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

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

MARK NEWBY, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO: H-01-3624
v.	§	AND CONSOLIDATED CASES
	§	
ENRON CORPORATION, *et al.*,	§	
	§	
Defendants.	§	

**DEFENDANT KENNETH L. LAY'S
JOINDER IN, AND MEMORANDUM IN SUPPORT OF,
ARTHUR ANDERSEN'S EMERGENCY MOTION
TO STAY DISCOVERY AND TO ENJOIN FLEMING FROM
SEEKING A TEMPORARY INJUNCTION IN *BULLOCK V. ARTHUR ANDERSEN LLP***

TO THE HONORABLE MELINDA HARMON:

On April 17, 2002, Defendant Arthur Andersen L.L.P. ("Andersen"), joined by several individual defendants now or formerly associated with Andersen, filed with this Court an "Emergency Motion to Stay Discovery and to Enjoin [the] Fleming [Law Firm] from Seeking a Temporary Injunction in *Bullock v. Arthur Andersen LLP*." Defendant Kenneth L. Lay hereby joins Andersen's request for that stay and injunction. Lay also adopts the arguments and authorities for that relief set forth in Andersen's Emergency Motion, except insofar as they are unique to Andersen.[1] In further support of the requested stay of discovery and injunction, Defendant Lay states as follows:

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[1] For example, Andersen advances certain arguments based on the pendency of the criminal proceedings in which it is now involved. (*See, e.g.*, Andersen's Emergency Motion at 12, n. 10.) Such arguments do not pertain to Defendant Lay.

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BACKGROUND

1. On January 24, 2002, Fleming & Associates, L.L.P. ("Fleming"), filed the case styled *Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 32716, in state district court in Washington County, Texas. Fleming filed the *Bullock* case in state court more than three months after filing its first Enron-related action in *this* Court, *Odam, et al. v. Enron Corp., et al.*, No. 01-3914 (S.D. Tex.), and more than six weeks after Judge Rosenthal had consolidated the *Odam* case with 45 other Enron-related federal court actions in this Court, under the caption *Newby v. Enron Corp.* ("*Newby* Litigation"). All of the *Bullock* Plaintiffs are included in the putative class described in both the early class action pleadings in the consolidated *Newby* Litigation, and in the recently filed Consolidated Complaint for Violation of the Securities Laws, submitted by Lead Counsel for Plaintiffs in *Newby*. Moreover, two of the *Bullock* Plaintiffs -- Hal Moorman and Milton Tate, as co-trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan and Trust -- were already before this Court, having been named by Fleming as plaintiffs in *Odam*.

2. When it filed the *Bullock* lawsuit, Fleming also obtained from the state district court in Washington County a temporary restraining order, granting relief against Andersen that was virtually identical to an Order previously entered by this Court, but expanding that injunctive relief to encompass Defendant Lay, as well. Defendant Lay promptly filed an Emergency Motion to Enjoin the *Bullock* Plaintiffs and Counsel from prosecuting the *Bullock* case in such a manner as to interfere with this Court's jurisdiction. (*See* Defendant Kenneth L. Lay's Emergency Motion to Enjoin Certain Plaintiffs and Counsel From Prosecuting State Court Action in Derogation of this Court's Jurisdiction, and Supporting Brief, January 28, 2002.) That motion was promptly set for hearing, but Andersen removed the *Bullock* case to federal court prior to the hearing date. This Court

nevertheless entertained argument from counsel on the matters addressed by that motion; but, of course, it issued no order with respect to those matters, because the case had been removed and the issues mooted for the time being. (*See* Transcript of Hearing before the Hon. Melinda Harmon, January 30, 2002.)

3. Soon thereafter, Fleming filed another state court action -- again making substantially the same allegations as in *Bullock*, *Odam*, and in Fleming's other lawsuits, and again seeking and securing temporary restraining order without providing advance notice to Defendant Lay and others. *See Jose, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 2002 CI 001906 (57th District Court, Bexar County, Texas). Defendant Lay, along with Defendant Jeffrey Skilling and others, again promptly filed a motion with this Court seeking emergency relief against Fleming's continued attempts to undermine this Court's jurisdiction and to thwart its orderly supervision and disposition of the consolidated cases before it. (*See* Defendant Kenneth L. Lay's Motion to Enjoin Fleming & Associates, L.L.P. from Seeking *Ex parte* Relief in State Court and for Sanctions, and Supporting Brief, February 12, 2002; Jeffrey K. Skilling's Memorandum of Law in Support of Motion for Emergency Injunctive Relief Under the All Writs Act and Imposition of Sanctions on Fleming and Associates.)

4. The Court conducted a hearing on those Emergency Motions on February 14, 2002 (*see* Transcript of Hearing before the Hon. Melinda Harmon, February 14, 2002), and issued an order granting the injunctive relief requested by the Defendants. (Memorandum and Order, February 15, 2002 ("Fleming Firm Order").)[2] More specifically, this Court "ordered [Fleming] to dissolve the

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[2] The Court took "the issues of sanctions and attorneys fees . . . under advisement," and they remain pending. (*Id.*, p. 8.)

Temporary Restraining Order obtained February 7, 2002 in *David Jose, et al. v. Arthur Andersen, L.L.P., et al.*," and "enjoined [Fleming] from filing any new Enron-related actions without leave of this Court." (*Id.* at 8.) The Court found that Fleming's behavior had "underscore[d] its desire to circumvent the orders and procedures established by this Court and threaten[ed] to disrupt the orderly resolution of the consolidated *Newby* actions." (*Id.*)

5. Unfortunately, this Court's Fleming Firm Order did not (and could not) directly address the *Bullock* case. At the time the Court issued its Fleming Firm Order, *Bullock* remained pending in the United States District Court for the Western District of Texas, to which it had been removed. Shortly after this Court issued its Fleming Firm Order, however, the *Bullock* case was remanded to state court. (*See* Order of Remand, No. A-02-CA-070-H, Mar. 4, 2002 (attached as Exhibit 1 to the Fleming Motion to Quash Andersen's Emergency Motion to Stay).)

6. Fleming lost little time in seeking to exploit this opportunity to circumvent the protections that this Court plainly envisioned and intended in its Fleming Firm Order. Even though this Court had recently issued a Scheduling Order establishing a framework for discovery, pretrial preparation, and trial of the consolidated *Newby* Litigation -- a schedule that was significantly shorter and more compressed than that which had been agreed upon and jointly proposed by Plaintiffs and Defendants (*see Newby/Tittle* Scheduling Order, February 27, 2002) -- Fleming set about attempting to undercut and undermine that schedule. At a status conference before the state district court in Washington County held March 28, 2002, Fleming (specifically, Sean Jez) requested "an August 2002 trial setting." (*See* Transcript of *Bullock* Pretrial Hearing, p. 9, March 28, 2002 (excerpts attached as Exhibit 1)("*Bullock* Transcript").) Counsel for Defendants protested and proposed that trial and discovery in *Bullock* be coordinated with trial and discovery in the *Newby* Litigation in this Court,

to avoid duplication of effort and disruption of this Court's processes. (*See Id.,* pp. 13, 20, 22, 24, 29-30, 31.) Fleming rejected that request for coordination, and persisted in the request for more expedited discovery and an earlier trial setting. (*Id.*, pp. 13-14, 30, 36.)

7. On April 11, 2002, Fleming redoubled its efforts to secure injunctive relief disruptive of this Court's processes by filing an Amended Petition and seeking a Temporary Injunction that would both deal with preservation of documents (a matter addressed in prior orders of this Court) and constrain the use and disposition of the Defendants' assets (a matter that has been the subject of extensive briefing before this Court and is presently pending decision). After Fleming originally gave notice of a May 16, 2002 hearing date on that Application for Temporary Injunction, the date of that hearing has now been accelerated to May 3, 2002. (*See* Plaintiff's First Amended Petition and Application for Temporary and Permanent Injunction, ¶ 110(d), (e), (f), attached as Exhibit F to Andersen's Emergency Motion.)

8. Finally, in order to exploit this scenario fully, Fleming delivered to counsel for Defendant Lay on Monday April 22, a Subpoena Duces Tecum that purports to require Defendant Lay to appear at the May 3 hearing on the proposed Temporary Injunction, and to bring with him seven categories of documents, including "all records of any sales of Enron stock by Kenneth L. Lay since August 1, 2001 and the ultimate distribution of those proceeds." (*See* Subpoena No. 32716, *Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, copy attached as Exhibit 2.)[3]

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[3] Defendant Lay was not served with process in the *Bullock* action until recently, and therefore has not yet been required to answer or otherwise appear in that case. As a consequence, Defendant Lay has not been served with all of the discovery and other pleadings circulated among the parties in *Bullock.* Counsel for Defendant Lay understands, however, that similar requests for appearance and/or production of documents have been served upon Skilling and other Defendants in the *Bullock* matter, and that discovery has been sought both from other Defendants and from (continued...)

9. Based upon these blatant efforts by Fleming to end-run this Court's Fleming Firm Order of February 15, 2002, and to undermine and disrupt the processes of this Court in the consolidated *Newby* Litigation, Andersen filed its Emergency Motion to Stay Discovery and to Enjoin Fleming on April 17, 2002. Defendant Skilling has now filed a parallel motion for a stay and injunctive relief. Fleming and the *Bullock* Plaintiffs have responded with motions asking this Court to quash both Andersen's and Skilling's Emergency Motions, or to delay consideration of those Motions until on or after May 1 -- just two days before its May 3 hearing on the Application for Temporary Injunction in *Bullock*.

ARGUMENT

10. Having adopted the arguments and authorities set forth in Andersen's Emergency Motion, Defendant Lay will not reiterate them in this Memorandum in the interest of economy, judicial and otherwise. Certain matters, which either were not addressed in Andersen's Emergency Motion or which came to pass after that Motion was filed, do warrant brief comment.

11. At the outset, there can be no serious dispute that the discovery and schedule sought by Fleming in *Bullock* will disrupt and interfere with the schedule established by this Court and the discovery stay now in place in the consolidated *Newby* Litigation, and that Fleming knew that when the *Bullock* discovery and schedule were set in motion. When offered the opportunity to coordinate discovery in *Bullock* with discovery in this case, Fleming declined. (*Bullock* Transcript, pp. 13-14, 30.) When told unequivocally that the pursuit of discovery in *Bullock* on a schedule more accelerated

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[3](...continued)
nonparties, such as the LJM partnerships.

than that prescribed in the *Newby* Litigation would interfere with discovery and other processes in this Court, Fleming and the *Bullock* Plaintiffs persisted in seeking that disruptive schedule. (*Id.*)

12. In their Motion to Quash Andersen's Emergency Motion (and in their similar motion directed to Skilling's Emergency Motion), Fleming argues that the Defendants "did not object to the discovery schedule at [the *Bullock* status conference], or to the fact that a hearing on the injunction would be scheduled." (Fleming Motion to Quash Andersen's Emergency Motion, ¶ 10.) That, of course, is simply not true. Defendants opposed any trial setting or discovery schedule that would conflict with or outstrip the schedule established by this Court in *Newby*. (*Bullock* Transcript, pp. 13, 20, 22, 24, 29-30, 31.) To underscore their insistence that discovery and trial in *Bullock* be coordinated with the schedule and proceedings already established by this Court, Defendants even went so far as to apprise the state district court in *Bullock* that establishment of a schedule or the pursuit of discovery disruptive of this Court's processes in *Newby* would likely lead to a request that this Court stay such discovery in order to prevent the predictable disruption in this Court. (*Id.*, p. 22.) Defendants, in sum, did not acquiesce to the disruptive discovery and schedule about which they now complain.

13. It is equally clear that Fleming's request for a Temporary Injunction in *Bullock* will interfere with this Court's jurisdiction and processes. The *Bullock* Application for Temporary Injunction seeks a combination of relief previously addressed by this Court and relief currently sought in this Court by way of motions that are already briefed and pending disposition. For example, the request in *Bullock* for an order regarding preservation of documents already has been dealt with in large measure by this Court's "Order Preventing the Destruction of Evidence," issued January 23, 2002. The *Bullock* Plaintiffs' request for an injunction to constrain the Defendants' use of their own

assets prior to and during trial is subsumed within the motions and briefing that have been presented to this Court on Amalgamated Bank's request for similar relief. (*See, e.g.*, *Newby* Memorandum Opinion and Order, January 8, 2002; Amalgamated Bank's Supplemental Brief in Response to the Court's January 8, 2002 Memorandum Opinion and Order (January 25, 2002); Defendant Kenneth L. Lay's Brief in Opposition to Amalgamated Bank's Request to Lift Discovery Stay, February 8, 2002. Similar papers were filed by or on behalf of other Plaintiffs and Defendants, and the issue is awaiting decision.)

14. Moreover, the mere pursuit of the Temporary Injunction by Fleming and the *Bullock* Plaintiffs -- separate and apart from its potential issuance -- will disrupt and interfere with this Court's jurisdiction and processes. As demonstrated by the Subpoena Duces Tecum that Fleming delivered to Lay's counsel earlier this week (attached as Exhibit 2), Fleming and the *Bullock* Plaintiffs are using the Temporary Injunction process to pursue documents and other discovery that are foreclosed to the Plaintiffs and putative classes who are before this Court in the consolidated *Newby* and Multi-District Litigations.[4]

15. Fleming and the *Bullock* Plaintiffs have not denied that the discovery and injunctive relief they seek will disrupt this Court's processes, interfere with its jurisdiction, and usurp issues that already have been decided by this Court, are awaiting decision, or will be presented to this Court in the orderly progression of the *Newby* and Multi-District Litigations. Instead, Fleming and the *Bullock* Plaintiffs seek to avoid this Court's purview by arguing, *first*, that *Bullock* embodies a simple state law claim that bears little or no resemblance to the complex allegations in the various cases that are

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[4] Those documents and information are foreclosed to Fleming and at least some of the *Bullock* Plaintiffs, themselves, in their role as counsel and Plaintiffs in the *Odam* action, consolidated before this Court.

consolidated before this Court and, *second*, that this Court simply lacks jurisdiction to do anything about their disruptive practices in any event. Neither argument succeeds.

16. To create the impression that *Bullock* is just a simple state-law case that does not entail the complexities of the allegations before this Court, Fleming and the *Bullock* Plaintiffs have asserted that "the *Bullock* Plaintiffs' claims arise out of misrepresentations made by Defendant Lay in Washington County at the Chamber of Commerce banquet in October 2000," without reference to anything more. (Fleming Motion to Quash Andersen's Emergency Motion, ¶ 11; Fleming Motion to Quash Skilling's Emergency Motion, ¶ 5 ("*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. . . . Therefore, Plaintiffs' claims differ from the [federal] class action . . . .").) This misleading characterization is a vast oversimplification of the *Bullock* Plaintiffs' allegations in their Amended Petition, in which they complain of allegedly "false, misleading and incomplete information conveyed in Enron's public filings, press releases, and other publications" over a number of years -- including a specified series of press releases issued during the period January 18, 2000 through August 29, 2001, and purportedly "unqualified, misleading, and false reports regarding Enron's finances for the periods of 1997, 1998, 1999, and 2000," and all of the underlying information entailed in those allegedly "misleading and false reports." (*See Bullock* First Amended Petition, ¶¶ 15, 18, 47-58, 72-73.) Indeed, far from relying solely upon remarks allegedly made by Defendant Lay "at a Washington County Chamber of Commerce dinner in October 2000," the *Bullock* Plaintiffs have based their claims on the vast array of information allegedly emanating from Enron "beginning in 1997" and extending for years thereafter. (*See Id.*, ¶¶ 73, 75-96.) In short,

while the *Bullock* Plaintiffs have attempted to use Defendant Lay's attendance at a dinner in Washington County as the basis for maintaining their lawsuit in that jurisdiction and venue, their allegations, taken as a whole, largely mirror those made in the consolidated class actions pending before this Court, and will entail much the same discovery, briefing, and argument.

17. The contention of Fleming and the *Bullock* Plaintiffs that this Court lacks jurisdiction to impose a stay of discovery or to enjoin pursuit of the Temporary Injunction in *Bullock* is similarly misguided, and similarly unavailing. At the outset, much of the argument advanced by Fleming and the *Bullock* Plaintiffs in their Motion to Quash Andersen's Emergency Motion really is addressed solely to the question whether this Court would have removal jurisdiction over the *Bullock* case. (*See, e.g.,* Fleming Motion to Quash Andersen's Emergency Motion, ¶¶ 6-10.) But, as Andersen has amply demonstrated in its Emergency Motion, whether or not this Court could exercise removal jurisdiction to bring the *Bullock* case into this Court or to retain it, the Court clearly has jurisdiction under SLUSA to "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 . . . ." 15 U.S.C. § 78u-4(b)(3)(D). Similarly, whether or not the All Writs Act provides this Court with removal jurisdiction, it certainly authorizes this Court to enjoin Fleming and others from pursuing actions in state court, when necessary in aid of this Court's jurisdiction or to protect its orders or processes. 28 U.S.C. § 1651. This is particularly true where, as here, pursuit of a state action threatens to frustrate proceedings and disrupt the orderly progress and resolution of complex, multi-district federal litigation. *See In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332, 1334-35 (5th Cir. 1981).[5] Perhaps most

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[5] The protestations of Fleming and the *Bullock* Plaintiffs that this Court lacks jurisdiction over them to issue the requested stay and injunctive relief are curious in another respect. (continued...)

importantly, this Court's authority and jurisdiction to enter the orders and grant the relief requested here have been thoroughly briefed, analyzed, and argued before this Court in connection with its Fleming Firm Order, issued February 15, 2002; this Court expressly found in that Order that it had the requisite jurisdiction and authority. That determination need not be revisited here.[6]

CONCLUSION

For the reasons set forth above and as more fully explained in Andersen's Emergency Motion to Stay Discovery and to Enjoin Fleming, Defendant Kenneth L. Lay respectfully prays that this Court grant Andersen's Emergency Motion, and that it (i) stay all discovery in *Bullock* until after the motions to dismiss in *Newby* have been decided and (ii) require Fleming and the *Bullock* Plaintiffs to withdraw their Application for Temporary Injunction in *Bullock*, cancel the May 3 hearing on that Application, and refrain from re-submitting that or any similar application in the future absent prior approval from this Court.

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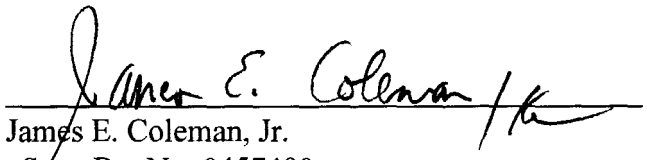
[5](...continued)
Fleming is counsel of record in the *Odam* case, which Fleming filed in this Court, and which has now been consolidated in the *Newby* Litigation. Two of the *Bullock* Plaintiffs, Hal Moorman and Milton Tate, as co-trustees, also have long been before the Court as Plaintiffs in those same capacities in the *Odam* litigation. Finally, Fleming has submitted the remaining *Bullock* Plaintiffs to the jurisdiction of this Court by its recent filing of two previously referenced motions on their behalf in the *Newby* Litigation, seeking to quash the emergency motions filed by Andersen and Skilling (this, in addition to their being encompassed in the plaintiff class proposed to be certified in the *Newby* Litigation). Everyone against whom Defendants seek relief in their Emergency Motions, therefore, is actually before this Court, and has come here voluntarily.

[6] To the extent that the Court wishes to review the briefing on that score in connection with the Fleming Firm Order, Defendant Lay respectfully refers this Court to his Motion to Enjoin Fleming & Associates, L.L.P. From Seeking *Ex Parte* Relief in State Court and for Sanctions, and Supporting Brief, pages 9-13.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served on this 23rd day of April, 2002, in accordance with the Court's April 4, 2002 Order.

Ken Carroll

The Exhibit(s) May

Be Viewed in the

Office of the Clerk