United States Courts
Southern District of Texas
FILED
MAR 25 2002
Michael N. Milby, Clerk

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

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

RESPONSE TO *PEARSON* PLAINTIFFS' MOTION TO ALLOW INSPECTION OF DOCUMENTS AND SUBPOENA OF SAME FOR SAFEKEEPING

THE HONORABLE JUDGE OF THIS COURT:

NOW COMES LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper (collectively, "Respondents") and file this Response in Opposition to the *Pearson* Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping (Dkt. No. 345) and, in support thereof, would respectfully show the Court as follows:

1. In the motion filed March 5, 2002, counsel for the *Pearson* Plaintiffs, Fleming & Associates, L.L.P. ("Fleming"), claimed to be seeking permission from this Court to "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 request for documents in the proposed subpoena was not particularized. The subpoena for which Fleming claimed to be seeking Court approval requested – without limitation – all "records in [the witness's] possession or under [his] control related to: LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub. L.P., Big Doe LLC, LJM Swap Co., LJM2 Co-Investment LP, Southhampton Place LLP and LJM Partnership."

2. In fact, as the Court is aware, Respondents learned that notwithstanding the pending request for Court permission, Fleming had apparently served and attempted to enforce the subpoena requested in its motion (which called for production on an expedited basis) before obtaining the required Court approval of the proposed subpoena – indeed, before the motion was submitted for decision to the Court. As a result, Respondents filed their Motion to Quash Subpoena Wrongfully Issued by Fleming & Associates, L.L.P. ("Fleming") and for Sanctions. On March 15, 2002, the Court granted Respondents' motion to quash and for sanctions. Thus, the subpoena previously served by Fleming on the witness has been quashed. However, to the extent that Fleming's motion remains pending before this Court, Respondents respectfully request that this Court deny Fleming's motion, as such discovery is currently subject to a stay pursuant to the Private Securities Litigation Reform Act ("the Reform Act") and this Court's scheduling order in *Newby*, and Fleming has failed to prove that discovery is necessary to preserve evidence. *See* 15 U.S.C. § 78u-4(b)(3)(B) (West 1997).

3. The Reform Act provides that "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." *Id.* The sole basis for Fleming's motion to obtain discovery despite this mandatory stay is its claim that the discovery is necessary "to prevent the[] destruction or deletion" of documents allegedly in the possession or control of Mr. Trahan.[1] However, Fleming fails to inform the Court or Respondents of the factual basis for this conclusory allegation.

[1]Fleming does not claim that the discovery is necessary to prevent "undue prejudice."

4. 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). *See also SG Cowen Sec. Corp. v. United States Dist. Ct.,* 189 F.3d 909, 912-13 (9th Cir. 1999) (Reform Act contemplates that discovery should only be permitted after court has sustained legal sufficiency of the complaint). Moreover under the Court's scheduling order entered on February 27, 2002, no discovery in the *Newby* cases (of which the *Pearson* Plaintiffs' claims are a consolidated part) is 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 Corporation, as ordered by the Bankruptcy Court. (Dkt. No. 326.)

5. Plaintiffs cannot circumvent the provisions of the Reform Act by purportedly asserting state law claims. *SG Cowen Securities Corp.,* 189 F.3d at 913 n.1. 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]."). Likewise, since the information at issue is claimed even by Fleming not to be that of Mr. Trahan individually but rather of entities for whom Mr. Trahan's employer has performed information technological support, there is no reason why discovery cannot proceed on a normal schedule if and when the time comes for such discovery. Such normal conduct of discovery would allow for the making and resolution of appropriate objections by all parties affected (including by those whose information may be sought from a third party).

6. Even if the subpoena were seeking information belonging to a party not in the litigation, 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).

7. In the motion, Fleming alleges without any support whatsoever that the discovery from Mr. Trahan is "imperative . . . to prevent [documents'] destruction or deletion." In order to lift the mandatory stay on discovery, Fleming has the burden of proving that "exceptional circumstances exist." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-369, 104th Cong. 1st Sess. (1995), reprinted in 1995 U.S.C.C.A.N. 731, 736. Such a conclusory allegation, unsupported by any evidence, is insufficient to justify lifting the statutory stay on discovery. *See, e.g., In re DFS-Related Sec. Fraud Lit.* 179 F. Supp.2d 1260, 1264 (N.D. Ok. 2001); *In re Fluor Corp. Sec. Lit.,* Fed. Sec. L. Rep. ¶ 90,420, 1999 WL 817206 (C.D. Cal. 1999) (conclusory allegations of possible evidentiary destruction without supporting facts insufficient to lift mandatory stay on discovery). Permitting discovery based on the wholly speculative allegations of potential document destruction would "defy the plain language of the

[Reform] Act and eviscerate the legislative goals of the [Act]." *In re Carnegie Int'l,* 107 F. Supp.2d at 681.[2]

8. There are even stronger than ordinary reasons to apply the Reform Act stay in this case, given the "gamesmanship" employed by the Fleming firm and as found by this Court, all of which is directed at disrupting this Court's efforts to proceed in an orderly way with the resolution of civil claims by Enron shareholders. This Court has already held two lengthy hearings to address the continuing efforts of Fleming to disrupt the orderly prosecution of the claims presented in the Enron-related lawsuits. On February 15, 2002, this Court found that "[t]he harassing actions of Fleming[] have necessitated the waste of substantial defense resources addressing their duplicative and uncalled for TRO's." Memorandum & Order (Feb. 15, 2002) (Dkt. No. 296) at 7. The Court also found "[s]uch behavior underscores [Fleming's] desire to circumvent the orders and procedures established by this Court and threatens to disrupt the orderly resolution of the consolidated *Newby* actions. Such a circumstance would constitute irreparable harm to the defendants for which there is no adequate remedy at law." *Id.* at 7-8.

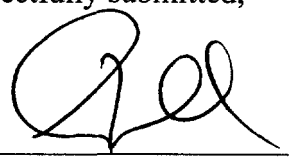
[2]Moreover, Fleming's document request is not particularized. It seeks production of all records relating to eight different entities. No time frame narrows the scope of the request. No subject matter limits the broad reach of the subpoena. It simply seeks to require virtually unlimited discovery into the records of eight separate entities – none of which have been named as defendants by Fleming in *Pearson* – in the possession of the witness. This is not a particularized document request. As such, it fails to meet the requirements for an exception to the stay on discovery imposed by the Reform Act.

9. The egregious behavior of Fleming continues unabated, as Fleming has failed to heed the Court's warnings. As indicated above, on March 15 the Court quashed the subpoena at issue. On March 21, counsel for Movants learned from counsel for Mr. Trahan that Fleming had turned around and served another identical subpoena on Mr. Trahan, this time in a state court action, *Bullock v. Arthur Andersen, L.L.P.*, Cause No. 32,716, in the 21st Judicial District Court of Washington County, Texas, in which none of Respondents is named as a defendant. This subpoena demands production on eight days' notice of a similarly broad category of "all records" relating to the eight entities listed above. This conduct typifies Fleming's disregard for this Court's efforts to coordinate resolution of the Enron-related claims.

10. There may be a time and place for the type of discovery sought by the subpoena, albeit in a much more focused way. However, as ordered by the Court, that time is not now. Furthermore, there may be an appropriate way to conduct this type of discovery if and when the time arrives, but Fleming has not proposed or proceeded in an appropriate way. Fleming's wrongful approach is to serve overly broad discovery requests in a manner that merely serves to harass parties and non-parties, and to attempt to serve and enforce the extremely broad discovery on a short time frame – apparently in the hopes that it can act before any court has an opportunity to address its conduct.

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request that this Court deny the *Pearson* Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping.

Respectfully submitted,



By:_____

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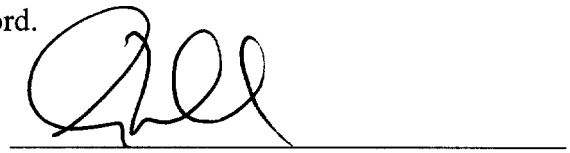
CERTIFICATE OF SERVICE

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on March 25, 2002, to all counsel of record.



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