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APR 19 2002

Michael N. Milby, Clerk

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

MARK NEWBY, *ET AL.*,

Plaintiffs,

v.

ENRON CORPORATION, *ET AL.*,

Defendants.

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CIVIL ACTION NO: H-01-3624
CONSOLIDATED LEAD CASE

**THE *BULLOCK* PLAINTIFFS' MOTION TO QUASH ANDERSEN'S
EMERGENCY MOTION TO STAY AND TO ENJOIN F&A FROM SEEKING A
TEMPORARY INJUNCTION IN *BULLOCK*
AND
ALTERNATIVE MOTION TO DELAY CONSIDERATION
OF ANDERSEN'S MOTIONS**

TO THE HONORABLE COURT:

1. Defendant Arthur Andersen, L.L.P., joined by individual Defendants Goddard, Duncan, Cash, Willard and Bauer (collectively Andersen), filed an emergency motion to stay discovery in *Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, No. 32,716; in the 21st Judicial District Court, Washington County, Texas (*Bullock*). Andersen also seeks to enjoin the *Bullock* Plaintiffs and their counsel Fleming & Associates, L.L.P. (F&A) from seeking a temporary injunction in *Bullock*.

Although Andersen styles its motion as "emergency," it is hardly that. Since late March 2002, Andersen has been aware of the fact that May 3 is the scheduled date for the temporary injunction hearing.

2. In an order dated April 18, 2002, this Court has ordered a response by noon on April 24, 2002, presumably because Andersen considers that its motion should be expedited.

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3. In response, F&A and the *Bullock* Plaintiffs move to quash Andersen's motion to stay discovery and to enjoin F&A. In the alternative, they request the Court to delay its consideration of the motions until at least May 1, 2002.

4. This motion to quash and alternative motion to stay are both filed subject to the right of F&A and the *Bullock* Plaintiffs to object to this Court's jurisdiction over a pending state court proceeding, which involves only state law issues. Additionally, should the Court deem it necessary, F&A and the *Bullock* Plaintiffs intend to file an opposition addressing in more detail the issues Anderson raises in its emergency motion.

5. As the Court is aware, whether it had jurisdiction to issue an injunction and related orders concerning a case then pending in Bexar County state court (*Jose, et al. v. Arthur Andersen, L.L.P., et al.*) is the subject of an expedited appeal to the U.S. Court of Appeals for the Fifth Circuit. A briefing schedule is in place, and oral argument will be held during the week of June 3, 2002.

6. The history of *Bullock* is known to this Court. The case was filed in the 21st Judicial District Court of Washington County, Texas, on January 24, 2002. Andersen removed the action to the U.S. District Court for the Western District of Texas on January 30. *See Bullock, et al. v. Arthur Andersen, et al.*; No. A-02-CA-070-H. Andersen argued in support of removal that the court had subject matter jurisdiction under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). At the time of removal, a hearing on the *Bullock* Plaintiffs' application for temporary injunction had been set for early February.

Because *Bullock* was brought on behalf of well under fifty plaintiffs, Andersen urged that plaintiffs in all cases separately filed by F&A must be aggregated to reach SLUSA's fifty-person

(“covered class action”) jurisdictional minimum. Andersen has presented the same argument in each case it has removed, including those removed to this Court. It reurges it now.

7. No court has upheld Andersen’s argument to date. In fact, after considering Andersen’s argument, the U.S. District Court for the Western District of Texas (Hon. Harry Lee Hudspeth) ordered the action remanded on March 5, 2002. A copy of the order of remand is attached as Ex. 1. The court stated that it was not “persuaded by Defendant Andersen’s objection that ‘plaintiffs’ counsel [ha]s s[ought] to avoid the creation of a ‘covered class action’ by bringing a number of separate lawsuits arising from identical alleged facts and making identical claims.” Ex. 1 at 6. Therefore, the court “decline[d] the Defendants’ invitation to count persons in separate lawsuits in different courts as members of a ‘covered class’ in order that SLUSA’s fifty-person requirement be satisfied.” Order at 7.

8. The same reasoning applies here. Briefly put, if SLUSA does not cover individual securities-related actions filed in state court, the Court lacks jurisdiction. In that regard, the *Bullock* Plaintiffs remind the Court of an opinion it issued on February 5, 2002, ten days before it enjoined F&A from filing new Enron-related actions in state court. *See In re Waste Mgmt., Inc. Secs. Litig.*, _____ F. Supp. 2d _____, 2002 WL 464222 (S.D. Tex. Feb. 5, 2002). The Court concluded, citing SLUSA’s language, that the statute “preempted class actions based on state statutory or common law involving a ‘covered security’ as defined in that act.” *Id.* at *2. It continued by observing that “SLUSA in essence made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law. *Id.* And further, the Court noted that “a [House] report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field of securities relations, but expressly delineated the scope of preemption” *Id.* Finally, the Court noted, “with

respect to removal, the plain language of SLUSA . . . evidences Congress' intent to preempt a specifically defined category of state law class actions" *Id.* at *3.

SLUSA's wording is unambiguous, and no court (including this Court) has held otherwise. Therefore, the only way the Court could have jurisdiction is if SLUSA provided that plaintiffs in separately filed cases are to be aggregated to reach the fifty-person "covered class action" minimum. It does not. In enacting SLUSA, Congress could have limited the number of separate securities-related cases filed on behalf of individuals. It did not choose to do so. Therefore, unless and until SLUSA is amended, F&A's conduct does not violate the statute.

9. Further, Andersen is incorrect in invoking jurisdiction under any other potential source. Neither the All Writs Act, 28 U.S.C. § 1651(a), nor the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, nor the inherent power doctrine can bestow subject matter jurisdiction upon this Court if the Court does not independently possess jurisdiction. *See, e.g., United States v. New York Tel.*, 434 U.S. 159, 172 (1977) (All Writs Act's purpose is to "prevent the frustration of orders . . . previously issued in the exercise of jurisdiction otherwise obtained"); *Regions Bank of La. v. Rivet*, 224 F.3d 483, 493 (5th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001) (Anti-Injunction Act); *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1358 (5th Cir. 1978) (inherent powers doctrine). In short, the law is clear: a federal court is prohibited from issuing an injunction to restrain an in personam state action involving the same subject matter from going on at the same time as the federal action. *See generally Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *see also Vendo Co. v. Lektro Vend Corp.*, 433 U.S. 623, 630, 642 (1977) ("We have never viewed parallel in personam actions as interfering with the jurisdiction of either court . . .").

10. Shortly after *Bullock* was ordered remanded on March 5, the state court (Hon. Terry Flenniken) set a scheduling conference for March 28, 2002. Although Andersen now seeks relief in this Court, its counsel appeared before Judge Flenniken at the scheduling conference. It did not claim at the time that the case was properly in federal court or that it was part of the federal class action. Andersen and others were advised on that date that a hearing would be held on the injunction.

A trial date has been set in *Bullock* for March 2003. Therefore, the discovery dates of which Andersen now complains are necessary, since discovery must begin as soon as possible. And, despite its appearance at the scheduling conference, Andersen did not object to the discovery schedule at that time or to the fact that a hearing on the injunction would be scheduled. Only with the hearing fast approaching does Andersen claim that there is an emergency.

11. In short, Andersen has given the Court no legal reason to interfere with an ongoing state court proceeding. This Court should decline to do so for all reasons above.

Further, the *Bullock* Plaintiffs' claims arise out of misrepresentations made by Defendant Lay in Washington County at the Chamber of Commerce banquet in October 2000. It does not involve all the parties or issues presented in the putative class action.

12. In the alternative, F&A and the *Bullock* Plaintiffs respectfully request that the Court delay consideration of Andersen's motions until May 1, 2002, at the earliest.

13. G. Sean Jez is the only attorney of record in *Bullock* as well as in the other Enron-related lawsuits filed by F&A. Mr. Jez wishes to participate in the hearing, if the Court decides one is necessary. He will be unavailable on April 26, however.

14. Attached is the affidavit of G. Sean Jez, attesting to his unavailability due to a trial commencing in the 67th Judicial District Court of Tarrant County, Texas. A pretrial hearing

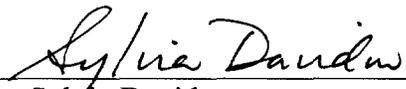
has been scheduled for April 18, voir dire is to take place on April 19, and trial will begin on April 22. Trial, which has been scheduled since September 11, 2001, will continue through at least April 26.

15. Therefore, for all reasons above, Fleming & Associates, L.L.P. and Plaintiffs Jane Bullock, *et al.*, respectfully request that the Court grant their motion to quash Andersen's emergency motion; or, alternatively, that the Court delay consideration of Andersen's motions until at least May 1, 2002, to allow their counsel to appear.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

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By 
Sylvia Davidow

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing pleading has been served on April 19, 2002, in accordance with the Court's April 10, 2002 Order.



Sylvia Davidow

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FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MAR 05 2002

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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JANE BULLOCK, JOHN BARNHILL, §
DON REILAND, SCOTT BORCHART, §
MICHAEL MIES, VIRGINIA ACOSTA, §
JIM HEVELY, MIKE BAUBY, ROBERT §
MORAN, JACK & MARILYN TURNER, §
and HAL MOORMAN & MILTON TATE, §
CO-TRUSTEES FOR MOORMAN, TATE, §
MOORMAN & URQUHART MONEY §
PURCHASE PLAN AND TRUST, §

Plaintiffs, §

v. §

ARTHUR ANDERSEN, L.L.P., §
D. STEPHEN GODDARD, JR., §
DAVID B. DUNCAN, DEBRA A. CASH §
ROGER WILLARD, THOMAS H. BAUER §
ANDREW S. FASTOW, KENNETH L. §
LAY, AND JEFFREY J. SKILLING, §

Defendants. §

NO. A-02-CA-070-H

Reference Washington Co: 32,716

ORDER OF REMAND

Factual and Procedural History

On this day came on to be considered the above-styled and numbered cause which derives from the recent collapse of the Houston-based Enron Corporation. The Plaintiffs are citizens of the state of Texas and owners of Enron stock. They bring claims for fraud, negligence, and civil conspiracy against three of Enron's directors and/or officers, Enron's independent auditor, Arthur Andersen, L.L.P. ("Andersen"), and several partners at Andersen's Houston office.

This case was originally filed in the 21st Judicial District Court of Washington County, Texas, on January 24, 2002. Six days later, Defendant Andersen filed a notice of removal explaining that jurisdiction lies with this Court based on (1) the



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Securities Litigation Uniform Standards Act ("SLUSA") of 1998, and (2) allegations of federal securities law violations within the complaint. In their motion to remand, the Plaintiffs counter that SLUSA does not apply because they do not fit its definition of a "covered class" and that mere allegations will not give rise to federal question jurisdiction. After carefully considering Defendant Andersen's notice of removal, the Plaintiffs' motion to remand and Defendant Andersen's response thereto, the Court is of the opinion that this case should be remanded to state court for lack of subject matter jurisdiction.

Discussion

In its first argument, Defendant Andersen argues that Congress has expressly preempted state law class actions alleging fraud in connection with the purchase or sale of covered securities. SLUSA, it says, requires that this case be removed from state court. As such, the Court will begin its analysis with a brief examination of the influences and motivations behind SLUSA and its statutory precursors.

Responding to the reluctance of investors to reenter the securities markets following the 1929 crash of the stock market, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934. See 15 U.S.C. § 77a et seq. (1933 Act); 15 U.S.C. § 78a et seq. (1934 Act); see also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976) (detailing the purposes and influences of the Acts). The aim of the 1933 Act, as the Supreme Court has explained, was "to provide investors with full

disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing." *Id.* at 195; see 15 U.S.C. § 78b (Necessity for regulation); H.R. Rep. No. 73-85 (1st Sess. 1933). The 1934 Act, on the other hand, imposed reporting requirements on companies whose stock was listed on national securities exchanges and was further designed to ward against manipulation of stock prices through regulation of the securities exchanges and over-the-counter markets. See 15 U.S.C. § 78b; *Ernst & Ernst*, 425 U.S. at 195. In the wake of the 1933 and 1934 Acts, various states also enacted laws which similarly aimed to protect investors from fraud in connection with the sale of securities. See *Gutierrez v. Deloitte & Touche, L.L.P.*, 147 F.Supp.2d 584, 588 (W.D. Tex. 2001).

Although the 1933 and 1934 Acts were intended to protect investors from corporate insiders, Congress has more recently become concerned with protecting corporations from the claims and causes of overly litigious investors. *Id.* at 588-89. The Private Securities Litigation Reform Act ("PSLRA") of 1995 was enacted as a result. *Id.* at 589. At the time, it was thought that PSLRA's heightened pleading requirements would make it more difficult for investors to bring securities fraud class actions against corporate issuers. Yet the subsequent decline in filings of securities fraud class actions in federal courts was roughly equivalent to the increased number of filings in state courts.

See H.R. Conf. Rep. No. 105-803 (1998); see also *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001). Accordingly, SLUSA was signed into law in 1998. Congress hoped that SLUSA would finally set uniform standards for the filing of class actions based on fraud against companies issuing certain covered securities by dictating that such actions be governed exclusively by federal law. See *Lander*, 251 F.3d at 108; see also 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2). SLUSA does not preempt all state actions against the issuers of securities, however. See *Gutierrez*, 147 F.Supp.2d at 590; 2 Thomas Lee Hazen, *Securities Regulation* § 12.15 (4th ed. 2002) ("[T]he Uniform Standards Act applies only to class actions and thus not to individual or derivative suits."). It provides unique definitions of "covered class" and "covered securities," for example, and will not apply to actions whose terms land them outside those definitions. See 15 U.S.C. §§ 77p(f) and 78bb(f); see also Pub. L. No. 105-353, § 2, 112 Stat. 3227 ("[I]t is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.")

In order to establish the claim in this case as falling within SLUSA's preemptive scope, the Defendants must demonstrate that (1) the action is a "covered class action," (2) the action is based on state law, (3) they are alleged to have

misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and (4) their misrepresentation or omission of that material fact (or their use or employment of a manipulative or deceptive device or contrivance) came "in connection with" the purchase or sale of a "covered security." See 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2); see also *Green v. Ameritrade, Inc.*, 2002 WL 126170, at *4 (8th Cir. Feb. 1, 2002). The Plaintiffs have based the present case on state law, and they contend that the Defendants made "untrue and deceptive statements of material fact" and "omitted to state material facts" which induced them "to purchase and/or retain Enron common stock at artificially inflated prices." The only question to be resolved then is whether the case is a class action by SLUSA's definition. The Court finds that it is not.

SLUSA defines a "covered class action" as:

- (i) any single lawsuit in which--
 - (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
 - (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
- (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--
 - (I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. §§ 77p(f)(2)(A) and 78bb(f)(5)(B). The Plaintiffs do not seek damages on a representative basis or on behalf of fifty or more persons. And while a number of lawsuits involving common questions of law or fact have been filed, these suits have not been joined or consolidated, and they do not proceed as a single action. The Court disagrees with Defendant Andersen's assertion that the act of consolidating similar cases would be an "empty formality" and that because various cases could be consolidated, they should be viewed as having been consolidated. The issue before the Court is whether this case is removable, not whether it might be consolidated with other cases.

Nor is the Court persuaded by Defendant Andersen's objection that plaintiffs' counsel "[ha]s sought] to avoid the creation of a 'covered class action'" by bringing a number of separate lawsuits arising from identical alleged facts and making identical claims. The Court reminds the Defendants that the Plaintiffs are the masters of their complaint. **See Louisville & Nashville R.R., v. Mottley**, 211 U.S. 149, 153 (1908). It notes too that the courts must "presume that a legislature says in a statute what it means and means in a statute what it says[.]" **Connecticut Nat'l Bank v. Germain**, 503 U.S. 249, 253-54 (1992). Where a "statute's language is plain, the sole function of the courts is to enforce it according to its terms." **United States v. Ron Pair Enters., Inc.**, 489 U.S. 235, 241 (1989) (quoting **Caminetti v. United States**, 242 U.S. 470, 485 (1917)). Moreover,

"removal statutes are to be strictly construed against removal." *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 n.13 (5th Cir. 1988). Thus, the Court will decline the Defendants' invitation to count persons in separate lawsuits in different courts as members of a "covered class" in order that SLUSA's 50-person requirement be satisfied.

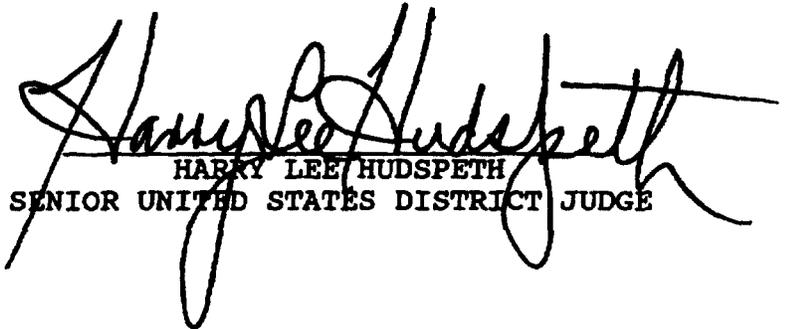
The Defendants request alternatively that the case be removed because the Plaintiffs allege in the complaint that several of the Defendants engaged in insider trading. In other words, they suggest that the case is removable because the Plaintiffs refer to federal crimes in their factual allegations. This claim fails as well, however, because plaintiffs alleging facts sufficient to invoke either federal or state jurisdiction may limit their claim so that it is based solely on state law. See *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 839-41 (1989). As the Fifth Circuit Court of Appeals recognized long ago, "[a] question of federal law is often lurking in the background of every case. In order to invoke the jurisdiction of a federal court there must be a substantial claim founded directly upon federal law." *Johnston v. Byrd*, 354 F.2d 982, 984 (5th Cir. 1965) (internal quotation marks omitted).

Finally, even if the case were to meet SLUSA's requirements or were to appear to be otherwise removable, the Court would still be obliged to remand it to state court. All defendants who are properly joined and served must join in the notice of removal within thirty days of the date on which they receive notice that

the case is removable. See 28 U.S.C. 1446(b); *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993). None of Defendant Andersen's Co-Defendants have filed written consent that the case be removed. As the case was originally filed in state court on January 24, 2002 and as Defendant Andersen's Co-Defendants received notice of the fact on January 30 at the very latest, the time period to join in the removal has now expired.

It is therefore ORDERED that the above cause be, and it is hereby, REMANDED to the 21st District Court of Washington County, Texas. The District Clerk is directed to transmit the file to the District Clerk of Washington County, Texas.

SIGNED AND ENTERED this 5th day of March, 2002.


HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE

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

MARK NEWBY, *ET AL.*,

Plaintiffs,

v.

ENRON CORPORATION, *ET AL.*,

Defendants.

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**CIVIL ACTION NO: H-01-3624
AND CONSOLIDATED CASES**

AFFIDAVIT OF G. SEAN JEZ

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

On this day, G. Sean Jez appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, G. Sean Jez said:

“My name is G. Sean Jez. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am an associate at the law firm of Fleming & Associates, L.L.P.

I am the attorney of record on every Enron related lawsuit Fleming & Associates, L.L.P. has filed on behalf of its clients, including Cause No. 32,716; *Jane Bullock, et al. v. Arthur Andersen, L.L.P., et al.*; In the 21st Judicial District Court of Washington County, Texas.

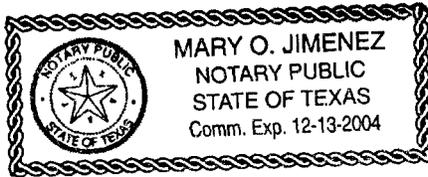
I also lead counsel Cause No. 067-185454-00; *JUDY L. BRANTON, as Independent Executrix of the Estate of FRED A. M. RODGERS, Deceased vs. FORT WORTH OSTEOPATHIC HOSPITAL, INC. d/b/a OSTEOPATHIC MEDICAL CENTER OF TEXAS and RAY R. TREY FULP, III, D.O.*; In the 67th Judicial District Court of Tarrant County, Texas which is set for trial on April 22, 2002. I will be participating in a Pre-trial hearing on April 18, 2002 and voir dire on

April 19, 2002. I estimate the trial will take five to seven days to complete. This matter has been set for trial since September 11, 2001.

I anticipate that I will be in trial until at least April 26, 2002 and thus unavailable to attend a hearing should Judge Harmon set a hearing on or before April 26, 2002 on Defendant Arthur Andersen's Emergency Motion to Stay Discovery and to Enjoin Fleming from Seeking a Temporary Injunction in *Bullock v. Arthur Andersen LLP*.


G. Sean Jez

SWORN TO and SUBSCRIBED before me by G. Sean Jez on April 17, 2002.




Notary Public in and for
The State of Texas

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

MARK NEWBY, *ET AL.*,

Plaintiffs,

v.

ENRON CORPORATION, *ET AL.*,

Defendants.

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CIVIL ACTION NO: H-01-3624
CONSOLIDATED LEAD CASE

ORDER

Before the Court is the motion to quash Andersen's motion to stay discovery and to enjoin F&A from seeking a temporary injunction in *Bullock*, filed by Fleming & Associates, L.L.P. and Plaintiffs Jane Bullock, *et al.* Having considered the motion, the Court is of the opinion that it should be granted.

IT IS THEREFORE ORDERED that the motion to quash Andersen's motion to stay and to enjoin Fleming & Associates, L.L.P. from seeking a temporary injunction in *Bullock* is GRANTED.

SIGNED this _____ day of _____, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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

MARK NEWBY, *ET AL.*,

Plaintiffs,

v.

ENRON CORPORATION, *ET AL.*,

Defendants.

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CIVIL ACTION NO: H-01-3624
CONSOLIDATED LEAD CASE

ORDER

Before the Court is the alternative motion to delay until May 1, 2002, this Court's consideration of Arthur Andersen, L.L.P.'s motions, filed by Fleming & Associates, L.L.P. and Plaintiffs Jane Bullock, *et al.* Having considered the motion, the Court is of the opinion that it should be granted.

IT IS THEREFORE ORDERED that the motion to delay consideration of Andersen's motions is GRANTED.

SIGNED this _____ day of _____, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE