United States Courts
Southern District of Texas
FILED
MAR 1 1 2002
Michael N. Milby, Clerk

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

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

DEFENDANT KENNETH L. LAY'S RESPONSE IN OPPOSITION TO FLEMING & ASSOCIATES, L.L.P.'S MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE, MOTION TO SUSPEND THE COURT'S INJUNCTION PENDING APPEAL

TO THE HONORABLE MELINDA HARMON:

Defendant Kenneth L. Lay respectfully requests that the Court deny the relief requested in Fleming & Associates, L.L.P.'s Motion for Reconsideration Or In the Alternative, Motion to Suspend the Court's Injunction Pending Appeal ("Motion for Reconsideration"), and respectfully shows the Court the following:

On February 15, 2002, this Court issued a Memorandum and Order ("Order") enjoining Fleming & Associates, L.L.P. ("Fleming") from filing new Enron-related actions without leave of Court. Order at p. 8. On February 19, 2002, Fleming filed its Motion for Reconsideration, asking the Court "reconsider" its Order "based on the argument and briefing supplied by [Fleming] at the hearing of February 14, 2002."

Fleming gave this Court very little time to consider its Motion for Reconsideration. Less than 48 hours after the motion was filed, on February 21, 2002, Fleming filed a request for mandamus with the United States Court of Appeals for the Fifth Circuit. Mr. Lay has filed a response in opposition to Fleming's request for mandamus, a copy of which has been served upon this Court.

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On February 25, 2002, the Court entered an Order expressly denying Fleming's motion for an expedited hearing on its Motion for Reconsideration. In its Order, the Court also commented on Fleming's request for reconsideration, stating: "The Court has reconsidered its Injunction against [Fleming's] filing of Enron-related actions in state court. No new arguments or authorities have been offered. The injunction is justified and necessary for the reasons stated in the Court's decision. Suspension of the injunction pending appeal would frustrate the injunction." Mr. Lay requests that the Court enter an order expressly denying Fleming's Motion for Reconsideration. As stated in the Court's earlier Order, Fleming brings nothing new to the Court to consider in connection with its motion. [1]

For the foregoing reasons, Defendant Kenneth L. Lay respectfully respects that the Court deny Fleming & Associates, L.L.P.'s Motion for Reconsideration Or In the Alternative, Motion to Suspend the Court's Injunction Pending Appeal, and grant Defendant such other and further relief to which he has shown himself to be justly entitled.

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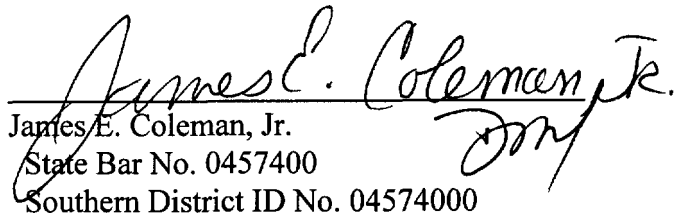
[1] . Fleming's Motion for Reconsideration should be denied for the additional reason that, to obtain a stay pending appeal, the movant must establish: (1) a likelihood of success on the merits, (2) irreparable injury if the stay is not granted, (3) the absence of substantial harm to the other parties from the granting of the stay, and (4) service to the public interest from granting the stay. *Hunt v. Bakers Trust Co.*, 799 F.2d 1060, 1067 (5th Cir. 1986) (citations omitted). "The criteria for granting a stay pending appeal have been so often repeated by [the Fifth Circuit], that they are rubric." *Hunt*, 799 F.2d at 1067. Fleming has not (and cannot) make this requisite showing.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 8th day of March, 2002.

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