

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

United States Courts
Southern District of Texas
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Michael N. Milby, Clerk
U.S. COURTS
SOUTHERN DISTRICT
OF TEXAS

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 JEFFREY SKILLING'S
MOTION FOR EMERGENCY INJUNCTIVE RELIEF
STAYING DISCOVERY IN *BULLOCK*
AND
THEIR ALTERNATIVE MOTION TO DELAY CONSIDERATION
OF SKILLING'S MOTION**

TO THE HONORABLE COURT:

INTRODUCTION

1. Defendant Jeffrey K. Skilling (Skilling) has moved for emergency injunctive relief, asking the Court 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*). One day earlier Defendant Arthur Andersen L.L.P. (Andersen) sought similar relief from the Court. Skilling also joins in the motion filed by Andersen.

2. In an order dated April 18, 2002, the Court ordered a response to Andersen's motion by noon on April 24, 2002, presumably because Andersen considered that its motion deserves expedited treatment, as does Skilling now. Fleming & Associates, L.L.P. (F&A) and the *Bullock* Plaintiffs' responsive motion to quash Andersen's motion and alternative motion to

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delay its consideration is presently on file. F&A and the *Bullock* Plaintiffs adopt those motions and incorporate them here.

3. Skilling's arguments are similar to those advanced by Andersen, with several minor differences. Therefore, in this motion F&A and the *Bullock* Plaintiffs address the additional points raised. As they did in their response to Andersen's motions, F&A and the *Bullock* Plaintiffs submit their motions subject to their right to object to the Court's jurisdiction over a state court proceeding.

BACKGROUND

4. The *Bullock* Plaintiffs filed suit in January 2002 and since that time have been attempting to enjoin Skilling from transferring assets outside of the country or to third parties not in the ordinary course of business. The proposed temporary injunction (to which Andersen objects and in whose motion Skilling now joins) would be for the benefit of plaintiffs in all lawsuits against Skilling.¹ Based on news reports and information in the media, Plaintiffs are very concerned that Skilling and other Defendants will have transferred their assets subject to execution outside of the United States, or to third parties not in the ordinary course of business, making it more difficult for Plaintiffs to recover any of their damages.

5. A temporary injunction hearing in *Bullock* is set for May 3, 2002, with trial scheduled in Washington County on March 3, 2003. *Bullock* involves claims arising from the appearance of co-Defendant Kenneth L. Lay at a Washington County Chamber of Commerce dinner in October 2002. At that dinner Lay made representations concerning the value of Enron stock that have been made the basis of the suit. Those representations have proven to be false

¹ Originally a temporary injunction hearing had been scheduled in *Bullock* for February 4, 2002. The hearing did not take place because *Bullock* was removed to the U.S. District Court for the Western District of Texas.

and fraudulent. Therefore, Plaintiffs' claims differ from those brought in the putative class action and involve only some class Defendants.

6. Skilling contends that his attorneys do not have time to represent him both in the class action and in the Washington County case. A review of the Martindale Hubble listing for Skilling's lead counsel, O'Melveny & Myers, L.L.P., shows that the law firm has over seven hundred lawyers. Surely Skilling can afford to hire one more lawyer to represent him in *Bullock*, from the same firm if necessary.

Skilling also has retained the services of Ronald Gene Woods, a renowned Houston attorney who was formerly the U.S. Attorney for the Southern District of Texas. While in that office, Mr. Woods supervised attorneys trying cases simultaneously in each of the eight divisions of the Southern District of Texas. He is well versed in both state and in federal court procedure.

During the *Bullock* scheduling conference of March 28, 2002, Mr. Woods appeared on behalf of Skilling and did not object to the March 3, 2003 trial setting set by Judge Flenniken.² He is knowledgeable regarding the facts of the case, and thus able to adequately defend Skilling at the May 3 injunction hearing as well as at trial. Under the able guidance of Mr. Woods, other counsel for Skilling at O'Melveny & Myers, L.L.P. could adequately represent Skilling at trial.

ARGUMENT

A. MOTION TO QUASH

7. Skilling asserts that allowing discovery to proceed in *Bullock* — a case remanded for lack of jurisdiction by a federal court sitting in the district where *Bullock* was filed — would undermine the consolidated *Newby* proceedings over which this Court presides. He runs into

² Nor did counsel contend that there was an emergency, as is now claimed.

legal roadblocks in his attempt to enlist this Court's interference with ongoing discovery in *Bullock*.

8. Skilling reiterates much of the same argument that convinced the Court to issue an injunction and related orders against F&A, which are now the subject of an expedited appeal. He invokes two sources of the Court's jurisdiction: the Securities Litigation Uniform Standards Act of 1998 (SLUSA) and the All Writs Act (although he appears to meld the exceptions to the Anti-Injunction Act with the All Writs Act). But Skilling's argument tumbles like a house of cards. SLUSA does not apply to the *Bullock* action, brought in state court on behalf of far fewer than fifty plaintiffs, and advancing only state causes of action. And if the statute does not apply, any reliance upon the All Writs Act and exceptions to the Anti-Injunction Act is futile. Neither confers independent jurisdiction upon the Court.

9. Skilling begins by contending that the Court has authority to stay discovery in *Bullock* under SLUSA. The discovery provision he quotes states the following in part:

A court may stay discovery proceedings **in any private action** in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

15 U.S.C. § 78U-4(b)(3)(D) (emphasis supplied). First, of course, there must be a "private action" that is subject to the provision. According to Skilling, there is. He claims the *Bullock* Plaintiffs are prohibited from pursuing discovery in a parallel state action because the term "any private action" encompasses their case.

10. Another district court, when confronted with the exact situation and argument, denied motions to stay after engaging in a comprehensive analysis of SLUSA. *See In re Transcript Int'l Secs. Litig.*, 57 F.Supp. 2d 836 (D. Neb. 1999). In that case a putative securities fraud class action had been filed in federal court and discovery was stayed during the pendency

of motions to dismiss. During the stay, however, a number of individual securities fraud suits were commenced in state court. *Id.* at 838.

After thoroughly analyzing SLUSA, the court concluded that any “private action” does not mean any securities-related action, but rather refers to a class action. Thus, it held that the motions to stay must be denied.

The court began by quoting the findings section of SLUSA. That section states the following:

Sec. 2. FINDINGS.

The Congress finds that—

- (1) The Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;
- (2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities *class action* lawsuits have shifted from Federal to State courts;
- (3) this shift has prevented that Act from fully achieving its objectives;
- (4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and
- (5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it 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.*

Id. at 842 (emphasis in original). Having recited SLUSA’s findings, the court observed the following:

Noticeably absent from this section is any reference to the ills of *individual* lawsuits in state— or federal—court, either of which could also be used as a means to circumvent the Reform Act’s stay provision. A plain reading of this section yields the conclusion that Congress was at least principally, if not exclusively, concerned with private class action *lawsuits*, rather than private individual *lawsuits*.

Id. (emphasis in original). The Court continued by noting that its “conclusion is consistent with language in other sections of the Act,” and cited numerous other SLUSA sections. *Id.* at 842-43 (citations omitted).

11. All courts, including this Court, have construed SLUSA’s language literally. *See In re Waste Mgmt., Inc. Secs. Litig.*, _____ F. Supp. 2d _____, 2002 WL 464222 (S.D. Tex. Feb. 5, 2002). In *Waste Mgmt.*, the Court concluded, based on SLUSA’S plain language, that the statute dealt only with securities-related class actions.

Statutory construction must begin the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *See, e.g., Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Therefore, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal quotation marks and citation omitted). But in attempting to ascertain plain meaning a court must look not only to “the particular statutory language at issue”; it must also review “the language and design of the statute as a whole.” *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citation omitted).

In this case the words of the statute are in accord with its legislative history. Further, in light of the statute as a whole, which deals only with class actions, the term “any private action” can be construed to mean nothing but any private class action.

12. And the same result obtains if the Court were to consider the term “private action” ambiguous, or susceptible of more than one meaning. *See, e.g., United Servs. Auto. Ass’n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1997) (citations omitted). In that case, the Court should look

to the legislative history of SLUSA. *See Ron Pair Enters., Inc.*, 489 U.S. at 241. The statute's history establishes that Congress intended for SLUSA to cover state court class actions only.

For example, the following Senate report excerpt establishes the distinction between individual and class actions in securities cases brought under SLUSA:

The definition of class action originally drafted as part of [SLUSA] would inadvertently include cases that were beyond the intent of the legislation — such as certain types of individual state private securities actions. . . .
In order to ensure that individual state actions would not be included as part of the bill's definitions the committee specifically included a threshold number of 50 or more persons . . . as part of the definition of a class action under this legislation.

See S. Rep. No. 105-182, 1998 WL 226714 at *6. And some five months later, another Senate report noted the following:

The purpose of [SLUSA] is to help ensure that securities fraud class actions involving certain securities traded on national markets are governed by a single set of uniform standards. **While preserving the right of individual investors to bring securities lawsuits wherever they choose**, the bill generally provides that class actions can be brought only in federal court where they will be governed by federal law.

144 Cong. Rec. S12444-01, 1998 WL 712149 (Cong. Rec.) at *S 12445 (emphasis supplied). Likewise, the House explained that SLUSA was enacted to solve the problem presented by the PSLRA, *i.e.*, that the enactment of the PSLRA resulted in many securities class actions being brought in state court. Therefore, SLUSA was passed “to make federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities.” 144 Cong. Rec. H10771-02, 1998 WL 712049 at *H10775.

The *Transcript* court devoted several pages to analyzing other parts of SLUSA's legislative history. In the interest of brevity those citations will not be included here; they are found at 57 F.Supp. 2d 843-47. The court summarized its conclusion as follows:

Since the overwhelming thrust of the legislation and nearly all the comments in the legislative history concentrate on removing state class actions to federal court, and only certain class actions at that, I conclude that the words “any private action in a state court” refer only to private class actions.

Id. at 847.

In summary, Skilling’s out-of-context quotation provides no legal basis for this Court to stay discovery in an ongoing state proceeding. The Court should deny a stay.

13. Skilling’s fallback argument is that *Bullock* discovery should be stayed under the All Writs Act, 28 U.S.C. § 1651(a) and/or the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283. He argues that the “expressly authorized” and “in aid of jurisdiction” exceptions allow for a discovery stay. Neither does, however.

14. An insurmountable legal impediment exists to Skilling’s use of the two acts. He may not invoke exceptions to the Anti-Injunction Act or the All Writs Act because neither can bestow subject matter jurisdiction if this 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).

15. 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 . . .”).

16. But even assuming without conceding that the Court had jurisdiction, neither exception applies. For an injunction to be covered by the “expressly authorized” exception, a statute “must have created a specific and uniquely federal right or remedy . . . that could be frustrated if the federal court were not empowered to enjoin a state court proceeding.” *See Mitchum v. Foster*, 407 U.S. 225, 237 (1972).

SLUSA’s discovery stay provision does not create the type of federal right or remedy that the statutory authorization exception contemplates. The test is “whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.” *Id.* at 238. The Supreme Court found that uniquely federal right in 42 U.S.C. § 1983, which offered a “uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.” *Id.* at 239. Therefore, “Section 1983 provides the quintessential example of a congressional act designed to displace state law.” *See Employers Resource Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1131 (4th Cir. 1995), *cert. denied*, 516 U.S. 1094 (1996).

The Fourth Circuit declined to hold ERISA subject to the express statutory authorization exception under *Mitchum*, *see id.*, as did the Fifth Circuit several years earlier. *See Total Plan Servs., Inc. v. Texas Retailers Ass’n, Inc.*, 925 F.2d 142 (5th Cir. 1991); *see also Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo*, 988 F.2d 252, 261 (1st Cir. 1993) (reversing the lower court’s holding that Title VII fell within the express statutory authorization exception).

The fact that Skilling provides no authority to support his claim that “there can be no serious dispute” that the provision in question expressly authorizes a discovery stay is telling.³ Therefore, the Court should deny Skilling any relief.

17. Skilling also relies on the “in aid of jurisdiction” exception to the Anti-Injunction Act (or included in the All Writs Act). The exception is “to prevent a state court from so interfering with the federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.” *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 295 (1970). The second exception does not apply either.

18. The Anti-Injunction Act is in force because the United States has always had two separate legal systems that proceed independently of each other. *See generally Atlantic Coast Line R.R.*, 398 U.S. at 286; *see also Vendo Co.*, 433 U.S. at 630. Therefore, an injunction in aid of jurisdiction is appropriate only in certain limited circumstances: where a state proceeding threatens to dispose of property forming the basis for federal in rem jurisdiction (or in cases where conflicting rulings are undesirable, such as in school desegregation). In no event, however, may the exception be invoked merely because a concurrent state proceeding might result in a judgment inconsistent with a federal court’s decision. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 132 (5th Cir. 1990). And, likewise, an earlier state schedule does not violate the act, nor is an injunction permitted under the “in aid of jurisdiction exception” merely because the federal case will proceed more slowly.

³ The case Skilling cites deals solely with a different SLUSA provision that was invoked to enjoin competing state class actions — not individual actions. *See In re Bankamerica Corp. Secs. Litig.*, 263 F.3d 795 (8th Cir. 2001), *cert. denied*, ___ U.S. ___, 2002 WL 109322 (Apr. 1, 2002).

The “in aid of jurisdiction” exception has been expanded slightly to encompass situations involving settled or imminently settling class actions; multidistrict litigation; limited fund situations; protracted litigation; and the like. In other words, the cases concern a “res” that a federal court must protect in aid of its jurisdiction, *i.e.*, to be able to manage the litigation. *See In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (class action so far advanced as to be the “virtual equivalent of a res over which the district judge required full control”).

Although Skilling cites two of those types of cases, neither applies. For example, in *Carlough v. AmChem Prods., Inc.*, 10 F.3d 189, 197-98 (3d Cir. 1993), a federal district court had enjoined a class action filed in state court two months after it had provisionally approved a settlement class. The appellate court found the injunction necessary to protect the imminent federal settlement, reached after years of negotiations. Likewise, in *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (Former 5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982), the Fifth Circuit affirmed an injunction prohibiting a competing state class action from continuing. The district court had certified over fifty private antitrust cases, previously consolidated under MDL, as a mandatory class. Plaintiffs in the federal multidistrict class then proceeded to file a state class action; and, moreover, the state court issued an order that would have interfered with settlements then ongoing in the federal class action.

19. Skilling has no legal basis to ask this Court to stay ongoing discovery proceedings in a state court case remanded by the U.S. District Court for the Western District of Texas. The Court should deny his motion.

B. MOTION TO DELAY CONSIDERATION

20. In the alternative, F&A and the *Bullock* Plaintiffs respectfully request that the Court delay consideration of Skilling’s motion until May 1, 2002, at the earliest.

21. 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 any hearing, if the Court decides one is necessary. He will be unavailable on April 26, however.

22. The original affidavit of G. Sean Jez, attesting to his unavailability due to a trial commencing in the 67th Judicial District Court of Tarrant County, Texas, is attached to the motion to quash Andersen's motions filed by F&A and the *Bullock* Plaintiffs. As stated in the affidavit, a pretrial hearing was scheduled for April 18, voir dire took place on April 19, and trial has begun on April 22. Trial, which has been scheduled since September 11, 2001, will continue through at least April 26.

CONCLUSION

23. 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 Skilling's motion for emergency injunctive relief; or, alternatively, that the Court delay consideration of Skilling's motion until at least May 1, 2002, to allow their counsel to appear.

Respectfully submitted,

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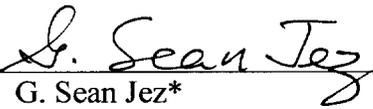
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By 
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ATTORNEYS FOR PLAINTIFFS

*Signed by permission.



CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing pleading has been served on April 22, 2002, in accordance with the Court's April 10, 2002 Order.



Sylvia Davidow

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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 Skilling's motion for emergency injunctive relief staying discovery in *Bullock*, filed by Plaintiffs Jane Bullock, *et al.* and Fleming & Associates, L.L.P. Having considered the motion, the Court is of the opinion that it should be GRANTED.

IT IS THEREFORE ORDERED that the motion to quash Skilling's motion for emergency injunctive relief 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 Jeffrey K. Skilling's motion for emergency injunctive relief, filed by Plaintiffs Jane Bullock, *et al.* and Fleming & Associates, L.L.P. 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 Skilling's motion is GRANTED.

SIGNED this ____ day of _____, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE