United States Courts
Southern District of Texas
ENTERED

APR 18 2005

Michael N. Milby, Clerk of Court

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

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	§	MDL-1446
MARK NEWBY, ET AL.,	§	
Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624
	§	CONSOLIDATED CASES
ENRON CORPORATION, ET AL.,	§	
Defendants	§	

ORDER

Pending before the Court in the above referenced cause is Kenneth L. Lay's motion to dismiss Excess Enron D&O Policy Insurers' (Associated Electric & Gas Insurance Services Limited, Federal Insurance Company, Greenwich Insurance Company, and St. Paul Mercury Insurance Company's) Third-Party Interpleader Counterclaim[1] and Former Enron Outside Directors' "Counterclaim"[2]

[1] Part 2 of Instrument #2483. Part 1 is the Insurers' Answer to the Outside Directors' Third-Party Complaint for Contract Enforcement and Injunctive Relief regarding D&O Policy Proceeds (#2450, filed on October 12, 2004) against a large number of insurers, including those involved in the Interpleader. The First Amended Third-Party Complaint announced that the Outside Directors had settled with Plaintiffs in the *Newby* action and with the Official Committee of Unsecured Creditors of Enron Corporation in the derivative *Pirelli* actions and sought to utilize all of the Enron D&O liability insurance above the Hartford/Twin City layer of excess coverage to fund the settlements. The Outside Directors sought a declaratory judgment of their right to use these insurance proceeds and a preliminary injunction, which they were granted, and and a permanent injunction barring the Insurers from paying out any proceeds from the excess policies above the Hartford/Twin City layer of excess coverage to preserve the funds for the settlement.

[2] Part 2 of Instrument #2551, which was Outside Directors' Answer to the D&O Insurers' First Amended Action in Interpleader

for lack of jurisdiction (instrument #2607). Ken Harrison and Jeffrey Skilling also challenged subject matter jurisdiction in their opposition to the Outside Directors' application for preliminary injunction.

The D&O Insurers assert federal question subject matter jurisdiction for their Interpleader Counterclaim based on interpleader jurisdiction under 28 U.S.C. § 1335 and on supplemental jurisdiction under 28 U.S.C. § 1367.

The Outside Directors base their subject matter jurisdiction for their Counterclaim for Declaratory Relief on 28 U.S.C. §§ 1335 and 1367, as well as on 28 U.S. C. §§ 2201(a) and 2202.

Lay contends that federal jurisdiction cannot be based on a defense or counterclaim, but must arise from the face of a plaintiff's "well-pleaded complaint." *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830-32 (2002); *Metro Ford Truck Sales v. Ford Motor Co.*, 145 F.3d 320, 326-27 (5th Cir. 1998). He insists there is no federal question jurisdiction apparent from the face of the Outside Directors' First Amended Third-Party Complaint for Contract Enforcement, which asserts federal jurisdiction based solely upon § 1367, to provide federal question jurisdiction over the two counterclaims that arise from it, i.e., the Insureds' Interpleader Counterclaim and the Outside Directors' Counterclaim for Declaratory Judgment. He notes that the Outside Directors' claims against the insurers

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(#2488, filed on October 22, 2004).

are based on contractual and common law tort duties and thus do not arise from a "common nucleus of operative fact" with the allegations asserted by the securities and derivative plaintiffs in *Newby* and *Pirelli*.

In relation to requests for preliminary injunctive relief, this Court has previously addressed the same issues. *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, No. MDL-1446, Civ. H-01-3624, 2004 WL 2889891 (S.D. Tex. Dec. 9, 2004), It found that it had federal subject matter jurisdiction under 28 U.S.C. § 1335, because it is a statutory interpleader action filed by the Excess Insurers within the original jurisdiction of the Court, because there are two or more claimants to the insurance proceeds that are of diverse citizenship, and because the amount in controversy, $500.00, has been satisfied. *Id.* at *1. This Court also determined that it has supplemental jurisdiction under § 1367(a) over the Settling Parties' Interpleader Action and the Counterclaims in response to that Interpleader because the claims in those actions are so related to claims in *Newby* and in *Pirelli*, over which the Court has federal subject matter jurisdiction, that they constitute part of the same case or controversy and because claims for indemnity are within the ancillary (now supplemental) jurisdiction of the federal courts. *Id.* at *2, *citing* § 1367 ("supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties"); *W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865, 870 (5th Cir.

1990)("clearly proper" use of ancillary jurisdiction to bring insurers into a case during settlement negotiations); *Zurn Indus., Inc. v. Acton Construction Co. v. Garland*, 847 F.2d 234, 238 (5th Cir. 1988)(multiple insurers and indemnitors brought into the case through ancillary jurisdiction); *Revere Copper and Brass Inc. v. Aetna Casualty and Surety Co.*, 426 F.2d 709, 716 (5th Cir. 1970)("action for indemnity . . . would not exist without the threat of liability arising out of the original claim"); *Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 436-37 (2d Cir. 2000)("It is well settled that a third-party action for indemnification comes within a court's ancillary jurisdiction.").

Furthermore the Court now concludes that it has jurisdiction over the Outside Directors' Counterclaim for Declaratory Judgment under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), pursuant to which it "may declare the rights and legal relations of any interested party seeking such declaration," although it is not compelled to exercise that jurisdiction. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995). The Fifth Circuit has established seven factors for a district court to consider in deciding whether to exercise its jurisdiction: whether there is a pending state court action in which all of the matters in dispute may be fully litigated; whether the plaintiff filed this suit in anticipation of a suit filed by defendant; whether the plaintiff was forum shopping in bringing this suit; whether there are possible inequities in

allowing the declaratory plaintiff to gain precedence in time or to change forums; whether the federal court is a convenient forum for the parities and witnesses; whether retaining the lawsuit would serve the purposes of judicial economy; and whether the federal court is being asked to interpret a state judicial decree involving the same parties and entered by the court before whom the parallel state court suit is pending. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994). The answers to these questions fully support this Court's exercise of jurisdiction under the statute. There is no parallel state court action pending, and thus no state judicial decree to construe; the interpleader and counterclaims were not filed in anticipation of defendants' bringing a suit, the plaintiff was not forum shopping but filing it in the MDL suit addressing the disputes covered by the policies; there are no inequities in pursuing these matters in this forum where the primary litigation is proceeding; for the same reason the forum is the most convenient and judicial economy is optimally served.

Accordingly, the Court

ORDERS that Defendant Lay's motion to dismiss for lack of subject matter jurisdiction is DENIED.

SIGNED at Houston, Texas, this 30th day of March, 2005.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE