

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

5
MAY 28 2002

Michael N. Milby, Clerk

In Re ENRON CORP. SECURITIES
LITIGATION

) Consolidated Lead Case No. H-01-3624 ✓

_____)
RALPH A. WILT, JR.,)

) Civil Action No. H-02-0576

) Plaintiff,)

) v.)

) ANDREW S. FASTOW, et al.,)

) Defendants.)
_____)

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**THE WILT PLAINTIFFS' OPPOSITION TO
CERTAIN DEFENDANTS' MOTION TO STRIKE
FIRST AMENDED COMPLAINT IN *WILT V. FASTOW***

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF THE WILT PLAINTIFFS' RESPONSE IN OPPOSITION TO
CERTAIN DEFENDANTS' MOTION TO STRIKE
THE FIRST AMENDED COMPLAINT IN *WILT V. EASTOW***

1. SUMMARY OF ARGUMENT.

Plaintiffs Ralph A. Wilt, Jr., Keirnan J. Mahoney, and David I. Levine (the "Wilt Plaintiffs") oppose the Motion of Defendant Arthur Anderson, LLP and others to Strike the Wilt Plaintiffs' First Amended Complaint ("Motion to Strike") on the grounds that:

- (a) Plaintiffs Mahoney and Levine were entitled to join the Enron fraud litigation by filing the exact equivalent of the First Amended Complaint as their initial pleading;
- (b) the factual amendments in the First Amended Complaint are relatively discrete;
- (c) the Motion to Strike cites no apposite authority that would justify striking the entire First Amended Complaint;

- (d) the Order of Consolidation does not obliterate the individual actions that are consolidated with the Lead, *Newby* action; and
- (e) the First Amended Complaint is consistent with the amended Scheduling Order and the Federal Rules of Civil Procedure.

2. PROCEDURAL BACKGROUND.

On February 14, 2002, Plaintiff Wilt – without Plaintiffs Mahoney and Levine -- filed his original Complaint against Defendant Andrew S. Fastow and others, alleging fraud in stock transactions and civil conspiracy under Texas Business & Commerce Code Section 27.01 and common law fraud and civil conspiracy under Texas state law state. Pursuant to the Order of Consolidation of December 12, 2001, Plaintiff Wilt's individual action was consolidated with the Lead, *Newby* matter on February 18, 2002.

Having received no responsive pleading, the Wilt Plaintiffs filed a First Amended Complaint on the deadline of April 1, 2002, set in the original Scheduling Order. The Moving Defendants are now moving to strike the entire First Amended Complaint. The Motion to Strike should be denied in its entirety for the reasons detailed below.

3. LEGAL ARGUMENT AND ANALYSIS

A. **Plaintiffs Mahoney and Levine Were Entitled to File the Exact Equivalent of the First Amended Complaint as Their Initial Pleading.**

Plaintiffs Mahoney and Levine were not parties to the original Complaint filed by Plaintiff Wilt. As investors aggrieved by the Enron fraud, they were legally entitled to file their own individual action. Indeed, they could have filed the exact equivalent of the First Amended Complaint, either jointly or separately, as an individual action. If they had done so, those new actions would have resulted in consolidation orders, and they would be in essentially the identical procedural posture. The Moving Defendants would have no grounds for moving to strike such separate complaints.

Plaintiffs Mahoney and Levine chose to join Plaintiff Wilt's existing action as new parties in the First Amended Complaint because that was the most efficient way to proceed. It is axiomatic that the Federal Rules of Civil Procedure "shall be construed and administered to secure the *just, speedy, and inexpensive* determination of every action." Fed. R. Civ. P. 1 (emphasis added). Consistent with this bedrock principle, the Court should rule that Plaintiffs Mahoney and Levine were entitled to join the Enron litigation by joining their claims with Plaintiff Wilt's, through jointly retained counsel, by means of the First Amended Complaint. To argue otherwise, as Moving Defendants so, is to place

form over substance and needlessly increase the administrative burdens on the Court. Plaintiffs have advanced no good reason for such hypertechnical formalism.

The Moving Defendants purport to base the Motion to Strike upon the Order of Consolidation, but their Motion conflicts with the Order. This Court contemplated that future cases relating to the Enron securities fraud would be filed. This Court expressly provided in that Order that future cases relating to the Enron securities fraud would be consolidated with the lead, *Newby* action. This Court has never ordered that future cases cannot be filed in this District, nor has this Court ever barred individual investors from filing individual actions as opposed to participating in the class actions. Notwithstanding the absence of any such ruling by the Court (and any authority to enter such an Order), the Moving Defendants are asking this Court to strike the *initial pleading by Plaintiffs Mahoney and Levine*. In so doing, the Moving Defendants are inviting clear error.

B. The Factual Amendments Are Relatively Discrete.

The primary purpose of the First Amended Complaint was to join Plaintiffs Mahoney and Levine efficiently. The secondary purpose was to correct typographical errors and to add the following discrete allegations about the Accountant Defendants:

On information and belief, on dates and/or during a period that is currently not precisely known, AA has made strategic business decisions to transform itself from a traditional, independent, and objective accounting and auditing firm with acknowledged responsibilities to the public, into a very aggressive, pro-active, pro-client, advisory firm committed to promoting client success through value creation. On information and belief, the AA model of client success through value creation was described at length by three AA partners, on behalf of AA, in *Cracking the Value Code: How Successful Businesses Are Creating Wealth in the New Economy* (2000), and summarized as follows:

Value creation – that is, future value captured in the form of increased market capitalization – is how successful businesses are creating value in the New Economy....

In the pages that follow, you will find a new set of tools that we have developed to help you create value in the New Economy [i.e. increased market capitalization]. It is called Value Dynamics, and it is based, in part, on an intensive three-year, 10,000-company research project by professionals at Arthur Andersen.

On information and belief, on or about January 10, 2001, AA appointed Joseph F. Berardino to be its new chief executive officer. In a press release announcing Mr. Berardino's new appointment, AA described its collective "Cracking the Value Code" vision as follows:

Arthur Andersen's vision is to be the partner for success in the new economy. The firm helps clients find new ways to create, manage and measure value in the rapidly changing global economy. With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing and a focus on client success.

On information and belief, the fraudulent acts, omissions, and scheme set forth below was substantially the result of AA's very aggressive, pro-active, pro-client business strategy and management-consulting philosophy of fostering "inventiveness" and promoting client success through value creation as measured by increased market capitalization. On information and belief, if AA had performed the more traditional roles of independent and objective accountant and auditor, then the fraudulent acts, omissions, and scheme below would not have occurred or would have been exposed much earlier.

First Amended Complaint ¶¶ 48-50.

It is understandable that the Moving Defendants would prefer not to address these new paragraphs. However, they cite no authority to justify striking this new matter, and it should be allowed to ensure a just, speedy, and inexpensive determination of this case.

C. The Motion to Strike Cites No Apposite Authority That Would Justify Striking the Entire First Amended Complaint.

The Motion to Strike relies on the "inherent authority of Rule 42(a) and this Court's consolidation orders." Federal Rules of Civil Procedure 42(a) provides that:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The Moving Defendants devote much of their brief to describing this Court's power to manage related cases under Rule 42(a). The Wilt Plaintiffs agree in general principle and have not contested consolidation at any time. In fact, they argued strongly in support of consolidation in their Response in Support of the Court's Order of Consolidation and Opposition to Vinson & Elkins Motion to Sever Themselves (PACER No. 410), stating: "it cannot be denied in good faith that the requirements for consolidation of *Wilt* with *Newby* under Rule 42(a) are satisfied. Many common issues of fact and law exist."

The remaining portion of the Motion to Strike makes general observations but cites no authority to justify striking the First Amended Complaint. More specifically, the Moving Defendants do not (and cannot) cite authority for their contention that the filing of the Consolidated Class Action Complaint by Lead Counsel in *Newby* wipes out the First Amended Complaint in *Wilt*. Their contention is erroneous and absurd.

D. The Order of Consolidation Does Not Obliterate the Individual Actions That Are Consolidated with the Lead, *Newby* Action.

In *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97, 53 S. Ct. 721, 727-28 (1933), the Supreme Court addressed consolidation in a receivership suit. The Court concluded that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of

the parties, or make those parties in one suit parties in another.” *Id.* The Court could not have been more clear that consolidation does not obliterate the consolidated cases.

Johnson was decided prior to Rule 42(a), but the Fifth Circuit continues to follow *Johnson*. For example, in *In re Excel Corporation*, 1997 U.S. App. LEXIS 12792 (5th Cir. 1997), the Fifth Circuit stated:

Before Rule 42(a) was adopted, the Supreme Court in *Johnson v. Manhattan Railway Co.*, 289 U.S. 496-97, 53 S. Ct. at 727-28, held that consolidation “does not merge suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” We have adhered to this instruction after the adoption of Rule 42(a).

See also Bristol-Myers Squibb Co. v. National Casualty Corp., 43 F. Supp.2d 734, 745 (E.D. TX 1999); *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982); *Oelze v. Commissioner of Internal Revenue*, 723 F.2d 1162, 1163 (5th Cir. 1983).

In *Miller v. United States Postal Service*, 729 F.2d 1033, 1036 (5th Cir. 1984), the Fifth Circuit again followed *Johnson*: “consolidation does not so completely merge the two cases as to deprive a party of any substantial rights that he may have had if the actions had proceeded separately, for the two suits retain their separate identities and each requires the entry of a separate judgment.” In *Miller*, the plaintiff was concerned that

consolidation would inexorably join his two suits and that if one were dismissed, the other would inevitably be dismissed as well. The Court held that Miller's concern was unfounded because the suits, though consolidated, "retain their separate identities." *Id.*

Johnson is followed, as it must be, in securities fraud class actions. In *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115 (S.D.N.Y. 1997), one group of plaintiffs objected to consolidation because they feared that consolidation would interfere with their selection of counsel and their ability to affect their case. *Id.* at 130. The Court ordered consolidation, stating that it would not "impair their right to choose their own counsel or have any substantial impact on their ability to pursue their claims." *Id.* The Court observed that the cases maintained their separate identity despite the consolidation order. *See also Discount Bank & Trust Co., v. Salmon Inc.*, 141 F.R.D. 42 (S.D.N.Y. 1992); *Garber v. Randell*, 477 F.2d 711, 716 (2nd. Cir. 1973).

This Court's consolidation and scheduling orders do not cause the *Wilt* action, the *Wilt* Plaintiffs' original Complaint, or their First Amended Complaint to "disappear," as argued by Moving Defendants. Rather, under *Johnson* and settled Fifth Circuit case law, the *Wilt* action survives as a separate and distinct individual case, and the First Amended Complaint is the operative pleading. Therefore, the Motion to Strike must be denied.

E. The First Amended Complaint Is Consistent with the Amended Scheduling Order and the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 15(a) provides for amendment as of right:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

The Fifth Circuit discussed the term "pleading" under Rule 15(a) in *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 - 21 (5th Cir. 1984). The Court held that Federal Rule of Civil Procedure 7(a) defines a "pleading." *Id.* Rule 7(a) provides:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

The Court in *Zaidi* noted that Rule 7(a) did not include a motion to dismiss or a motion for summary judgment. *Id.* See also *Grynberg Production Corp. v. British Gas*, 149 F.R.D. 135 (E.D. TX. 1993); *Barksdale, II v. King*, 699 F.2d 744 (5th Cir. 1983).

No responsive pleading was filed or served to the original Complaint. Therefore, under Rule 15(a), the Wilt Plaintiffs were free to file the First Amended Complaint. The Wilt Plaintiffs did so on April 1, 2002, in compliance with the deadline set in this Court's original Scheduling Order, thereby proving that they are following the Court's orders and are not, as suggested by Moving Defendants, a loose cannon on the deck. Therefore, the First Amended Complaint complies with Rule 15(a) and all of this Court's orders.

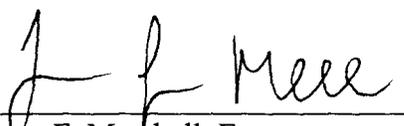
4. **CONCLUSION.**

The Moving Defendants cite no controlling authority and give no good reason to justify striking the First Amended Complaint. Plaintiffs Mahoney and Levine were entitled to join the *Wilt* case as new plaintiffs in that amended pleading. This Court's consolidation orders do not cause the *Wilt* case to cease to be a separate and distinct case with its own operative pleading. Plaintiff *Wilt* was entitled to file the First Amended Complaint as of right under Federal Rule of Civil Procedure 15(a) and did so by April 1, 2002, in full compliance with all this Court's orders. The Wilt Plaintiffs fully intend to continue complying with the Scheduling Order and have not tried to take their individual case "outside of the scope of the Court's orders," as the Moving Defendants suggest. For all the reasons set forth above, the Motion to Strike the First Amended Complaint in *Wilt v. Fastow* should be denied in its entirety.

The Moving Defendants should not be permitted to file serial motions against the First Amended Complaint. The Motion to Strike should be deemed a motion to dismiss under the amended Scheduling Order. Accordingly, the Moving Defendants should be ordered to answer the First Amended Complaint by a date certain, to be set by the Court.

Dated: May 22, 2002

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CERTIFICATE OF SERVICE

**In re ENRON Corp. Securities Litigation
Consolidated Lead Case No. H-01-3624**

**Wilt v. Fastow,
Case No. H-02-0576**

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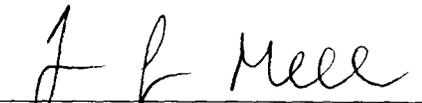
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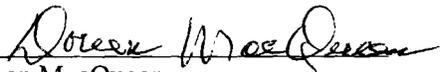
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Carolyn S. Schwartz
United States Trustee, Region 2

Fax Number:
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