

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

United States Courts  
Southern District of Texas  
FILED

MAR 14 2002

CR

Michael N. Milby, Clerk

MARK NEWBY, ET AL.,

Plaintiff,

vs.

ENRON CORPORATION, ET AL.,

Defendants.

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CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

**MOTION TO QUASH SUBPOENA  
WRONGFULLY ISSUED BY FLEMING & ASSOCIATES  
AND FOR SANCTIONS**

THE HONORABLE JUDGE OF THIS COURT:

NOW COMES LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper (collectively, "Movants") and file this Motion to Quash Subpoena Wrongfully Issued by Fleming & Associates, L.L.P. ("Fleming") and for Sanctions because Fleming has apparently served and attempted to enforce a subpoena *before obtaining the required Court approval of the proposed subpoena that Fleming itself asked for in a motion that has not yet been submitted for decision by the Court*. In support hereof, Movants would respectfully show the Court as follows:

1. On March 5, 2002, Fleming filed a motion in the consolidated *Newby* cases entitled *Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping* with this Court. As no expedited treatment of the motion was sought by Fleming, under the Court's Local Rules, the motion is currently set for submission to the Court *on March 25, 2002*. In the motion, Fleming requests that the Court "allow this subpoena" and "allow the inspection and copying of the documents" in the possession of Joseph Trahan, an individual who has never appeared in any of the consolidated Enron-related matters before this Court. The order

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proposed by Fleming asks for the Court's permission "to subpoena, inspect and copy all [requested] records." See Tab A (copy of motion to authorize subpoena).

2. Counsel for Movants learned yesterday afternoon that despite having filed a motion seeking this Court's approval of the subpoena, Fleming *served it on Mr. Trahan* prior to obtaining the Court's approval. Counsel for Movants learned this morning that Fleming not only served the subpoena on Mr. Trahan *but has sought to arrange a production of documents to Fleming pursuant to the subpoena*. As of the time of filing of this Motion, it has been represented to Counsel for Movants, both by counsel for Mr. Trahan and by Fleming, that no actual production has occurred. However, Fleming has refused to withdraw the subpoena, or even abate its enforcement, until after its own motion seeking approval of the subpoena is submitted to the Court on March 25, 2002 and thereupon considered by the Court.

3. The reasons that Fleming sought Court approval of the subpoena are obvious. The case in which the subpoena is sought is consolidated (as is recognized by Fleming's filing) into the *Newby* cases. These *Newby* cases are subject to (1) the Court's scheduling order governing proceedings in those cases and (2) the stay of "all proceedings" under the Private Securities Litigation Reform Act ("Reform Act") referred to in the Court's scheduling order. As the Court is well aware, under the Reform 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 necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B) (West 1997). Under the Court's scheduling order, no discovery in the *Newby* cases was authorized prior to the filing of and ruling by the

Court on motions to dismiss, with the limited exception of a specified document production by Enron Corp. as ordered by the Bankruptcy Court. *See* Tab B (Court’s Scheduling Order).

4. The subpoena served on Mr. Trahan was purportedly issued under the authority of this Court and was signed by Gregory Jez.<sup>1</sup> The subpoena specifically “commanded” Mr. Trahan “to produce and permit inspection and copying of” various records on March 11, 2002 at the offices of Fleming. It is dated March 1, 2002 – four days *before* Fleming sought permission from this Court to undertake the discovery, and five days before Fleming sought fit to serve any of the parties who have appeared in these consolidated proceedings with a copy of the proposed subpoena.<sup>2</sup>

5. *Pearson, et al. v. Fastow et al.*, Civil Action No. H-02-0670, was consolidated by this Court into lead case *Newby v. Enron* on February 26, 2002. *See* Order of Consolidation (Docket No. 324). Consolidation was expressly ordered, within the inherent authority of this Court, “to ensure the orderly progress of these lawsuits and to avoid unwarranted duplication of discovery and motion practice” and based on the Court’s finding that the cases arose from a common core of operative facts. Order of Consolidation (dated Dec. 12, 2001) at p. 17. The Court recently reiterated its commitment “that the litigation should proceed as a unified class with a strong Lead Plaintiff, at least until the time for class certification.” Memorandum and

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<sup>1</sup> The subpoena states it is “signed by permission” for Mr. Jez. It fails to identify the specific person signing.

<sup>2</sup>When counsel for Movants initially reviewed the motion and noticed that the subpoena sought to be approved by the Court was signed, she contacted Fleming’s office and was referred to a legal assistant. The legal assistant informed counsel that she personally did not know whether the subpoena had been issued and served, but would either have someone call counsel for Movants with that information or would determine that information herself and call counsel for Movants back. Fleming did not respond to this inquiry until counsel for Movants told Fleming that they had learned of the subpoena’s service from counsel for Mr. Trahan.

Order (dated Feb. 15, 2002) at p. 63. The Court has also ordered that a consolidated complaint be filed in *Newby* by April 1, 2002. Scheduling Order (entered on Feb. 28, 2002) at 5.

6. As noted by the Court in an order issued earlier in the *Newby* case, the Reform Act stay of discovery “has been interpreted to mean that discovery is stayed from the filing of the complaint *until* the court has determined the sufficiency of the plaintiff’s pleading, unless the plaintiff can establish one of the exceptions.” Memorandum Opinion and Order, dated Jan. 8, 2002, at 43 (Docket No. 111) (emphasis in original).

7. Plaintiffs cannot circumvent the provisions of the Reform Act by purportedly asserting state law claims. *SG Cowen Securities Corp. v. United States District Court*, 189 F.3d 909, 913 n.1 (9th Cir. 1999). The *Pearson* plaintiffs (like the other plaintiffs in the Fleming lawsuits) claim, *inter alia*, that each of the defendants “deceived Plaintiffs and the investing public ... and caused Plaintiffs to purchase Enron’s common stock at artificially inflated prices... .” Plaintiffs’ Original Petition ¶ 41. These causes of action have been consolidated with the federal securities law claims contained in *Newby*. Accordingly, there is no basis to seek this discovery prior to the time called for in the Court’s Order and as provided in the Reform Act. *Angell Investments, L.L.C. v. Purizer Corp.*, 2001 WL 1345996, at \*2 (N.D. Ill. Oct. 31, 2001) (“Allowing plaintiffs to conduct discovery on the [state law claims] now despite the stay would be an improper run around the [the Reform Act].”).

8. The discovery stay applies to discovery sought from non-parties. *See In re Carnegie Int’l Corp. Sec. Lit.*, 107 F. Supp. 2d 676, 679 (D. Md. 2000). “By its language, the Reform Act addresses ‘all discovery’ with no distinction between that sought from nonparties as opposed to parties.” *Powers v. Eichen*, 961 F. Supp. 233, 235 (S.D. Cal. 1997). Fleming’s

service and attempted enforcement of the subpoena on Mr. Trahan without authorization of the Court violates the stay.

9. In the motion, Fleming alleges that the discovery from Mr. Trahan is “imperative . . . to prevent [documents’] destruction or deletion.” Even if Fleming had awaited an order from the Court, this conclusory allegation, unsupported by any evidence whatsoever, would be insufficient to justify lifting the stay on discovery. *See, e.g., In re DFS-Related Sec. Fraud Lit.* 179 F. Supp.2d 1260, 1264 (N.D. Ok. 2001)

10. Fleming’s service and attempted enforcement of a subpoena on Mr. Trahan violates not only the Court’s Order but also the discovery stay imposed by the Reform Act. Fleming has acknowledged the application of the Court’s Order and Reform Act stay by filing a motion claiming to seek this Court’s permission to undertake the discovery. Fleming’s unilateral decision to undertake and to attempt to enforce this discovery – despite the stay and without an order from this Court on its own motion – flaunts the authority of this Court and the laws governing this action. Under the circumstances, it would be appropriate to sanction Fleming for its actions.

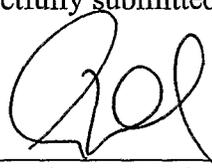
11. This Court has authority to issue sanctions against Fleming under Rule 11 of the Federal Rules of Civil Procedure. The motion and the subpoena filed by Fleming with this Court were deliberately designed to mislead the Court and Defendants regarding the status of the subpoena and its enforcement. Because Fleming has violated the Court’s scheduling order, Rule 16(f) permits the Court to impose sanctions on Fleming. *See also* FED. R. CIV. P. 26(g)(2) (requiring counsel certify that all discovery requests are consistent with the rules and warranted by law). Additionally, this Court has the power to sanction Fleming because its actions have

unreasonably and vexatiously multiplied these proceedings, 28 U.S.C. § 1927, and pursuant to the Court's inherent power to sanction for bad faith, willful disobedience of court orders, and for fraud on the court.

**Conclusion**

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that this Court quash the subpoena issued by Gregory Jez on Joseph Trahan and impose sanctions against Fleming for the costs incurred by Mr. Trahan in complying with the wrongfully issued subpoena and by Movants, including reasonable and necessary attorneys' fees, for the preparation and prosecution of this motion.

Respectfully submitted,

By: 

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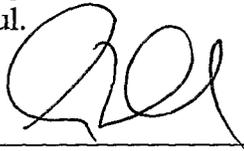
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**CERTIFICATE OF CONFERENCE**

I certify that I attempted to resolve the matters presented by this motion with Sean Jez of the Fleming firm, and that my efforts were unsuccessful.

  
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Eric J.R. Nichols

**CERTIFICATE OF SERVICE**

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on March 14, 2002, to all counsel on the attached Service List.

  
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Eric J.R. Nichols