE RELIEF THEY SEEK

In its January 9 Order, the Court ruled that to obtain a "freeze order" plaintiffs must first show "a sufficient nexus between the assets sought to be frozen and the equitable relief plaintiffs request." Jan 9 Order at 14. In formulating this test the Court quoted extensively, and favorably,

[6] To the contrary, in their memorandum supporting their removal petition, plaintiffs affirmatively state that Defendant Prentice was unaware of certain adverse nonpublic information. *See* Memorandum of Law in Support of the Motion of the *Tittle*, *Rinard*, and *Kemper* Plaintiffs For Appointment of an Independent Fiduciary for the Enron 401(k) Plan (filed Feb. 11, 2002) ("Removal. Mem") at 21-22. Moreover, plaintiffs selectively recall Mr. Prentice's Senate testimony at which his Enron trading was discussed. While they note his disclosure of a sale of "some $900,000 worth of Enron stock in June, 2001 . . . .". (ERISA Pl Mem at 7), they fail to mention his disclosure of a second Enron sale in late 2001 at a price of about $1.00 per share. As a result of this second sale, he suffered a reduction in excess of $2 million in the value of his 401(k) Plan over the course of 2001.

from *United States ex rel. Rahman v. Oncology Associates P.C.*, 198 F.3d 489, 496 (4th Cir. 1999):

> when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets.

Jan 9 Order at 13-14 (emphasis added). In the case of the securities plaintiffs, the Court found such a nexus given that the assets sought to be frozen were the claimed profits from defendants' alleged "insider trading" in violation of Federal Securities Laws, i.e., the profits from "trading Enron securities at prices artificially inflated due to the concealment of materially adverse 'inside' information." *Id.* at 4. The equitable relief requested was an "accounting" for the profits on those very same trades. *Id.* at 34.

No similar "nexus" exists here with respect to the ERISA claims asserted against Defendants Prentice and Joyce. While the ERISA plaintiffs contend that "there is a sufficient nexus between the equitable relief asserted by the ERISA Plaintiffs and the ill-gotten assets the ERISA Plaintiffs seek to freeze" (ERISA Pl Mem at 4), their contention is unsupported by their Derivative Complaint. That Complaint asserts *no* claims against Defendants Prentice and Joyce seeking to recover any alleged "ill-gotten" gains such that equitable relief could be appropriate.

As noted earlier, the Derivative Complaint makes no "insider trading" claims against these Defendants under the Federal Securities laws.[7] Nor does that Complaint seek the recovery

[7] The ERISA Plaintiffs allege only that *other* defendants engaged in insider trading and other violations of the securities laws. Derivative Complaint at 54 ¶¶ 185-86 ("Insider Trading"), 55 ¶ 187 ("Scienter Allegations"), 69-74 (securities Counts VI-VIII) (filed Feb. 12, 2002). And significantly it is only against these *other* Defendants that they seek "a constructive trust" and

(Continued ...)

of "profits" allegedly obtained by these defendants as a result of a violation of their ERISA fiduciary duties. Rather, the only relief requested against them on these ERISA claims is the recovery of "losses" allegedly sustained by the Savings Plan.[8] The recovery of such plan losses, which is an available remedy for breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, has been characterized by Justice Scalia as the ERISA equivalent of "compensatory" or "money damages." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252, 255 (1993). Such generalized "losses" are not the "specific fund or *res* that resulted from the defendant's breach" recognized by this Court as the necessary pre-requisite to a pre-judgment freeze order. Jan 9 Order at 33.[9]

In the language of *Rahman,* these ERISA plaintiffs have failed to show the "nexus between the assets sought to be frozen" and "the ultimate relief requested," a showing held to be "essential" to the entry of a preliminary injunction freezing assets. 198 F.3d at 496. Thus, a

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"an equitable accounting" on "profits" made from trading Enron stock "while in possession of materially adverse insider information." *See* Derivative Complaint, Prayer for Relief, Paragraphs D and E, pp. 79-80. There is no similar prayer for a "constructive trust" or an "equitable accounting" of insider profits – which this Court found essential to its authority to issuing a freeze order in ruling on the securities plaintiffs motion – against Defendants Prentice and Joyce.

[8] *See* Counts I through III, pp. 55-62. The parallel ERISA portion of the Prayer for Relief, paragraph G, seeks "compensatory damages" in favor of the Savings Plan. While paragraph H of the Prayer for Relief seeks "rescission" of all sales of Enron stock to the Savings Plan, no claims giving rise to such relief have been asserted against Defendants Prentice and Joyce. Nor is there any allegation that these defendants sold any stock to the Plan, such that rescission could be a conceivable remedy against them.

[9] Although the ERISA Plaintiffs premise the present motion on their recently filed Derivative Complaint, the claims asserted in the *Tittle*, *Rinard* and *Kemper* Complaints would fare no better with respect to Defendants Prentice and Joyce. None of these complaints alleges that these defendants engaged in insider trading or otherwise personally profited from their alleged breaches of fiduciary duty. Nor were any such allegations set forth in the memorandum supporting Plaintiffs' removal petition which in their words, "describe[s] in detail their ERISA Claims." ERISA Pl Mem at 6. *See* Removal Memo. And while the Prayer for Relief in the *Kemper* Complaint generally includes a "constructive trust" and "an accounting" in the litany of remedies requested, such relief cannot appropriately be read to apply to Defendants Prentice and Joyce given the nature of the claims made against them.

freeze order is not available even as a theoretical matter against Defendants Prentice and Joyce given the nature of the claims asserted by the ERISA plaintiffs.

III. THE DISCOVERY BEING SOUGHT BY PLAINTIFFS IS UNJUSTIFIED AND CONTRARY TO THE COURT'S ORDER

Plaintiffs seek what they describe as "limited discovery" to determine "whether the grant of a preliminary freeze Order is proper." ERISA Pl Mem at 8. As demonstrated above, such a freeze Order is not available as matter of law with respect to these defendants. Therefore, granting such discovery is unjustified and serves no purpose. Moreover, contrary to plaintiffs' characterization, the discovery sought is far from limited.[10] Rather than simply seeking information relating to the risk of asset dissipation envisioned in the Court's January 9 Order, these plaintiffs seek information regarding whether Defendants even possessed insider information or engaged in Enron stock transactions. Further, they seek voluminous materials, presumably in the possession of Enron, directed toward the structuring of and accounting for the

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[10] For example, this "limited discovery" includes

> "(5) In connection with the limited partnerships Enron transacted with: formation documents, documents identifying all limited and general partners of the partnerships including ownership percentage, documents identifying all Enron personnel who received compensation or profit from those ownerships, documents summarizing all transactions between Enron and those partnerships or between those partnerships and any Enron employee, and documents reflecting any compensation or profit resulting from the association of any Enron employee with the limited partnerships;
>
> (6) Notes, memoranda and work papers concerning the review of accounting practices being conducted by Enron's inside and outside auditors, or concerning the restatements of Enron's previously reported results from operations;
>
> (7) All Enron Board of Director reports and minutes generated during the Relevant Period."

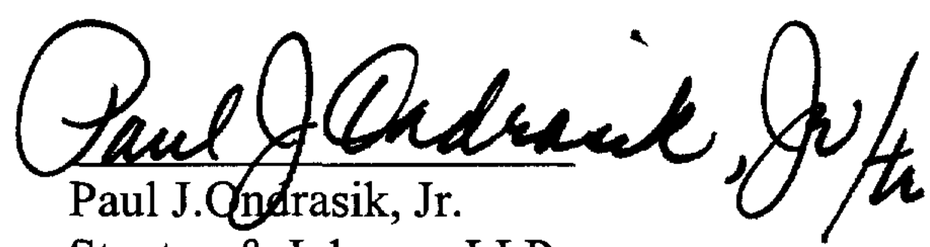
ERISA Pl Mem at 9.

very transactions which form the gravaman of the securities law claims. Permitting this premature piecemeal discovery, largely in the nature of a fishing expedition, would far exceed the limited ERISA-specific discovery authorized by this Court's Order of February 27, 2002.

CONCLUSION

In its January 9 Order, the Court denied the freeze motion filed by the securities plaintiffs because of their failure to demonstrate any threat of asset dissipation by the defendants whose insider profits those plaintiffs sought to freeze. The ERISA Plaintiffs' motion suffers from this and even greater defects: these plaintiffs have not alleged that Defendants Prentice and Joyce have inside information, engaged in insider trading or possess any "ill-gotten assets" derived from the alleged violations set forth in their complaints. Accordingly, there is no basis for the equitable relief being sought and this motion should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 6th day of March, 2002, I served a copy of the foregoing pleading by fax on all counsel as indicated on the attached fax cover sheets.

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ORDER

AND NOW, this _____ day of _____, 2002, upon consideration of the Motion of the *Tittle, Rinard And Kemper* Plaintiffs For A Preliminary Order Freezing and Imposing A Constructive Trust Over Individual Defendants' Assets, and Limited Expedited Discovery Into Those Assets, it is hereby ordered as follows:

Plaintiffs' Motion is **DENIED.**

IT IS SO ORDERED.

Date: _____

_____
Melinda Harmon
United States District Judge