United States Courts
Southern District of Texas
FILED

MAY 06 2002

Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*, Plaintiffs, v. ENRON CORPORATION, *et al.*, Defendants.	§ § § § § § § § §	Civil Action No. H-01-3624
PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, Derivatively On Behalf of Enron Corp., *et al.*, Plaintiffs, v. KENNETH L. LAY, *et al.*, Defendants.	§ § § § § § § § §	Civil Action No. H-01-3645
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, Plaintiffs, v. ENRON CORPORATION, *et al.*, Defendants.	§ § § § § § § § §	Civil Action No. H-01-3913

OPPOSITION TO DEFENDANT ANDREW S. FASTOW'S MOTION FOR PROTECTION FROM DOCUMENT REQUEST OF TITTLE PLAINTIFFS

U.S. COURTS
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I.

INTRODUCTION

In disregard of this Court's Scheduling Order of March 8, 2002, and with no authority whatsoever, Defendant Andrew S. Fastow ("Fastow") refuses to respond to the *Tittle* Plaintiffs' Request for the Production of Documents.[1] Fastow's refusal (unique amongst all the defendants to date) is as remarkable as it is untenable, for the following reasons:

First, as this Court is aware from the allegations of the Complaint that are taken as true for the purposes of this motion, Fastow was at the epicenter of the illegal acts that ultimately lead to the evisceration of the employees' retirement plans. As reported at length in the popular and business press, and verified through Congressional investigations and documents that have now been made public, and as alleged in the *Tittle* Complaint, Fastow was at the center of many of the improper Special Purpose Entities ("SPEs") that were designed to, *inter alia*, (i) improperly hide debt from Enron's books; (ii) improperly inflate Enron's earnings, and (iii) improperly reward Fastow with tens of millions of dollars in conflicted payments from Enron. The *Tittle* Complaint's controlling allegations detail this involvement. Hence, this Court should not entertain *Fastow's* repeated suggestion that he should not be a defendant in Plaintiffs' suit under ERISA, RICO and the common law.

Second, although Fastow is not now named as defendant in Plaintiffs' ERISA claims (as it does not now appear that he was a fiduciary of any of the Retirement Plans), he is quite plainly a key defendant in the RICO and civil conspiracy claims brought by Plaintiffs. If discovery reveals that he was a fiduciary of one or more of the plans, he will of course be named in the ERISA claims as well.

Third, there is nothing in this Court's Scheduling Order or the PSLRA that precludes discovery from Fastow merely because he is also a defendant in the *Newby* action under the

[1] The *Tittle* Plaintiffs respond separately to *Defendant Andrew S. Fastow's Motion to Postpone Discovery During Pendency of Criminal Proceedings.* Fastow has not sought a protective order relieving him of his obligation to respond.

federal securities laws. This Court recognized as much in its Order, and held that discovery in the *Tittle* case could begin "immediately" on claims that were "unique" to the *Tittle* case; as Fastow does not dispute, the RICO and civil conspiracy claims are unique to the *Tittle* case.

Finally, Fastow erroneously asserts that no discovery may proceed in the Fifth Circuit on fraud-based claims (including Plaintiffs' RICO and civil conspiracy claims here) until after the motions to dismiss are resolved. Fastow provides no authority that would allow him to import that PSLRA Rule into this action ***that indisputably is not brought under the securities laws.*** Once again, Fastow's argument is at odds with this Court's Scheduling Order.

In sum, Fastow's thinly-veiled request that this Court reconsider its Scheduling Order is untimely, and seeks only to impose further delay without any justification. Accordingly, this Court should deny the motion, and compel Fastow to produce undeniable relevant documents in his possession or control.

II.

ARGUMENT AND AUTHORITIES

A. This Court's Scheduling Order Allows Discovery From Fastow

Remarkably, although Fastow argues that he is somehow immune from discovery under this Court's Scheduling Order, he neglects to even mention or address the text of the Order itself. This omission is telling, as this Court clearly held:

> [T]he plaintiffs in the *Tittle* case, in as much as they are not subject to the PSLRA stay of discovery, may immediately begin any discovery unique to their case that has not been stayed in the *Newby* case by the PSLRA.[2]

As this Court further noted, "[t]he automatic stay of discovery mandated by the PSLRA was designed to prevent fishing expeditions in frivolous securities lawsuits." *Id.* It was not designed to prevent the *Tittle* Plaintiffs, with "unique," claims under RICO and the common law of Texas, from obtaining discovery. ***The flaw in Fastow's argument here is highlighted by the fact that***

[2] March 8, 2002 Scheduling Order at 4.

none of the other defendants, each with competent counsel, have similarly sought a protective Order.

Here, as Fastow also does not (and cannot) contest, he is a defendant in the following counts, each of which is unique to the *Tittle* First Amended Complaint ("FAC"): (i) Count VI (Violations of Sections 1962(c) and (d) of RICO)); (ii) Count VII (Violations of Sections 1962(a) and (d) of RICO), and (iii) Count IX (Civil Conspiracy). Accordingly, in keeping with this Court's Scheduling Order, discovery from Fastow is fully appropriate.

III.

THERE IS NO RULE AGAINST DISCOVERY ON RICO OR CONSPIRACY CLAIMS PRIOR TO THE RESOLUTION OF A MOTION TO DISMISS

Using the same sort of dissembling that has made him infamous, Fastow asserts that "Fifth Circuit law does not permit Plaintiffs to proceed with discovery on claims sounding in fraud against Fastow until after surviving a Motion to Dismiss." Fastow Mem. at 4. Fastow is wrong.

Indeed, the sole case upon which Fastow relies, *Williams v. WMX Techs. Corp.*, 112 F.3d 175, 177-78 (5th Cir. 1997), holds only that Fed. R. Civ. P. 9(b)'s particularity requirement applies to claims sounding in fraud. ***No one in good faith could contend that Williams bars discovery of fraud-based claims prior to resolution of a motion to dismiss.***

Indeed, in *Williams,* the Fifth Circuit found that the district court should have granted a motion to dismiss claims of securities fraud, RICO predicated on mail and wire fraud, and state law claims of fraud ***because the claims were not pled with the requisite particularity pursuant to Rule 9(b).*** *Williams,* 112 F.3d at 180. No discovery issues were before the Court. Notwithstanding the misleadingly out-of-context quote proffered by Fastow (Fastow Mem. at 4), when the Fifth Circuit held that the PSLRA "adopted the same standard" that Court applied to RICO and common law fraud-based claims, the Court was referring to the PSLRA ***pleading standard*** that requires "a plaintiff to specify the statements contended to be fraudulent, identify

the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 177 (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993).

Under *Williams,* if Fastow really believes the allegations against him are not sufficiently particularized, (*but see, e.g.,* FAC, ¶¶ 301-349), his remedy is a motion to dismiss on those grounds – and ***not*** a stay of discovery.[3]

IV.

CONCLUSION

For the reasons stated above, the *Tittle* Plaintiffs respectfully submit that this Court should deny Fastow's Motion for Protection from Document Requests of the *Tittle* Plaintiffs.

Respectfully submitted,

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[3] Finally, while Fastow correctly notes that Rule 9(b) governs fraud-based RICO predicates, he neglects the fact that normal Rule 8 standards govern Plaintiffs' RICO claims grounded in violations of 18 U.S.C. § 664 and 18 U.S.C. § 2313. *See, e.g., Colony at Holbrook v. Strata G C., Inc.,* 928 F. Supp. 1224, 1234 (E.D.N.Y. 1996). "[A]llegations of non-fraud based predicate acts [under RICO] need only . . . contain a 'short and plain statement' showing the pleader is entitled to relief." *Id.* at 1234; *see also McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir. 1992) (overruling a district court's holding that Rule 9(b) specificity was required for non-fraud predicates).

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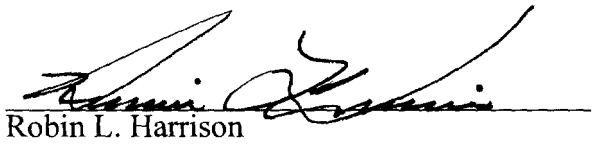
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion was served on all counsel by e-mail, certified mail, return receipt requested, and/or facsimile, this 6th day of May, 2002.



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