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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al.	§	
	§	
Plaintiffs,	§	No. H-01-CV-3624
	§	
vs.	§	(Consolidated Action)
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	
	§	
PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, Derivatively On Behalf of ENRON CORPORATION, et al.,	§	No. H-01-CV-3645
Plaintiffs,	§	(Consolidated Action)
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
TITTLE, et al.,	§	
	§	
Plaintiffs,	§	No. H-01-CV-3913
	§	
vs.	§	(Consolidated Action)
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	

DEFENDANT ANDREW S. FASTOW'S MOTION FOR PROTECTION FROM DOCUMENT REQUEST OF *TITTLE* PLAINTIFFS, SUBJECT TO MOTION TO POSTPONE DISCOVERY

Subject to his concurrently filed Motion to Postpone Discovery During Pendency of Criminal Proceedings, Defendant Andrew S. Fastow files this Motion for Protection:

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- Because the *Tittle* Plaintiffs' fraud-based RICO claims against Fastow (Plaintiffs did not plead any ERISA causes of action against him) do not come within this Court's narrow exception to the discovery stay of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), no discovery from him is permitted at this time.

- Fifth Circuit law precludes Plaintiffs from obtaining discovery of Fastow on their RICO claims until after resolution of any Rule 9(b) Motions to Dismiss, because their allegations against Fastow sound in fraud or misrepresentation. *See Williams v. WMX Techs. Corp.*, 112 F.3d 175, 177-78 (5th Cir. 1997).

1. ARGUMENT & AUTHORITIES

1.1 This discovery sought from Fastow violates this Court's Scheduling Order and the PSLRA's stay of discovery.

The PSLRA stays all discovery in the consolidated cases because at least some portion of the case alleges claims under the federal securities laws. *See* 15 U.S.C. § 78u-4(a)(3)(B) ("In *any* private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss . . . ."). Absent an exception, neither the *Tittle* nor *Newby* Plaintiffs could obtain discovery in this case prior to a ruling on Motions to Dismiss. The Court's Scheduling Order does make a narrow exception to the PSLRA for discovery unique to the ERISA case.

However, that exception to the stay does not apply to discovery sought from Fastow, because none of the five counts (I-V) in the *Tittle* First Amended Complaint ("FAC") that allege ERISA-based causes of action names Fastow as a defendant. The FAC makes no allegation that Fastow acted as a fiduciary for any of the ERISA benefit plans at issue, thereby effectively admitting that Fastow did not so act. The two causes of action Plaintiffs do allege against Fastow have nothing to do with ERISA, but rather are brought under the guise of the Racketeer Influenced Corrupt Organizations Act ("RICO") and civil conspiracy. As such, they do not fall within the narrow exception this Court has carved out of the otherwise global PSLRA stay on discovery. In other words, the PSLRA

stays any securities-related discovery against Fastow, and since Plaintiffs' do not plead any ERISA-related claims against him, they are not entitled to take discovery from him at this time. The text of the FAC leaves no doubt that Plaintiffs' true complaint against Fastow arises not from any specialized ERISA claim, but rather from a drop in the price of Enron stock, as shown by just a few excerpts from the 301-page document:[1]

> "Throughout the Class Period, Enron reported 'strong' or 'record' financial results for each successive year through 2000, but those results were only attained through the use of accounting trickery with the full complicity of Enron's auditors, its lawyers, and the investment banking firms named as defendants." ¶7
>
> "Participants in the Savings Plan, the ESOP, the Cash Balance Plans, having no knowledge of the accounting improprieties . . . continued to add more Enron stock to their accounts at prices typically between $50 and $80 per share . . . ." ¶8
>
> "[T]he non-Enron Defendants, . . . conspired with Enron and the Enron Insider Defendants for the unlawful purpose of masking the true financial condition of Enron, thereby deceiving Enron employees into (i) accepting over-valued Enron stock and 'phantom stock' as compensation; [and] (ii) keeping their retirement assets in artificially inflated Enron stock. . . ." ¶823.

Requiring Fastow to answer their document requests would violate the PSLRA by allowing Plaintiffs to obtain, improperly, discovery on stock-related claims before surviving a Motion to Dismiss.

1.2 Fifth Circuit law does not permit discovery on fraud-based RICO or conspiracy claims prior to resolution of a Motion to Dismiss.

[1] Fastow does not concede that Plaintiffs have stated any valid claim against him under any theory. To the contrary, Fastow takes the position that Plaintiffs FAC fails to state a claim against him and intends to make that argument in a Motion to Dismiss. However, for purposes of this Motion, Fastow takes the position that to the extent Plaintiffs might have stated any claim against him, it would have to involve the drop in the price of Enron stock, thereby implicating the stay provisions of the PSLRA.

Not only does the PSLRA bar discovery from Fastow until after a ruling on Motions to Dismiss, but also Fifth Circuit law does not permit Plaintiffs to proceed with discovery on claims sounding in fraud against Fastow until after surviving a Motion to Dismiss. *See Williams*, 112 F.3d at 178. Since all Plaintiff's claims against Fastow are based on allegations of fraud, Plaintiffs are not entitled to take discovery from him until after disposition of his Rule 9(b) Motion.

In *Williams*, the Fifth Circuit indicated that plaintiffs could not obtain discovery on RICO, fraud, and negligent misrepresentation claims until after the district court had overruled any Rule 9(b) Motions:

> This suit was filed prior to the effective date of the Private Securities Litigation Reform Act, and while its provisions do not apply, *the Act adopted the same standard we apply today.*

Id. (emphasis added). "[Rule] 9(b) stands as an exception to an overarching policy of immediate access to discovery . . . ." *Id.* "[R]eady access to the discovery engine all the while has been held back for certain types of claims. . . . An allegation of fraud is one." *Id.*

The two causes of action pled against Fastow in *Tittle* both sound in fraud, and thus, under *Williams*, Plaintiffs have no right to obtain discovery from Fastow until after surviving Rule 9(b) Motions to Dismiss. Although Plaintiffs purport to base their RICO claim on numerous predicate acts, the only predicate acts that purportedly involve Fastow involve allegations of mail fraud and wire fraud. *See* FAC, ¶784-806.[2] Similarly, the conspiracy allegations rest on a theory that various individuals engaged in a supposed

[2] Plaintiffs do make general allegations of conduct by "Enron Insider Defendants" in connection with other, non-fraud predicate acts. Plaintiffs may not rely on "group pleading" of this type to escape the bite of the PSLRA or the PSLRA-equivalent standard applied by the Fifth Circuit to fraud-based claims under Rule 9(b). *See In re: Sec. Litig., BMC Software, Inc.*, 183 F.Supp.2d 860, 902 (S.D. Tex. 2001).

scheme of "masking the true financial condition of Enron, thereby deceiving Enron employees into" accepting "over-valued" stock as compensation and "keeping their retirement assets in artificially inflated Enron stock." *Id.* ¶ 823.[3] Under *Williams*, Plaintiffs cannot have "ready access to the discovery engine" for these allegations until after they survive a Motion to Dismiss. 112 F.3d at 178.

2. CONCLUSION

For all of the foregoing reasons, Fastow requests that the Court grant his Motion for Protection, and order that Fastow is not required to respond at this time to the *Tittle* Plaintiffs' discovery.

Respectfully submitted,

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ATTORNEY-IN-CHARGE FOR DEFENDANT ANDREW FASTOW

[3] Like their pleading of RICO predicate acts, Plaintiffs conspiracy allegation also fails for lack of specificity, as it relies on group pleading with making a specific allegation against any particular defendant. *See supra* note 2.

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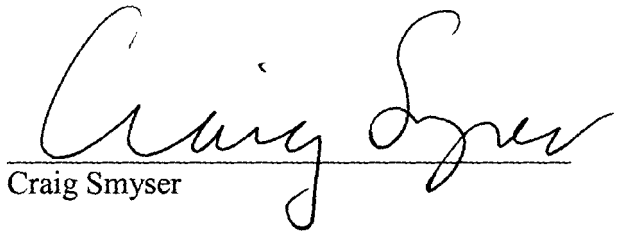
CERTIFICATE OF SERVICE

This is to certify that on **April 15, 2002** a true and correct copy of the above and foregoing instrument was served on all counsel of record by facsimile transmission and/or by certified mail, return receipt requested, and in accordance with the Federal Rules of Civil Procedure.

SEE ATTACHED SERVICE LIST



Craig Smyser

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ORDER

The Court, having considered Defendant Andrew S. Fastow's Motion for Protection from Requests for Production served by the Tittle Plaintiffs, any opposition thereto, the arguments of counsel, and all other relevant matter, determines that the Motion should be GRANTED.

It is therefore ORDERED that Fastow is not required to respond to any discovery requests until thirty (30) days after this Court rules on a Motion to Dismiss filed by Fastow.

SIGNED this _____ day of _____, 2002.

_____
JUDGE PRESIDING