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

JUN 9 2004
Michael N. Milby, Clerk

In Re ENRON CORPORATION SECURITIES LITIGATION	§	
THIS DOCUMENT RELATES TO:	§	
All Cases	§	
MARK NEWBY, ET AL.,	§	
Plaintiffs,	§	**CIVIL ACTION NO: H-01-3624**
v.	§	**(Consolidated)**
ENRON CORPORATION, ET AL.,	§	
Defendants.	§	

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MOTION TO COMPEL LEAD PLAINTIFF
TO ANSWER INTERROGATORIES
- and -
REQUEST FOR EXPEDITED CONSIDERATION

Defendants Mark A. Frevert, Steven J. Kean, Rebecca Mark-Jusbasche, and Lou L. Pai ("Defendants") file this motion to compel Lead Plaintiff to answer interrogatories, and respectfully show the Court as follows:

I. Introduction

Between March 19 and March 25, 2004, Defendants each served a set of interrogatories on Lead Plaintiff. The interrogatories that are the subject of this motion are simple, straightforward "identification" interrogatories; they simply request the Lead Plaintiff to identify specific persons quoted or referred to in the Lead Plaintiff's live Complaint. Defendants propounded the

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interrogatories to discover basic information necessary to prepare for fact-witness depositions, which have just started.

In response, Lead Plaintiff interposed at least 16 "general" objections and at least two specific objections to each interrogatory and typically limited the substantive answer to a generic reference to a list of 131 persons "likely to have discoverable information Lead Plaintiff may use to support its claims." A copy of Lead Plaintiff's response to each set of interrogatories is attached as Exhibits A-D.

II. Discussion

The interrogatories at issue request the Lead Plaintiff to identify specific persons falling into one of two categories: a) persons quoted in the Complaint; or b) persons referred to in the Complaint. Both categories constitute basic factual information clearly discoverable under the Rules. The longer Lead Plaintiff is able to avoid providing these clearly discoverable facts, the longer Defendants will be unfairly handicapped in conducting depositions.

A. Persons quoted in the Complaint.

Defendants move to compel complete answers to the following interrogatories, all of which seek information concerning the identity of specific persons quoted in the Complaint:

Mark Frevert Interrogatory Nos. 1, 5, 6, 13

Steven Kean Interrogatory Nos. 1, 3, 6, 7, 8, 9, 10, 12, 14

Lou Pai Interrogatory Nos. 3, 4, 5, 9, 11, 12, 13, 14

Rebecca Mark-Jusbache Interrogatory Nos. 1, 2, 9, 10

For example, Frevert Interrogatory No. 1 reads:

> Please identify the "co-author of Enron's broadband business plan" who said that by Spring 99 EIN development had "deteriorated into chaos," as alleged in ¶ 635 of the Complaint, and the factual basis for this identification. Include in your identification of factual basis the identification of the witness(es) and/or documents upon which you rely for such factual basis.

Leaving aside Lead Plaintiff's myriad, non-specific "General Objections," Lead Plaintiff objected that this interrogatory "seeks information that constitutes work product and reveals privileged attorney-client communications," and that the interrogatory is actually more than one interrogatory for purposes of the 25-interrogatory limit. Subject to its objections, Lead Plaintiff responded by referring to a list of 131 "persons likely to have discoverable information."

To begin with, Lead Plaintiff has failed to answer the interrogatory. Reference to a general list of possible witnesses is effectively the same as no answer at all. Discovery under the Rules is not multiple choice. If Lead Plaintiff knows the specific answer to the interrogatory, then reference to the list is merely obfuscatory and the interrogatory should be directly answered. If Lead Plaintiff does not know the answer, then reference to the list is meaningless and misleading.

Nor do Lead Plaintiff's objections present any valid excuse for failing to answer.

First, no attorney-client privilege could possibly protect the requested information (for example, counsel for Lead Plaintiff presumably does not represent the "co-author of Enron's broadband business plan"), and Defendants doubt that Lead Plaintiff would seriously contend that it does.

That leaves only Lead Plaintiff's second objection, based on the work-product doctrine (codified in the Rules as "Trial Preparation: Materials"). *See* Fed. R. Civ. P. 26(b)(3). Lead Plaintiff's assertion of the work-product doctrine immediately stumbles because the doctrine applies *only* to "documents and tangible things." *See, e.g., In re Pfohl Bros. Landfill Litigation*, 175 F.R.D.

13, 27 (W.D.N.Y. 1997) (noting that to be protected as work product, it must "be a document or tangible thing"); Fed. R. Civ. P. 26(b)(3). "*[O]ral* communications are not tangible documents for purposes of the work-product doctrine." *Pfohl Bros.*, 175 F.R.D. at 27. Moreover, the work-product doctrine protects an attorney's mental impressions and thought processes; it "does not extend to the underlying facts relevant to the litigation." *Piatkowski v. Abdon Callais Offshore, L.L.C.*, Civ. No. 99-3759, 2000 WL 1145825, at *2 (E.D. La. Aug. 11, 2000).

These principles are not controversial. Applying them, another district court in this circuit explained: "[F]acts that the adverse party's lawyer or representative has learned, *or the persons from whom he or she learned such facts*, . . . is [sic] discoverable." *Robinson v. La Dock Co.*, Civ. No. 99-1996, 2000 WL 1059860, at *2 (E.D. La. Aug. 1, 2000) (emphasis added). Accordingly, that same court overruled a work-product objection and compelled the answer to interrogatories seeking the identity of persons from whom witness statements had been taken, reasoning that "[t]he interrogatories seek only to discover underlying facts relevant to this litigation." *Id.*

In summary, the interrogatories at issue are straightforward requests for Lead Plaintiff to identify the person who is alleged to have made a particular statement quoted by Lead Plaintiff in its Complaint. The identities of those persons who made such statements are facts. Lead Plaintiff's objections should be overruled and Lead Plaintiff should be compelled to answer each of the subject interrogatories in full.

B. Persons referred to in the Complaint.

Defendants move to compel complete answers to the following interrogatories, all of which seek information concerning the identity of persons specifically referred to in the Complaint:

Mark Frevert Interrogatory Nos. 2, 3, 4, 7, 9, 10, 11, 12, 14

Stevee Kean Interrogatory Nos. 2, 4, 11, 13

Lou Pai Interrogatory Nos. 1, 2, 6, 7, 8, 10

Rebecca Mark-Jusbache Interrogatory Nos. 11, 12, 13

For example, Frevert's Interrogatory No. 2 reads:

> Please identify the "top officials" at JP Morgan who "constantly interacted" with "top executives of Enron . . . on an almost daily basis . . .," as alleged in ¶ 653 of the Complaint, and the factual basis for this identification. Include in your identification of factual basis the identification of the witness(es) and/or documents upon which you rely for such factual basis.

Lead Plaintiff responded similarly as to the first category of interrogatories: by stating a "work product" and "attorney-client" objection and asserting that each interrogatory contained "separate and discrete subparts." The only answer provided by Lead Plaintiff to these interrogatories was a reference to the list of 131 persons likely to have knowledge of discoverable facts.

As with the first category of interrogatories, Lead Plaintiff's answers to the second category are plainly inadequate. The interrogatories seek only basic factual information: the identities of specific people who are alleged in the Complaint to have engaged in specific conduct. This factual information is not privileged or immune from discovery, for the reasons stated above. Accordingly, Lead Plaintiff's objections should be overruled and Lead Plaintiff should be compelled to answer each interrogatory in full.

C. The number of interrogatories served.

Lead Plaintiff objects that each of Defendants' interrogatories contain multiple "discrete subparts" in violation of the 25-interrogatory limit imposed as a default by Rule 33. This objection provides no basis for Lead Plaintiff to resist answering, for two reasons.

First, with respect to the issue of how many "discrete subparts" each interrogatory contains, similar interrogatories were recently reviewed by another Texas district court, which found that each should be treated as one interrogatory. "[A] question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication." *Krawczyk v. City of Dallas*, Civ. No. 3:03-CV-0584D, 2004 WL 614842, at *2 (N.D. Tex. Feb. 27, 2004) (quoting *Yeager v. Corinthian Colleges, Inc.*, 2002 WL 1976773, at *3 (E.D. La. Aug. 23, 2002)). This is because interrogatory subparts that are "logically or factually subsumed within and necessarily related to the primary question" are *not* "discrete" such that they are counted separately. *See id.* Accordingly, each of Defendants' interrogatories, including all subparts, should count as one for purposes of the 25-interrogatory limit imposed by Rule 33(a).

Second, even if Defendants *had* served more than 25 interrogatories per party, ample cause exists to justify expanding the presumptive limit imposed by Rule 33. Lead Plaintiff's Complaint runs 649 pages and includes over 1,000 numbered paragraphs. Eighteen months of fact-witness depositions have been scheduled. This is not a run-of-the-mill case. Defendants therefore request, in the alternative, for leave to serve more than 25 interrogatories per party and move to compel Lead Plaintiff to respond to all of the interrogatories served upon it.

III. Request for Expedited Consideration

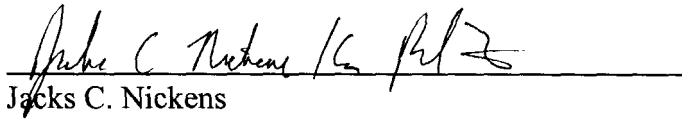
Defendants served these identification interrogatories to assist them in preparing for fact-witness depositions, which have already started. These depositions may include witnesses quoted or referred to in the Complaint. It is unfair for Lead Plaintiff to stonewall Defendants regarding

these witnesses. Defendants thus respectfully seek expedited consideration of this issue, including shortening the time for a response and submission to the Court. Loc. R. 7.8.

IV. Prayer

FOR THESE REASONS, the Defendants request that this Court order the Lead Plaintiff to answer the interrogatories specifically and in full.

Respectfully submitted,



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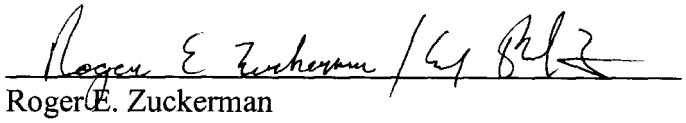

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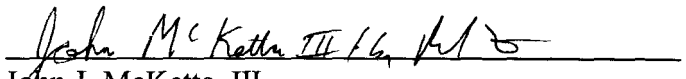

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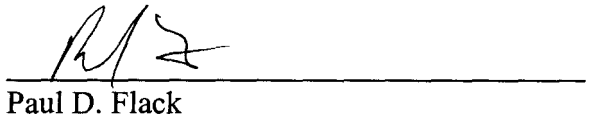
CERTIFICATE OF CONFERENCE

On May 24, 2004, R. Michael Peterson, counsel for Defendants Frevert and Kean, contacted Paul Howes, counsel for Plaintiff, by telephone to confer regarding the subject matter of this motion. The parties were unable to agree about the disposition of the motion.



Paul D. Flack

CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of June, 2004, he served a true and correct copy of the foregoing document on all counsel of record by posting said document in .PDF format to the http://www.esl3624.com website.

Paul D. Flack

The Exhibit(s) May

Be Viewed in the

Office of the Clerk

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Office of the Clerk