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

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

IN RE ENRON CORPORATION SECURITIES, DERIVATIVE, & "ERISA" LITIGATION	:	MDL-1446
This Document Relates to: MARK NEWBY, ET AL., PLAINTIFFS, VS. ENRON CORPORATION, ET AL., DEFENDANTS.	:	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES

DEFENDANT JOE H. FOY'S REPLY BRIEF
CONCERNING MOTION TO COMPEL PRODUCTION OF SEC TRANSCRIPTS[1]

TO THE HONORABLE MELINDA M. HARMON:

Defendant Joe H. Foy files this reply brief to advise the Court that he hereby withdraws his motion to compel production of the SEC transcripts in deference to the wishes of the SEC. This withdrawal is without prejudice to the rights of other parties who have joined the motion to continue to pursue the relief requested.[2]

Why is the Motion Being Withdrawn?

Defendant Joe H. Foy filed his motion to compel production of the SEC transcripts because the former sworn testimony (in any forum) of persons with knowledge of what caused Enron's collapse is highly relevant in this case. This Court itself recognized the clear relevance of former

[1] This pleading concerns *Newby* Instrument No. 2217.

[2] Both Lead Plaintiff and Certain Officer Defendants have filed pleadings joining Mr. Foy's request that the court compel production of the SEC transcripts.

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testimony in its order compelling the production of transcripts of interviews given to the Enron Examiner:

> This Court agrees with the Outside Directors that fairness dictates that all parties to the litigation should have access to the non-privileged information concerning the lawsuit, and Fed. R. Civ. Pr. 26(b)(1) contemplates access to such information in allowing discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party."

See March 16, 2004 Order on Motions to Compel the Banks to Produce the Sworn Statements and Deposition Transcripts of Their Employees at 4 (*Newby* Instrument No. 2021).

That said, once the motion was filed, the SEC indicated to Mr. Foy's counsel a strong preference that these transcripts not be produced. The Outside Directors have no desire to interfere in any way with any government investigation of what happened at Enron, including any ongoing investigation by the Securities and Exchange Commission. The Outside Directors have fully supported the effort by all government agencies to uncover what happened at Enron, and to bring those facts to light. The Outside Directors were the first to take steps to discern what had happened, when they formed a Special Investigating Committee of the Enron Board–a Committee that ultimately issued the now well-known "Powers Report." Since then, the Outside Directors have appeared repeatedly to testify before a number of congressional committees, the Department of Labor, the Securities and Exchange Commission, the Federal Bureau of Investigation, the Enron Examiner and the Enron grand jury. They have cooperated and will continue to do so as this matter moves forward.

Mr. Foy's request for the production of the SEC transcripts was of a piece with these efforts to cooperate, precisely <u>because</u> the SEC transcripts contain highly relevant evidence that could shed additional light on what happened at Enron. Indeed, at the time the motion was filed, the SEC had

not objected to the production of any SEC transcripts–and some 27 SEC transcripts had already been produced to the *Newby* depository. Since the motion was filed, however, the SEC has indicated to Mr. Foy's counsel that they prefer that these transcripts not be produced at this time. They have asked that Mr. Foy not press his motion further and, in deference to that request, Mr. Foy has agreed not to do so. That agreement, necessarily, is without prejudice to the rights of other parties to pursue the discovery of these transcripts and without prejudice to Mr. Foy's right to re-urge the motion again should circumstances warrant.

ACCORDINGLY, for the reasons stated above, Defendant Joe H. Foy hereby withdraws his Motion to Compel the Production of SEC Transcripts, without prejudice to his right to re-urge the motion later and without prejudice to the right of others who have joined the motion to continue to pursue the relief requested.

Respectfully submitted,

GIBBS & BRUNS, L.L.P.

By: _____ KP by permission

Robin C. Gibbs
Attorney-in-Charge
T.B.A. No. 07853000
Kathy D. Patrick
T.B.A. No. 15581400
Jean C. Frizzell
T.B.A. No. 07484650
Michael K. Oldham
T.B.A. No. 00798405
Aundrea K. Frieden
T.B.A. No. 24034468
Brian T. Ross
T.B.A. No. 24037395
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713)650-8805
(713)750-0903
ATTORNEYS FOR DEFENDANT JOE H. FOY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by electronic posting to www.ESL3624.com on this 16 th day of July, 2004.

Wendy Fuselier