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

United States Courts
Southern District of Texas
FILED
JUL 0 8 2004
Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This document relates to:	§	
MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	Civil Action No. H-01-3624 (Consolidated)
v.	§	
ENRON CORP., *et al.*,	§	
Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*, Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	
KENNETH L. LAY, *et al.*,	§	
Defendants.	§	

VINSON & ELKINS L.L.P.'S OPPOSITION TO JOE H. FOY'S MOTION TO COMPEL PRODUCTION OF SEC DEPOSITION TRANSCRIPTS

Joe H. Foy's motion to compel (Docket No. 2217) could give the Court the impression that: (1) Vinson & Elkins L.L.P. ("V&E") and Mr. Foy are at an impasse concerning whether the Securities and Exchange Commission ("SEC") transcripts he seeks should be produced, and (2) V&E has not fully complied with its discovery obligations. Neither of those propositions is correct. First, Mr. Foy filed his motion to compel even while expressing a willingness to withdraw the motion if the SEC formalized its objection to production of the transcripts – something the agency did within 24 hours of Mr. Foy's premature filing. Second,

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V&E's actions in ensuring that the SEC was aware of the request for the transcripts were appropriate and fully consistent with V&E's discovery obligations in this multi-faceted litigation. Because V&E properly objected to production of the SEC's work product and because the SEC now has objected formally to production of the transcripts, V&E respectfully requests that Mr. Foy's motion be denied.

DISCUSSION

Mr. Foy served document requests on all parties seeking, among other things, transcripts of testimony provided to the SEC. Upon receiving the requests, V&E contacted the SEC to inquire whether the agency had any objection to V&E producing transcripts of testimony provided by V&E attorneys to the SEC. The agency informed V&E that it regarded its inquiry as non-public and indicated that the agency did not want the transcripts released at that time. Based on the SEC's position, V&E objected to production of the transcripts.

On June 14, 2004, Mr. Foy's counsel sent a "global 'meet and confer'" letter to all parties who had objected to production of SEC transcripts asking those parties to explain and support their positions. Mr. Foy's counsel demanded a response by Friday, June 18, 2004.

As requested, counsel for V&E contacted Mr. Foy's counsel on June 18 to inform him that upon receipt of the discovery request, V&E had contacted the SEC and been informed that the agency did not want the transcripts released. In an effort to avoid a discovery dispute, counsel for V&E offered to contact the SEC again and ask whether the agency would continue to assert that the transcripts should not be released in discovery. V&E's counsel promised to seek an answer within one week. Counsel for Mr. Foy indicated an unwillingness to wait for the SEC's response, but stated that the motion to compel would not be filed until the following week. Counsel for V&E immediately called the SEC and left a message explaining the need for written confirmation of the agency's position.

On Monday, June 21, 2004, Mr. Foy's counsel left a voice message for V&E's counsel stating that it was in the interest of his client to get the motion on file without waiting for the SEC's response, and that the motion could be withdrawn as to V&E if the SEC confirmed its position.

Shortly thereafter, V&E counsel spoke with the SEC and learned that the agency intended either to intervene or otherwise to assert that the transcripts should not be produced, and that final written confirmation from the SEC would be forthcoming. V&E's counsel promptly informed counsel for Mr. Foy of the status of the SEC's position on the transcripts.

Nonetheless, Mr. Foy filed his motion to compel later that day.[1] His motion specifically acknowledged that resolution of this discovery dispute could depend on a forthcoming statement of position by the SEC. The motion states:

> [C]ounsel for Vinson & Elkins has conveyed that the SEC has verbally indicated some concern regarding the production of the transcripts. Should a documented objection follow, Mr. Foy will amend/withdraw this motion as to Vinson & Elkins, and/or address the merits of the SEC's objection(s) as appropriate.

Mot. at 7 n.3.

By letter dated June 22, 2004, the SEC has stated that it opposes production of the transcripts. Its letter provides:

> We understand that certain parties [in the *Newby* litigation] have served discovery requests for transcripts of SEC investigative testimony taken in the course of the SEC's Enron investigation. *The SEC objects to the discovery requests and to any production of the SEC transcripts.*

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[1] Certain Enron officer defendants purported to join Mr. Foy's motion on June 29, 2004, *see* Docket No. 2237, even though they had not propounded any similar document request seeking the transcripts. Lead Plaintiff similarly purported to join the motion on July 6, 2004. *See* Lead Plaintiff's Joinder in Joe H. Foy's Motion To Compel Production of SEC Transcripts ("Lead Plaintiff's Joinder").

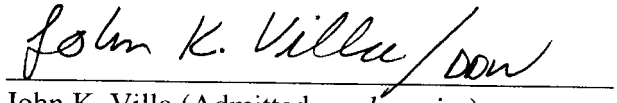
June 22, 2004 SEC Letter at 1 (emphasis added) (attached at Tab A). Counsel for V&E provided a copy of this letter to counsel for Mr. Foy on June 23, 2004. Without explanation, Mr. Foy has not yet withdrawn or amended his motion as to V&E.

The SEC's regulations deem transcripts such as those sought by Mr. Foy non-public. *See* 17 C.F.R. § 203.2 and 203.5. They do so for good reason – the SEC relies on protection from compelled production to facilitate its investigations of securities transactions. In light of the SEC's position that the transcripts are not public, Mr. Foy's motion should be denied.[2]

CONCLUSION

For the foregoing reasons, V&E respectfully requests that Mr. Foy's motion to compel be denied.

Respectfully submitted,



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DATED: July 8, 2004

Counsel for Defendant Vinson & Elkins L.L.P.

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[2] Mr. Foy asserts that it is "amazin[g]" that parties would object to producing the SEC transcripts in light of this Court's order requiring various banks to produce Examiner transcripts. Mot. at 2. The Examiner transcripts raised a different issue. While many, but not all, parties participating in the coordinated discovery had access to the Examiner transcripts, thus raising a fairness issue, only the SEC and V&E have access to the SEC transcripts of V&E witnesses. Even Lead Plaintiff's joinder recognizes this point. *See* Lead Plaintiff's Joinder at 1 (explaining that fairness argument with respect to Examiner transcripts would apply only to those SEC transcripts that have been distributed to parties other than the party providing testimony to the SEC).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Vinson & Elkins L.L.P.'s Opposition to Joe H. Foy's Motion To Compel Production of SEC Deposition Transcripts, and accompanying proposed order, was served upon all known counsel of record by website, http://www.esl3624.com, pursuant to the Court's Order dated August 7, 2002 (Docket No. 984), on this 8th day of July 2004.

Daniel D. Williams

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT

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June 22, 2004

Robert A. Van Kirk, Esq.
Williams & Connolly LLP
725 Twelfth St., N.W.
Washington, D.C. 20005

Re: Newby, et al., v. Enron Corp, et al., Case No. H-01-3624 (S.D. Texas)

Dear Mr. Van Kirk:

We understand that certain parties in the above-captioned private action have served discovery requests for transcripts of SEC investigative testimony taken in the course of the SEC's Enron investigation. The SEC objects to the discovery requests and to any production of SEC transcripts.

On October 30, 2001, pursuant to Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a), the Commission issued an Order directing Private Investigation and Designating Officers to Take Testimony in an investigation entitled *In the Matter of Enron Corp.* (the "Formal Order"). In the Formal Order, the Commission directed that an investigation be conducted to determine, among other things, whether Enron's reports filed with the Commission contained materially false and misleading statements, or omissions of material facts, in violation of the antifraud provisions of the federal securities laws.

Pursuant to Rule 203.2 of the SEC Rules of Practice, information obtained by the SEC during the course of the Enron investigation is non-public. In this confidential setting, the SEC has taken the sworn testimony of numerous witnesses with knowledge relevant to the investigation. Upon request of certain witnesses the SEC has provided transcripts of their testimony to them for their own personal use. The Commission has otherwise not made public to third parties in private litigation the transcripts for any purpose.

The SEC's investigation has resulted in the filing of several cases in the Southern District of Texas. Some of these cases have been settled. Others are stayed pending resolution of parallel criminal cases brought by the Department of Justice Enron Task Force. However, the SEC's investigation is ongoing and remains nonpublic. The SEC continues to interview witnesses, take testimony, obtain documents, and review evidence. The Enforcement Division may recommend that additional charges be brought against parties involved in the Enron matter.

It is critical that all aspects of the investigation remain confidential.

Disclosure of SEC transcripts would hamper the SEC's investigation of the Enron matter and would reveal sensitive information, such as the direction and specific subject areas of the investigation. Potential defendants in future SEC proceedings would also have the opportunity to prematurely review testimony well before the time permitted under the rules governing federal civil discovery. Further, defendants in SEC cases currently stayed due to pending parallel criminal cases would gain access to materials they are forbidden from obtaining from the SEC and DOJ at this time.

For the foregoing reasons, the SEC objects to the discovery and production of SEC transcripts by any party in the above-captioned action. If any party pursues such discovery, particularly over the SEC's objections, please advise us promptly so that we may consider further appropriate action.

Sincerely,

Luis R. Mejia

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ORDER

IT IS ORDERED that, as to Vinson & Elkins L.L.P., Joe H. Foy's Motion To Compel Production of SEC Deposition Transcripts is DENIED.

SIGNED this _____ day of _____, 2004.

_____
THE HONORABLE MELINDA HARMON
UNITED STATES DISTRICT JUDGE