

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

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED

APR 24 2002 JS

MICHAEL N. MILBY, CLERK OF COURT

MARK NEWBY, ET AL.,

Plaintiff,

vs.

ENRON CORPORATION, ET AL.,

Defendants.

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CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

**RESPONSE AND JOINDER IN MOTIONS TO STAY DISCOVERY  
IN *BULLOCK V. ARTHUR ANDERSEN, L.L.P.*  
AND MOVANTS' MOTION TO QUASH SUBPOENA**

THE HONORABLE JUDGE OF THIS COURT:

LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper (collectively, "Movants") respond to and join in the Motions to Stay Discovery in *Bullock v. Arthur Andersen, L.L.P.* filed by Defendants Arthur Andersen, LLP<sup>1</sup> and Jeffrey K. Skilling and, as part of that joinder, request that the Court quash yet another subpoena issued by Fleming and Associates ("Fleming"). In support thereof, Movants would respectfully show the Court as follows:

**I. Motions to Stay filed by *Newby/Bullock* Defendants Illustrate Fleming's Continuing Efforts to Undermine this Court's Authority**

1. Fleming is counsel of record for the plaintiffs in *Bullock* and six other Enron-related cases. Each case contains nearly identical allegations. Five of the other Fleming cases are pending before this Court. The sixth case is pending before the United States District Court for the Western District of Texas, San Antonio Division, pending pretrial transfer of the matter

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<sup>1</sup>*Bullock* defendants D. Stephen Goddard, Jr., David B. Duncan, Debra A. Cash, Roger Willard, and Thomas Bauer joined Arthur Andersen's emergency motion to stay discovery. On April 22, 2002, Defendant Andrew Fastow filed his joinder in Arthur Andersen's motion with this Court.

543

pursuant to a recent ruling by the Judicial Panel on Multidistrict Litigation.<sup>2</sup> Discovery is stayed in the *Newby* case, as reflected in this Court's scheduling order, until after the Court has ruled on motions to dismiss filed by the defendants.

2. Since the *Bullock* case was remanded to state court, Fleming has begun to issue discovery requests in that action. Fleming's initial discovery effort in *Bullock* was an attempt to circumvent this Court's March 15, 2002 order, which quashed the subpoena served by Fleming on Mr. Joseph Trahan. In an effort to avoid the impact of that order, Fleming simply ignored this Court's ruling and served an identical subpoena on Mr. Trahan from the Washington County state district court in which *Bullock* is pending. At that time, Movants sought a stay of discovery in the *Bullock* case from this Court. As discussed in greater detail below, Fleming subsequently entered into a stipulation whereby it withdrew this second subpoena. This stipulation was later entered as an order of this Court. Tab A, April 3, 2002 Order.

3. Fleming has now issued yet another and *broader* subpoena, seeking from LJM2 Capital Management, L.P. ("Capital Management") "all records . . . related to LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southampton Place L.L.P. and LJM Partnership." A copy of this subpoena is attached hereto at Tab B.

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<sup>2</sup>As the Court is aware, on April 16, 2002 the Judicial Panel on Multidistrict Litigation entered a Transfer Order consolidating pretrial proceedings in cases relating to "the financial collapse of Enron Corp." The Western District case, *Jose, et al. v. Arthur Andersen, L.L.P., et al.*, qualifies as a "tag-along" action under applicable MDL rules, and thus should be transferred by the MDL to this Court for consolidated pretrial proceedings.

3. The subpoena seeking records from Capital Management is not the only discovery request initiated by Fleming. In their motions to stay, various *Bullock* defendants have detailed certain discovery requests served by Fleming. Fleming's discovery efforts in *Bullock* include:

- Tex. R. Civ. P. 194 Requests for Disclosures on
  - Arthur Andersen,
  - David Duncan, and
  - D. Stephen Goddard;
- Requests for Production of Documents on
  - Arthur Andersen,
  - David Duncan, and
  - D. Stephen Goddard;
- Request for the depositions of
  - Timothy McCann,
  - John Riley,
  - David Stulb and
  - Shane Philpot;
- Service of a Subpoena and Request for Production on Jeffrey Skilling, purporting to command his appearance at the Hearing on *Bullock* Plaintiffs' Application for Temporary Injunction on May 3, 2002 before the 21<sup>st</sup> Judicial District Court of Washington County, Texas.

4. As a result of Fleming's continuing efforts to disrupt this Court's efforts to manage the consolidated Enron-related litigation, Movants join in the pending motions to stay discovery in *Bullock* and further request that this Court quash the subpoena issued by Fleming on LJM2 Capital Management, L.P.

## **II. Fleming's Serial Subpoenas Are Procedurally and Substantively Invalid**

5. Each of the four subpoenas, including the pending subpoena, issued by Fleming for the records of the above-listed entities has violated the procedural rules governing discovery from non-parties. Each of these subpoenas has also been objectionable on substantive grounds.

In order to place Movants' response and requested relief in context, it is necessary to briefly review the subpoenas issued by Fleming.

**A. The First Subpoena: Quashed by This Court.**

6. On March 5, 2002, Fleming filed a motion in the consolidated *Newby* cases entitled *Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping* with this Court. In the motion, Fleming requested that the Court "allow this subpoena" and "allow the inspection and copying of the documents" "related to LJM Cayman, L.P., LJM Partners, L.P., LJM Swap. Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southhampton Place L.L.P., and LJM Partnership" in the possession of Joseph Trahan, an individual who has never appeared in any of the consolidated Enron-related matters before this Court. The order proposed by Fleming asked for the Court's permission "to subpoena, inspect and copy all [requested] records."

6. However, counsel for Movants learned that despite having filed a motion seeking this Court's approval of the original Trahan subpoena, Fleming *served it on Mr. Trahan* prior to obtaining the Court's approval. Counsel for Movants also learned that Fleming not only served the subpoena on Mr. Trahan *but had sought to arrange a production of documents to Fleming pursuant to the subpoena*. As a result, Movants filed a motion to quash that subpoena. On March 15, 2002, this Court granted Movants' motion and quashed the subpoena issued by Fleming to Joseph Trahan in the consolidated *Newby* cases. (Dkt. No. 377.)

**B. The Second Subpoena: Withdrawn by Fleming**

7. Less than one week later, on March 21, 2002, Movants learned that Fleming had served another subpoena seeking the *identical discovery* from Joseph Trahan, this time

purportedly out of the 21<sup>st</sup> Judicial District Court of Washington County, Texas in *Bullock v. Arthur Andersen, L.L.P.* This second subpoena, the scope of which was identical to that previously quashed by this Court, purported to require production of documents eight days later, on Friday, March 29, 2002.

8. On March 25, 2002, Movants filed a Motion for Stay of Discovery Proceedings in Cause No. 32,716, *Bullock v. Arthur Andersen, L.L.P.*, pending in the 21<sup>st</sup> Judicial District Court of Washington County, Texas. As a result of Movants' efforts to resolve the issues raised by the subpoena, Fleming, on behalf of its clients, and Beck, Redden & Secrest, L.L.P. ("BRS"), on behalf of its clients, entered into a stipulation under which Fleming withdrew the second subpoena. On April 3, 2002, the Court entered the stipulation as an Order of the Court. *See* Tab A.

**C. The Third Subpoena: Fleming Seeks Production of Documents of Counsel**

9. Fleming did not comply with the stipulation that the Court entered as an Order on April 3, 2002. The stipulation provided that "to the extent [Fleming] desires to obtain in the future the material at issue in the subpoenas to Mr. Trahan and/or DNS, it will issue a subpoena in any court directed to LJM2 Capital Management, L.P., which BRS agrees that it will accept on behalf of LJM2 Capital Management, L.P." On April 12, 2002, Fleming faxed to Movants' counsel a the third subpoena, issued out by the District Clerk of Washington County, Texas in connection with the *Bullock* lawsuit (attached hereto at Tab C). This third subpoena commanded *Eric Nichols*, counsel for Movants, to produce "[a]ny and all records in [his] possession or under [his] control related to: LJM Cayman, L.P., LJM Partners, L.P., LJM Swap. Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southhampton Place L.L.P., and LJM

Partnership.” This subpoena not only violated the terms of the stipulation and Court Order, but also plainly sought the records of counsel, without regard to the attorney/client or attorney work product privileges. Counsel for Movants advised Fleming that the third subpoena was contrary to the Order and Stipulation entered by this Court. Fleming, thereafter, agreed to withdraw subpoena number three.

**D. The Fourth – and Pending – Subpoena: Not in Compliance with This Court’s Order and Seeks Significantly Expanded Document Production**

10. On April 15, 2002, Fleming faxed a fourth subpoena to counsel for Movants. A copy of this subpoena – which Movants seek to quash in connection with the request to stay all discovery in *Bullock* – is attached hereto at Tab B. This subpoena is addressed to “LJM2 Capital Management, L.P.” and commands that Capital Management produce on April 13, 2002 “[a]ny and all records in [its] possession or under [its] control related to: LJM Cayman, L.P., LJM Partners, L.P., LJM Swap. Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southhampton Place L.L.P., and LJM Partnership.” Further, it commands Capital Management to “remain at the place of the hearing from day to day until discharged by the court or by the party summoning the witness.” The fourth subpoena is significantly broader than the first two. It no longer limits the production to materials maintained by Mr. Trahan. It now seeks all documents relating to eight different entities, regardless of subject matter and for an unlimited period of time.

11. The fourth subpoena also violates the April 3, 2002 Order entered by this Court. First, it seeks more than the material at issue in the subpoenas to Mr. Trahan and/or Distributed Network Services Corp. *See* Tab A, Stipulation ¶ 3. Further, it seeks production in less than

thirty days.<sup>3</sup> Due to the continuing abuse of the discovery process by Fleming, Movants urge the Court to grant the *Bullock* Defendants' Motions to Stay Discovery in *Bullock* and, in addition request that this Court quash the latest subpoena issued by Fleming.

### III. Fleming's Continuing Efforts to Disrupt This Court's Jurisdiction

12. As this Court knows, Fleming has filed at least seven Enron-related lawsuits<sup>4</sup> ("the Fleming lawsuits") in five different forums. The factual allegations in each Fleming lawsuit – each purporting to be filed on behalf of a subset of Fleming's claimed 1,000-member Enron shareholder client group – are virtually identical. *Bullock* was initially removed by Defendant Arthur Andersen, L.L.P. to the United States District Court for the Western District of Texas. On or about March 5, 2002, *Bullock* was remanded to the 21st Judicial District Court of Washington County.<sup>5</sup>

13. 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

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<sup>3</sup>After objection by counsel for Movants, a legal assistant for Fleming sent a letter stating that rather than the date set out in the subpoena, the documents should be produced on May 15, 2002, a date which is thirty days after Fleming faxed a copy of the fourth subpoena to counsel for Movants.

<sup>4</sup>*Odam v. Enron Corporation*, Civil Action No. H-01-3914, filed in the United States District Court for the Southern District of Texas, Houston Division; *Rosen v. Arthur Andersen, L.L.P.*, originally filed under Cause No. 2001-57517 in the 333rd Judicial District Court of Harris County, Texas; *Bullock v. Arthur Anderson, L.L.P.*, Cause No. 32,716, originally filed in the 21st Judicial District Court of Washington County, Texas; *Pearson v. Fastow*, originally filed under Cause No. 2002-00609, in the 164th Judicial District Court of Harris County, Texas; *Ahlich v. Arthur Andersen, L.L.P.*, originally filed under Cause No. 02-000073-CV-272 in the 272nd Judicial District Court of Brazos County, Texas; *Delgado v. Fastow*, originally filed under Cause No. 2002-00569 in the 55th Judicial District Court of Harris County, Texas; and *Jose v. Arthur Andersen, L.L.P.*, originally filed under Cause No. 2002-CI-01906 in the 57th Judicial District Court of Bexar County, Texas. All of these cases were removed at some point to federal court. On or about March 5, 2002, *Bullock* was remanded to the 21st Judicial District Court of Washington County by an order issued in the United States District Court for the Western District of Texas.

<sup>5</sup>None of Movants are parties to *Bullock*, and thus made no appearance with respect to the removal of *Bullock* or the motion to remand.

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 and Order at 7 (February 15, 2002) (Dkt. No. 296). 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. As a result, the Court ordered Fleming to dissolve the *ex parte* temporary restraining order obtained in the *Jose* case while it was in state court and enjoined Fleming from filing any new Enron-related actions without leave of the Court. *Id.*

14. Fleming has publicly admitted that it represents a group of over 1,000 Enron shareholders. Yet, it also endeavors to claim, in resisting efforts to consolidate and/or remove such claims, that its lawsuits are merely small private actions not subject to the statutory restrictions of SLUSA or to this Court’s jurisdiction. The artifice of Fleming’s approach is made plain by the fact that Fleming owes fiduciary duties to all of its 1,000 clients. One aspect of this fiduciary duty is to treat all of these clients equally – that is, not to put the interests of any artificial grouping of less than 50 Fleming clients before those of other Fleming clients. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06. Any effort to prosecute the claims of an artificial grouping of less than the whole of Fleming’s client base, to the detriment of the remainder, would necessarily place Fleming in a conflict. This Court may fairly presume that Fleming seeks to avoid such a conflict by prosecuting all of its clients’ claims concurrently, notwithstanding that as a tactical measure it may name less than 50 in a particular filing.

15. As a result, this Court can and should ignore the fiction promulgated by Fleming. There is, in reality, only one Fleming client group – consisting of 1000+ shareholders – and that group, including the *Bullock* plaintiffs, is properly subject to the jurisdiction of this Court as a result of the lawsuits initiated by Fleming. Even Hal Moorman, one of the named plaintiffs in *Bullock*, admits that he is a putative class member to the consolidated *Newby* cases before this Court. According to Mr. Moorman, while he prefers to be in state court, “he could still opt into any federal class-action settlement that beats his case to the finish line.” Mary Flood, *Firm Sits Alone In Battle Over Enron*, HOUSTON CHRON. Mar. 28, 2002, at Bus. 1 (attached at Tab D). For these reasons, the Court has the authority to take the actions necessary to insure that the prosecution of this case is not further disrupted by the machinations of Fleming.

#### **IV. Discovery in *Bullock* Should be Stayed Under the Private Securities Litigation Reform Act<sup>6</sup>**

16. Regardless of any arguments Fleming may raise regarding the Court’s right to exercise jurisdiction over artificially created subsets of Fleming’s 1,000-member shareholder group, Congress has given the Court the authority to stay discovery in *Bullock*. In 1998, Congress amended the Private Securities Litigation Reform Act (“Reform Act”) to authorize the federal courts to prevent precisely the type of abuse occurring in the Enron-related litigation.

Upon a proper showing, 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 [the Reform Act.]

15 U.S.C. § 78u-4(b)(3)(D) (West Supp. 2001).

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<sup>6</sup>The All Writs Act also provides this Court with the authority to stay discovery in *Bullock*. Movants understand that other defendants have addressed the application of the Act, and join in that briefing.

17. According to the Eighth Circuit, this “limited injunction power is [] aimed at plaintiffs who would use state-court actions to circumvent the automatic discovery stay that applies in federal actions upon the filing of a motion to dismiss.” *Desmond v. McColl*, 263 F.3d 795, 802 (8th Cir. 2001) (affirming injunction issued in securities fraud class action that effectively stayed state-court proceedings).<sup>7</sup> “The entire thrust of the [Reform] Act could have been undone without this provision by bringing a parallel action in state court on behalf of a named plaintiff and using it as a means to obtaining discovery for use in the federal courts.” Harold S. Bloomenthal and S. Wolff, *SECURITIES AND FEDERAL CORPORATE LAW* § 16:159 (2d ed. 2001). Without this provision, “[p]laintiffs’ lawyers would still be free to bring a federal class action and a parallel state action on behalf of an individual who would otherwise be a member of the class.” Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U.L.Q. 435, 488 (2000). Therefore, “Congress gave federal courts control over discovery in the remaining securities cases that Congress has not reserved to the federal courts.” *Id.* at 489.

18. In fact, the legislative history behind section 78u-4(b)(3)(D) makes very clear that Congress intended the provision to be used to stay discovery in precisely the sort of situation that

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<sup>7</sup>As noted by the Eighth Circuit, a district court has taken the position that this provision applies only to state-court class actions. *In re Transcript Int’l Sec. Lit.*, 57 F. Supp.2d 836, 846-47 (D. Neb. 1999). This position is contrary to the plain language of the statute and has been roundly criticized by legal commentators. See, e.g., Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U.L.Q. 435, 496 n. 267 (2000) (*Transcript* “inexplicably declined to apply [the provision] to an individual state court securities action. This decision is inconsistent with the text of the statute (‘any private action’) and negates the primary purpose of the provision.”); Harold S. Bloomenthal and S. Wolff, *SECURITIES AND FEDERAL CORPORATE LAW, SECOND EDITION* § 16:159 (2001) (“Both SLUSA and the PLSRA ... clearly distinguished in a variety of contexts between class actions and any private action. It is difficult to conclude that in this one instance Congress did not know how to limit its application to class actions when that was the intent.”)

the *Bullock* case presents here. As the House Commerce Committee noted:

[Section 78u-4(b)(3)(D)] amends Section 27(b) of the Securities Act of 1933 to include a provision to prevent plaintiffs from circumventing the stay of discovery under the Reform Act by using State court discovery, which may not be subject to those limitations, in an action filed in State Court. This provision expressly permits a Federal court 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.... ***Because circumvention of the stay of discovery of the Reform Act is a key abuse that this legislation is designed to prevent, the Committee intends that courts use this provision liberally, so that the preservation of State court jurisdiction of limited individual securities fraud claims does not become a loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act.***

H.R. Rep. 105-640 (emphasis added).

19. This is precisely the situation with which this Court is confronted here. If discovery is not stayed in the *Bullock* state court action until motions to dismiss are ruled on in the *Newby* litigation, then the *Bullock* action will become “a loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act.” *Cf. id.* The fourth (and expanded) subpoena faxed to Capital Management provides a concrete example of the “gamesmanship” that is targeted to frustrate this Court’s efforts to resolve in an organized, coherent manner the claims of Enron shareholders and ERISA plan participants. Consequently, the Court should exercise its authority under section 78u-4(b)(3)(D) and stay discovery in the state court *Bullock* action.

#### **V. Request for Expedited Hearing**

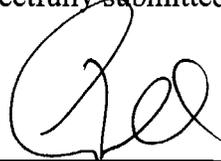
20. Movants respectfully request that the Court set their Motion to Quash the Fleming Subpoena for a hearing or ruling on the same schedule as Arthur Andersen’s Motion to Stay Discovery in *Bullock*.

**Conclusion**

WHEREFORE, PREMISES CONSIDERED, Movants respectfully join in the request that this Court stay all discovery in *Bullock v. Arthur Andersen, L.L.P.*, including the subpoena faxed to LJM2 Capital Management, L.P., until further order of this Court.

Respectfully submitted,

By: \_\_\_\_\_



Eric J.R. Nichols  
Federal I.D. No. 13066  
State Bar No. 14994900  
Beck, Redden & Secrest  
1221 McKinney Street, Suite 4500  
Houston, Texas 77010-2010  
Telephone: (713) 951-3700  
Telecopier: (713) 951-3720

Attorney-in-Charge for Movants  
LJM Cayman, L.P., Chewco  
Investments, L.P., and  
Michael J. Kopper

OF COUNSEL:

BECK, REDDEN & SECREST  
A Registered Limited Liability Partnership

Felicia Harris Kyle  
Federal I.D. No. 13838  
State Bar No. 24002438  
1221 McKinney Street, Suite 4500  
Houston, Texas 77010-2010  
Telephone: (713) 951-3700  
Telecopier: (713) 951-3720

Attorneys for Movants LJM Cayman, L.P.,  
Chewco Investments, L.P., and Michael J. Kopper

**CERTIFICATE OF CONFERENCE**

I certify that I attempted to resolve the matters presented by this motion with Sean Jez of the Fleming firm, and that my efforts were unsuccessful.



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Eric J.R. Nichols

**CERTIFICATE OF SERVICE**

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on April 24, 2002, to all counsel.



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Eric J.R. Nichols

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CLERK, U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
04/03/02  
FILED  
MICHAEL N. MILBY, CLERK  
BY DEPUTY *[Signature]*

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

United States Court  
Southern District of Texas  
ENTERED

APR 03 2002

*Michael N. Milby, Clerk of Court*

MARK NEWBY, ET AL.,  
  
Plaintiff,  
  
vs.  
  
ENRON CORPORATION, ET AL.,  
  
Defendants.

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CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

ORDER

ON THIS DAY the Court considered the Motion for Entry of Order on Stipulation of Parties Regarding Subpoenas. Having considered the motion and the applicable authorities, it is the opinion of this Court that the Motion should in all things be granted. The Court

ENTERS the attached stipulation as an Order of this Court.

The Court also accordingly

CANCELS the hearing previously set on the motion for stay of discovery proceedings in Cause No. 32,716, Bullock v. Arthur Andersen, L.L.P., pending in the 21st Judicial District Court of Washington County, Texas, and request for expedited hearing or ruling (instrument #406 in Newby, H-01-3624).

Signed at Houston, Texas, this 3<sup>rd</sup> day of April, 2002.

*Melinda Harmon*  
MELINDA HARMON  
UNITED STATES DISTRICT JUDGE

431

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

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

**STIPULATION**

This stipulation resolves by agreement the following motions currently on file with the Court:

- Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping (filed on March 5, 2002 by Plaintiffs Mary Bain Pearson and John Mason) (Dkt. No. 345);
- Motion to Quash Subpoena Wrongfully Issued by Fleming & Associates, L.L.P. and for Sanctions (filed on March 14, 2002 by Defendants LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper) (Dkt. No. 369);
- Motion for Reconsideration of Order Granting Emergency Motion to Quash Subpoena Issued by Fleming & Associates and for Sanctions (filed on March 22, 2002 by Fleming & Associates on behalf of Plaintiffs Mary Bain Pearson and John Mason) (Dkt. No. 401);
- Motion for Entry of Order Granting Sanctions Pursuant to Court's March 15, 2002 Order (filed on March 25, 2002 by Defendants LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper); and
- Motion for Stay of Discovery Proceedings in Cause No. 32,716, *Bullock v. Arthur Andersen, L.L.P.*, pending in the 21<sup>st</sup> Judicial District Court of Washington County, Texas (filed on March 25, 2002 by Defendants LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper).

Fleming & Associates ("Fleming"), on behalf of its clients; and Beck, Redden & Secrest, L.L.P. ("BRS"), on behalf of its clients, agree as follows:

1. Fleming shall withdraw the subpoenas issued to Joseph Trahan and/or Distributed Network Services Corp. ("DNS") in Civil Action No. H-02-0670 (consolidated into H-01-3624), *Pearson v. Fastow*, pending in the United States District Court for The Southern District of Texas, Houston Division, and in Cause No. 32,716, *Bullock v. Arthur Andersen, L.L.P.*, pending in the 21<sup>st</sup> Judicial District Court of Washington County, Texas.
2. Any material in the possession of Mr. Trahan or DNS shall be maintained in the following manner: The original of any such material shall be maintained by DNS in a secure location, and a complete and accurate copy of any and all such material shall be provided by DNS to BRS for its review, in the event that the material becomes subject to discovery in the future.
3. Fleming agrees that to the extent it desires to obtain in the future the material at issue in the subpoenas to Mr. Trahan and/or DNS, it will issue a subpoena in any court directed to LJM2 Capital Management, L.P., which BRS agrees that it will accept on behalf of LJM2 Capital Management, L.P.; and that LJM2 Capital Management, L.P. will make objections and responses to the requested discovery according to applicable rules and authorities. Any such subpoena shall not request production any earlier than 30 days from the date of service.
4. Fleming will not be required in the event of any production of materials pursuant to such subpoena to pay additional costs above and beyond those already paid in connection with the copying of computerized backup tapes.
5. Fleming and BRS agree to withdraw the motions listed above.

6. This agreement is without prejudice to any objection or motion that may be made with respect to discovery undertaken by Fleming in the future on behalf of its clients in any forum.
7. This agreement is without prejudice to arguments by any party as to the appropriate forum for the hearing of objections to discovery propounded in the future.

**STIPULATED AND AGREED:**

By: 

G. Sean Jez  
State Bar No. 00796829  
Fleming & Associates, L.L.P.  
1330 Post Oak Blvd, Suite 303  
Houston, Texas 77056-3019  
713/621-7944  
713/621-9638 (Facsimile)

By: \_\_\_\_\_

Eric J.R. Nichols  
State Bar No. 14994900  
Federal I.D. No. 13066  
Beck, Redden & Secrest, L.L.P.  
1221 McKinney, Suite 4500  
Houston, Texas 77010-2010  
(713) 951-3700  
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**STIPULATED AND AGREED:**

By: \_\_\_\_\_

G. Sean Jez  
State Bar No. 00796829  
**Fleming & Associates, L.L.P.**  
1330 Post Oak Blvd, Suite 3030  
Houston, Texas 77056-3019  
713/621-7944  
713/621-9638 (Facsimile)

By: \_\_\_\_\_

Eric J.R. Nichols  
State Bar No. 14994900  
Federal I.D. No. 13066  
**Beck, Redden & Secrest, L.L.P.**  
1221 McKinney, Suite 4500  
Houston, Texas 77010-2010  
(713) 951-3700  
(713) 951-3720 (Facsimile)

B

Cause No. 32,716

JANE BULLOCK; JOHN BARNHILL; §  
 DON REILAND; SCOTT BORCHART; §  
 MICHAEL MIES; VIRGINIA ACOSTA; §  
 JIM HEVELY; MIKE BAUBY; §  
 ROBERT MORAN; JACK & MARILYN §  
 TURNER; HAL MOORMAN & MILTON §  
 TATE, CO-TRUSTEES FOR MOORMAN, TATE, §  
 MOORMAN & URQUHART MONEY §  
 PURCHASE PLAN AND TRUST, §  
 DR. ROBERT STARK, SUDIE STARK, §  
 DELBERT H. STARK, JR., §  
 HENRY BOEHM, M.D., VIRGINIA LAKE, §  
 ROBERT ARDERBURN, LEON TOUBIN, §  
 ZHONG LIN, ROBIN T. STERN and §  
 JANE BARNHILL-NEWMAN. §

IN THE DISTRICT COURT OF

Plaintiffs,

WASHINGTON COUNTY, TEXAS

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.

21st JUDICIAL DISTRICT

**SUBPOENA**

**TO: LJM2 Capital Management, L.P. through its attorney Eric Nichols, Beck Redden & Secrest, 4500 One Houston Center, 1221 McKinney, Houston, TX 77010-2010**

YOU ARE COMMANDED to appear on May 13, 2002 at 1:30 p.m. at the office of G. Sean Jez, Fleming & Associates, L.L.P., 1330 Post Oak Blvd., Suite 3030, Houston, TX 77056 in the above-styled and numbered cause now pending in said 21<sup>st</sup> District Court. Said above

witness is further commanded to produce at said time and place above set forth the following documents or tangible items:

Any and all records in your possession or under your control related to LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southampton Place L.L.P. and LJM Partnership.

You must remain at the place of hearing from day to day until discharged by the court or by the party summoning the witness.

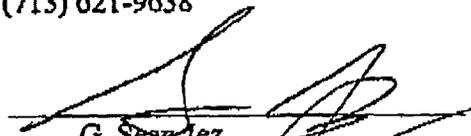
FAILURE TO OBEY THIS SUBPOENA MAY BE TREATED AS A CONTEMPT OF COURT. TEXAS RULE OF CIVIL PROCEDURE 176.8(a) PROVIDES AS FOLLOWS: Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

This subpoena is issued at the request of Jane Bullock, et al., whose attorney of record is G. Sean Jez of Fleming & Associates, L.L.P.

Date of Issuance: 04-15-02

SUBPOENA ISSUED BY:

FLEMING & ASSOCIATES, L.L.P.  
G. Sean Jez  
State Bar No. 00796829  
George M. Fleming  
State Bar No. 07123000  
1330 Post Oak Boulevard, Suite 3030  
Houston, Texas 77056-3019  
Telephone (713) 621-7944  
Fax (713) 621-9638

By:   
G. Sean Jez  
ATTORNEYS FOR PLAINTIFFS

**MEMORANDUM OF ACCEPTANCE**

I accepted service of a copy of this subpoena on \_\_\_\_\_ [date].

\_\_\_\_\_ [signature of witness]

**RETURN OF SUBPOENA**

I certify that I served the attached subpoena by delivering a copy and the required fee of \$ \_\_\_\_\_ to \_\_\_\_\_ [name of witness] in person, at \_\_\_\_\_ [address] on \_\_\_\_\_ [date] at \_\_\_\_\_ [time]. [My fee for this service is \$ \_\_\_\_\_ or My fee for this service has been paid in advance.].

\_\_\_\_\_ [signature]

\_\_\_\_\_ [typed name]

\_\_\_\_\_ [title, if any]

C

**RETURN TO  
DISTRICT CLERK**

CLERK OF THE COURT  
VICKI LEHMANN  
100 EAST MAIN, SUITE 304  
BRENNHAM, TEXAS 77833

ATTORNEY FOR PLAINTIFF OR PLAINTIFF  
G. SEAN JEZ  
1330 OAK BOULEVARD, SUITE 3030  
HOUSTON, TEXAS 77010-2010

THE STATE OF TEXAS

**SUBPOENA**

**NO. 32716**

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

VS.

ATHUR 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

**TO ANY SHERIFF, CONSTABLE, OR BY ANY OTHER PERSON WHO IS NOT A PARTY AND IS NOT LESS THAN EIGHTEEN YEARS OF AGE, OF THE STATE OF TEXAS, GREETING:**

YOU ARE HEREBY COMMANDED TO SUMMON ERIC NICHOLS, BECK REDDEN & SECREST, 4500 ONE HOUSTON CENTER, 1221 MCKINNEY, HOUSTON, TEXAS 77010-2010 to be and personally appear at 1:00 o'clock p. m., on the 13th day of May, 2002; at the office of G. Sean Jez, Fleming & Associates, L.L.P., 1330 Post Oak Boulevard, Suite 3030, Houston, Texas 77056-3019 on behalf of the Plaintiff in the above styled and numbered cause, now pending in said 21st District Court. Said above witness(s) is further commanded to produce at said time and place above set forth the following books, papers, documents or other tangible things, to-wit:

Any and all records in your possession or under your control related to: LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub. L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southampton Place L.L.P., and LJM Partnership

HEREIN FAIL NOT, and make due return hereof, showing how you have executed the same. Issued and given under my hand and seal of said Court at office, this the 9th day of April, 2002.

Vicki Lehmann  
District Clerk, Washington County, Texas

by: Peggy Diggs  
Peggy Diggs, Deputy

**RETURN**

Came to hand the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., and executed the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., by delivering to the within named \_\_\_\_\_ at \_\_\_\_\_ in \_\_\_\_\_ County, Texas, in person, a true copy of this Subpoena, and tendering said witness the sum of \$\_\_\_\_\_.

**FEES:**

\_\_\_\_\_  
\_\_\_\_\_ County, Texas

by: \_\_\_\_\_  
Deputy

**ACCEPTANCE OF SERVICE**

The undersigned witness named in Subpoena \_\_\_\_\_ acknowledges receipt of a copy thereof and hereby accepts and waives service of such Subpoena.

\_\_\_\_\_  
(Signature of Witness and Date)

D

**Paper:** Houston Chronicle

**Date:** THU 03/28/02

**Section:** BUSINESS

**Page:** 1

**Edition:** 3 STAR

## **Firm sits alone in battle over Enron / 'Ostracized' bypeers and judges, lawyers seek smaller, quicker trials in statecourt**

By MARY FLOOD  
Staff

At the first federal Enron hearing he attended, attorney G. Sean *Jez* sat alone at a large counsel table. Dozens of other lawyers in the case sat at other tables, some even in the spectator area.

"It was pretty obvious we were being ostracized," said *Jez*, whose firm, George Fleming and Associates, has become a pariah among the legal piranha swarming around Enron's remains.

While most of his peers jockey for position and fees in federal court in New York and Houston, *Jez* is seeking the same, but in state court, and in such places as Brenham.

He will be in the Washington County courthouse today for a hearing in a case that could result in the first Enron-related trial.

"These guys could really throw a wrench into the proceedings," said one of the chief lawyers in the Enron cases in U.S. District Judge Melinda Harmon's court. "What's worrisome is that some of their arguments are not entirely off base."

The law firm's renegade tactics are not appreciated by Harmon, who oversees most of the Enron cases in the nation, or by most of the other lawyers involved, on either side.

In a recent motion, lawyers for a former Enron executive blasted Fleming for "continuing efforts to disrupt the orderly prosecution" of the case and noted that Harmon herself had called the firm's actions a "waste of substantial defense resources."

The other cases are large class actions, alleging breaches of federal securities and retirement fund laws. But the Fleming firm, citing state fraud and conspiracy laws, wants to file dozens of state lawsuits for small groups, like the 12 Brenham-area people who bought stock in Enron after hearing Ken Lay speak at a local Chamber of Commerce forum.

The firm has gathered more than 1,000 clients through radio and newspaper ads and referrals from other firms.

Harmon has ordered the firm not to file any more suits in state courts, stopped its attempt to have state judges supervise the assets of Lay and others, and has indicated she will fine it for issuing a subpoena to a employee of an Enron off-the-book company because the lawyers did not get her authorization.

Still, if the firm accumulates enough clients and obtains a trial date (or dates), it will have sufficient leverage to become an independent player in settlement negotiations with the various defendants.

*Jez*'s boss, George Fleming, has a national reputation for aggressiveness. The firm has appealed Harmon's ban on state-court suits to the 5th U.S. Circuit Court of Appeals, which has indicated it is concerned that a federal judge has banned state claims. The firm wants to file next in Matagorda and Kerr counties.

Fleming has won national publicity from cases involving aviation accidents, polybutylene pipe, diet drugs and tobacco. The firm is currently involved prominently in lead paint and hip-replacement cases.

Much of Fleming's publicity has focused on his fees. In the plastic-pipe cases, he contracted for fees and expenses he said totaled \$108 million. A Harris County judge lowered the amount to \$43 million but an appellate court upheld the original contract.

Fleming gets 33 1/3 percent to 45 percent of anything won in the Enron cases, depending on how far the case goes in the judicial system.

In contrast, William Lerach, lead plaintiffs attorney in the federal shareholder class action, has a contract for only 8 percent to 10 percent, according to Trey Davis, spokesman for Lerach's client, the University of California.

"I don't mind that I'd pay more to my attorney," said David Jose, a San Antonio surgical equipment salesman and a Fleming client. "I figure it's a more focused rifle shot with a small state case."

Jose, whose wife heard a Fleming firm radio ad, is the named plaintiff in a Bexar County lawsuit now awaiting a federal judge's decision on whether it can proceed in that county. At stake is the \$20,000 in Enron stock he inherited from his grandmother that, in his words, "vaporized."

Hal Moorman, an attorney in Brenham who bought Enron stock after hearing Lay's speech there, said he also likes being in state court.

"I may get to trial faster. Things move quickly in our courts. And I won't have lost anything," he said, noting he could still opt into any federal class-action settlement that beats his case to the finish line.

Attorneys for defendants are trying to get the Fleming cases in Washington and Bexar counties moved to Houston federal court. Six Fleming firm lawsuits that originated in Harris or Brazos counties were successfully moved into Harmon's court.

Defense attorneys argue that Fleming and *Jez*, with more than 1,000 clients, are flouting federal securities law that requires cases of more than 50 people be heard in federal court.

*Jez* counters that it doesn't matter how many clients his firm has, but how many are in any one lawsuit. He said if Congress intended to keep small groups of people from suing in state court under any circumstances, the law would say so.

To be sure, Fleming's firm is not the only one to break from the pack. The Retirement Systems of Alabama, for instance, filed suit in state court there over \$65 million it claims to have lost in Enron securities. The pension funds are suing several financial institutions, blaming them for lending money to the company and some of its off-the-books partnerships while simultaneously pushing Enron securities without revealing its financial problems.

Careful to keep Enron itself out of the lawsuits because it is tied up in bankruptcy court, the Fleming firm is likely to add as defendants several financial institutions, which have reachable deep pockets.

*Jez* said the Fleming firm prefers "mass, not class" - meaning lots of smaller lawsuits instead of one big one, where everyone must agree and split the pot.

"I think a lot of times lawyers do class actions because the case is neater, it's a bigger package, you get a fee without a lot of work," he said. But he said in the phen-fen diet-drug cases, his firm's clients were paid more than a year ago while those in the class action are still waiting.

He said the goal is to get the client the most money, as quickly as possible. "We think we can get clients better deals because we have the ultimate hammer - we'll go to try the case, especially one like this where so much information is already public," *Jez* said.

The firm has not always won, however. Fleming recently lost a Harris County trial involving Rezulin, a diabetes medication.

But, *Jez* said, the firm doesn't balk at going its own way, even if its lawyers have to sit by themselves in a roomful of other attorneys.

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