United States Courts
Southern District of Texas
FILED
JUN 17 2002
Michael N. Milby, Clerk

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

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| **In re ENRON CORPORATION SECURITIES LITIGATION** | § | |
| | § | |
| **This Document Relates To:** | § | |
| | § | |
| **MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,** | § | |
| | § | |
| **Plaintiffs,** | § | |
| | § | |
| **vs.** | § | **Civil Action No. H-01-3624** |
| | § | **(Consolidated)** |
| **ENRON CORP., et al.,** | § | |
| | § | |
| **Defendants.** | § | |
| | § | |

**ENRON CORP.'S OPPOSITION TO**
**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S**
**MOTION FOR A LIMITED PRODUCTION OF ENRON DOCUMENTS**

Enron Corp. ("Enron") respectfully files this Opposition to the Regents of the University of California's Motion for a Limited Production of Enron's Documents.

## SUMMARY OF ARGUMENT

The Private Securities Litigation Reform Act of 1995 ("the PSLRA"), codified at 15 U.S.C. §§ 77a et seq., unambiguously states:

> In any private action arising under this chapter, *all discovery and other proceedings shall be stayed* during the pendency of any motion to dismiss, unless the court finds upon motion of any party that particularized discovery is necessary to preserve evidence or to prevent prejudice to that party.



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15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). As is clear from the text of the statute, there are only two exceptions to this explicit ban on discovery during the pendency of motions to dismiss: (1) a showing that particularized discovery is necessary to preserve evidence or (2) a showing that particularized discovery is necessary to prevent prejudice to the moving party. The Motion for a Limited Production of Enron Documents by the Regents of the University of California (hereinafter, "plaintiff") makes no pretense of falling within either of these two limited exceptions.

As plaintiff has failed to set forth any legally recognized justification for violating the mandatory stay of discovery set forth in the PSLRA, Enron respectfully requests that plaintiff's Motion for a Limited Production of Enron's Documents be denied.

## ARGUMENT

### I. The Court Allowed Access to a Limited Set of ERISA Documents Because ERISA is Not Subject to the PSLRA.

The PSLRA reflects Congress's clear intent that complaints in securities cases are to be measured on their face against stringent pleading requirements and that the mere filing of a complaint is not to be used as a means to launch discovery to see if the claims postulated actually have any support. The Senate Securities Subcommittee determined that "discovery should be permitted in securities class actions only after the court has sustained the legal sufficiency of the complaint." S. Rep. 104-98, 1995 WL 372783 (Legis. Hist.), at 14 (1995), 1995 U.S. Code Cong. & Admin. News 679, 693. Congress codified that requirement in 15 U.S.C. § 78u-4(b)(3)(B). The statute is clear and unambiguous. It forbids "discovery" "during the pendency

of any motion to dismiss," unless the court finds upon motion that particularized discovery is necessary to preserve evidence or to prevent prejudice to that party. *Id.*

It is well settled that when interpreting a statute, a court must first look to the plain meaning of the language used by Congress. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent," the judicial inquiry ends. *Id.* at 340. Here, the PSLRA clearly states that "[i]n any private action . . . all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss . . ." 15 U.S.C. § 78u-4(b)(3)(B). The Court's inquiry should begin and end with this plain language. Plaintiff's motion must be denied. *Id.* at 340.

Plaintiff's argument for violating the established statutory proscription on discovery seems to be a "give an inch; take a mile" strategy. Notably, plaintiff's Motion makes no mention of the PSLRA's requirements, let alone any effort to show how they are satisfied here. Instead, plaintiff argues that since the Court allowed a limited production of documents in connection with investigations into Enron's handling of its ERISA-governed plans, the Court should also require Enron to produce tens of thousands of documents related to the core of the securities claims. Specifically, plaintiff asks the Court to order production of the following documents:

> [A] copy of all documents and materials Enron produced in connection with any inquiry or investigation into the Company's business affairs that were provided to any legislative branch committee, the executive branch, including DOJ and SEC, copies of all transcripts or witness interviews taken or conducted by governmental entities or Wilmer, Cutler & Pickering, in its representation of the Enron Board's Special Investigative Committee, or

> depositions in Enron's possession given or taken in connection with these inquiries or investigations.

Plaintiff's Motion for Limited Production of Enron Documents at 1. As is clear from the breadth of plaintiff's request, and plaintiff's failure to allude to any statutory basis for it, plaintiff effectively asks this Court to eviscerate the automatic stay mandated by the PSLRA.

Plaintiff attempts to justify its current motion to commence discovery by relying on a sentence in the Court's February 27, 2002, Scheduling Order, addressing the ERISA claims brought by the *Tittle* plaintiffs. In discussing the schedule under which Enron was to produce documents previously produced in connection with investigations into its ERISA-governed plans, the Court stated that the PSLRA "was not designed to keep secret from counsel in securities cases documents that have become available for review by means other than discovery in the securities case." S.D. Tex. No. H-01-3624, Order, 1/27/02 (filed 1/28/02), at 4.

Plaintiff's attempted reliance on this sentence to avoid the PSLRA's mandate of a stay of discovery in securities claims is misplaced. In the immediately preceding paragraphs of the Scheduling Order, the Court ordered Enron to place into a document depository copies of documents Enron had produced since filing for bankruptcy and pursuant to subpoena in connection with inquiries or investigations into the Company's handling of its ERISA-governed pension plans. *Id.* at 3. The Court further directed that, once placed into the depository, these documents were to be "made available to all lawyers in both the consolidated *Tittle* and *Newby* cases." *Id.* It was only after ordering that the *Newby* plaintiffs could have access to documents produced in connection with investigations into Enron's ERISA plans that the Court allowed that the PSLRA was "not designed to keep secret from counsel in securities cases documents that

*have become available for review by means other than discovery in the securities case."* *Id.* (emphasis added)

The Court's January 18, 2002, Order stated that "[t]he Court seeks to reassure [ERISA] Plaintiffs that it does not intend to rigidly impose on the ERISA cases the delayed schedule or procedural hoops *required for the securities fraud cases governed by the PSLRA.* Every effort will be made to accommodate both groups." S.D. Tex., No. H-01-CV-4236, Order, 1/18/02 (filed 1/22/02) at 7 (emphasis added). Recognizing potential difficulties in consolidating ERISA claims with securities law claims, the Court explicitly set out the options available to ERISA plaintiffs on how to proceed with their claims, given the consolidation and the bankruptcy case. *Id.* at 7.

In the Scheduling Order, the Court reiterated that it was not subjecting the ERISA claims to the PSLRA's requirements and was allowing access to ERISA documents by "plaintiffs in the *Tittle* case, *inasmuch as they are not subject to the PSLRA stay of discovery* . . ." S.D. Tex. No. H-01-3624, Order, 1/27/02 (filed 1/28/02) at 4 (emphasis added). The Court never intimated that it would not enforce the PSLRA's statutory stay of discovery with respect to the securities law claims.

Plaintiff offers no authority or rationale for expanding the Court's Scheduling Order's accommodation of the ERISA claims to order wholesale production of hundreds of thousands of pages of documents in the securities case. Whether the discovery request is a "fishing expedition" or a "surgical strike," the PSLRA prohibits both. An effort to "accommodate both groups" does not translate to violation of the "mandatory" and "automatic"

dictate of the PSLRA's statutory discovery stay. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001).

## II. The PSLRA Stays All Discovery in All Contexts.

The current posture of this case is precisely the situation in which Congress sought to preclude discovery. Currently before the Court are motions to dismiss challenging the legal sufficiency of plaintiffs' Amended Complaint. At this juncture, Congress intended for plaintiffs to focus on rebutting the legal attacks made on the complaint, rather than seeking information from defendants or third parties as a means of obfuscating those attacks. "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed." *SG Cowen Securities Corp. v. United States District Court for the Northern District of California*, 189 F.3d 909, 912 (9th Cir. 1999) (quoting *Medhekar v. United States Court*, 99 F.3d 325, 328 (9th Cir. 1996)) (mandamus petition granted, vacating district court's order allowing discovery in securities law case where motion to dismiss was pending).

The PSLRA bans all discovery in all contexts, absent application of the two exceptions. "There is no distinction between discovery of non-parties and parties." *In re Carnegie International Corp. Securities Litigation*, 107 F. Supp. 2d 676, 679 (D. Md. 2000); *see In re Grand Casinos, Inc. Securities Litigation*, 988 F. Supp. 1270 (D. Minn. 1997) (stay prohibits seeking discovery from parties and non-parties alike). Further, all parties have an interest in maintaining the stay of discovery, regardless of whether the request was propounded

to them or to another party. *In re CFS-Related Securities Fraud Litigation AUSA*, 179 F. Supp. 2d 1260 (N.D. Okla. 2001).

For example, in *In re CFS*, plaintiffs argued that the stay did not apply to those defendants who had not filed motions to dismiss. In rejecting this argument, the court wrote:

> Plaintiffs suggest that because CSI has not filed a motion to dismiss, the PSLRA's discovery stay does not apply to CSI, and discovery should proceed as to CSI. Such an interpretation of the PSLRA's discovery stay is not, however, supported by § 78u-4(b)(3)(B)'s language. . . . As long as any defendant has filed a motion to dismiss claims arising under Chapter 2B of the 1934 Securities Act, the PSLRA stays "all discovery," even discovery against answering, non-moving defendants. If this were not so, the PSLRA's stay would be of little benefit to those defendants who do move to dismiss.

*Id.* at 1263. As the Court explained, if a plaintiff and a non-moving defendant engage in discovery, at a minimum, the moving defendant will want to monitor the process to protect its interests. *Id.* at 1264. Further, allowing discovery to proceed against certain defendants while the PSLRA's stay is in effect with regard to other defendants is extremely inefficient, particularly in litigation involving a large number of parties, because targets will have to respond to waves of discovery requests, as opposed to engaging in a coordinated, consolidated discovery plan. *Id.* Lastly, the court recognized:

> Plaintiffs are not, however, the only parties interested in obtaining discovery from CSI. CSI has many co-defendants in this action which more than likely want to point the finger away from themselves and toward CSI, and will need discovery from CSI in order to do so. . . . If Plaintiffs are permitted to proceed with their discovery now, CSI will have to review a mountain of documents to respond to plaintiff's requests and then CSI will have to

> review that mountain again when the cross claimants and those co-defendants with pending motions to dismiss propound their discovery requests once the PSLRA's discovery is lifted.

*Id.* Allowing discovery against any party renders the stay meaningless for all.

There are only two exceptions to the PSLRA's preclusion of discovery while a motion to dismiss is pending, neither of which plaintiff claims.[1] 15 U.S.C. § 78u-4(b)(3)(B). "[T]his provision has been interpreted to mean that discovery is stayed from the filing of the complaint until the court has determined the sufficiency of the plaintiff's pleading, unless the plaintiff can establish one of the exceptions." *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 709 (S.D. Tex. 2002).

The pendency of related bankruptcy proceedings does not affect the applicability of the PSLRA stay. In *Mishkin v. Ageloff*, 220 B.R. 784 (S.D.N.Y. 1998), the bankruptcy court granted the trustee relief from the automatic stay imposed by the PSRLA, on the ground that relief from the stay was needed to avoid undue prejudice. In accepting the appeal and vacating the order, the district court held that the trustee failed to articulate the particularized discovery necessary to avoid undue prejudice and, therefore, did not satisfy the requirements for relief from the stay. *Id.* at 794-95. In making this finding, the district court rejected arguments that a request for "duplication of discovery" – akin to the request here -- could be considered

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[1] Given that plaintiff recognizes that these documents have been produced to government agencies, plaintiff can hardly claim discovery is necessary to preserve evidence. Additionally, plaintiff's blanket request for all documents, interview memos, and deposition transcripts related to not only every governmental inquiry, but also Wilmer, Cutler & Pickering's investigations, cannot be characterized as "particularized discovery." *See Mishkin v. Ageloff*, 220 B.R. 784, 793 (S.D.N.Y. 1998).

particularized. *Id.* at 793-94. Moreover, the *Mishkin* Court rejected the argument that somehow the facts of the case – the combination of a bankruptcy estate and a securities class action falling within the scope of the PSLRA -- made the stay inapplicable. "[O]ther courts have rejected similar arguments from litigants seeking to carve out special exceptions, based upon arguably unique circumstances, from the broad language ('any private action') adopted by Congress." *Id.* at 795 (citing *In re Trump Hotel Shareholder Derivative Lit., No. 96*, 1997 WL 442135 at *1 (S.D.N.Y. 1997) (rejecting argument that the automatic stay provision does not apply to derivative actions); *Medical Imaging Centers of America v. Lichtenstein*, 917 F. Supp. 717, 721 (S.D. Cal. 1996) (rejecting argument that the automatic stay provision does not apply to injunction actions filed by corporations)). There is simply no legally recognized justification for plaintiff to begin discovery now.

## III. The Scope of Plaintiff's Request Exceeds the Allegations of the Pending Complaint.

Plaintiff's request, although styled as "limited," actually exceeds the scope of the allegations in the pending Amended Complaint. Plaintiff's request includes documents Enron has produced to any committee of Congress or the executive branch in connection with ***any*** inquiry into the company's business affairs, whether or not those inquiries are germane to the allegations in Amended Complaint. Among other subjects not pertinent to the allegations in *Newby*, plaintiff's request literally encompasses the thousands of documents Enron has produced to the FERC in connection with an investigation into company's energy marketing and trading practices in California and elsewhere. The Amended Complaint is not based upon these trading

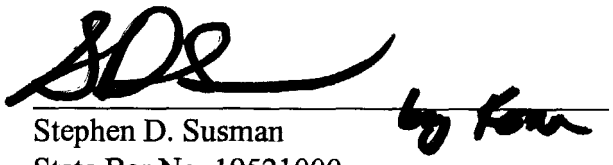
practices, nor could it be since their disclosure occurred after Enron filed for bankruptcy in December of last year.

## CONCLUSION

The PSLRA requires all discovery to be stayed until a motion to dismiss is resolved and the validity of the complaint has been tested. Plaintiff presents nothing to justify violating Congress's prohibition on discovery while a motion to dismiss is pending, absent an applicable exception. Enron respectfully submits that plaintiff's Motion for a Limited Production of Enron Documents should be denied.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: 

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**CERTIFICATE OF SERVICE**

I, Kenneth S. Marks, hereby certify that on the 17th day of June, 2002, the foregoing was served by first class mail on the attached service list.

Kenneth S. Marks

The Service List

Attached

to this document

may be viewed at

the

Clerk's Office