

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED  
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MICHAEL N. MILBY, CLERK OF COURT

6 In Re ENRON CORP. SECURITIES )  
7 LITIGATION )

Consolidated Lead Case No. H-01-3624

8 RALPH A. WILT, JR., )

Civil Action No. H-02-0576

9 Plaintiff, )

10 v. )

11 ANDREW S. FASTOW, et al., )

12 Defendants. )  
13

14  
15 **RESPONSE OF PLAINTIFF RALPH A. WILT, JR.,**  
16 **IN SUPPORT OF THE COURT'S ORDER OF CONSOLIDATION AND**  
17 **IN OPPOSITION TO THE VINSON & ELKINS DEFENDANTS' MOTION**  
18 **TO SEVER THEMSELVES FROM CONSOLIDATED LEAD ACTION**

19  
20 **AND**

21  
22 **REQUEST FOR ORAL ARGUMENT**  
23 **PURSUANT TO LOCAL RULE 7.5.A**

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ORIGINAL

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1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**  
2                                   **IN SUPPORT OF CONSOLIDATION AND IN OPPOSITION**  
3                                   **TO THE VINSON & ELKINS DEFENDANTS' MOTION TO SEVER**  
4

5   **1.   SUMMARY OF ARGUMENT.**  
6

7           Plaintiff Wilt supports the Court's Order of Consolidation and opposes the V&E  
8 Defendants' motion to sever themselves from the lead *Newby* action, on the grounds that  
9 (a) this Court wisely consolidated *Wilt* with *Newby*, and (b) the points and authorities of  
10 the V&E Defendants fail to outweigh the compelling reasons for consolidation.  
11

12   **2.   KEY ALLEGATIONS AGAINST V&E DEFENDANTS.**  
13

14           The V&E Defendants are sued as **direct participants** in the fraud leading to the  
15 collapse of Enron and billions of dollars in losses to shareholders. Complaint §§ 1, 77-  
16 82, 91. A **civil conspiracy** among the V&E Defendants and other defendants is alleged.  
17 *Id.* §§ 78-81, 88, 91-93, 95, 100-01, 105, 115, 121, 126, 129, 131, 137, 139, 144, 146,  
18 151, 153, 162, 167, 169, 175, 177, 182, 187, 189, 194, 196, 201, 203, 209, 211, 217-18,  
19 231, 237, 241, 245, 247, 251, 253, 267, 276, 293, 298-302, 308-312. Detailed facts are  
20 pled as to the extremely close working relationship between the V&E Defendants and  
21 Enron at all relevant times. *Id.* §§ 84-87. After identifying the specific defendants and  
22 summarizing their individual roles, the Complaint summarizes their alleged fraudulent  
23 conduct:  
24

25                                   On information and belief, for purposes of servicing Enron,  
26 V&E had attorneys present in Enron's corporate offices and  
27 operations continuously for years and at all relevant times,  
28 and had continual access to and knowledge of Enron's inside  
corporate and business information, including *inter alia* the  
manner in which Enron, the Accounting Defendants, and the  
Attorney Defendants were collaborating and working

1 together *inter alia* in creating, structuring, using, and  
2 accounting for the SPE's and sham transactions accomplished  
through the SPE's.

3 On information and belief, as a result of the Attorney  
4 Defendants' expertise, their close collaboration and working  
5 relationship with Enron and the Accountant Defendants, their  
6 constant interaction with Enron and the Accountant  
7 Defendants, the consensus-building role of the Accountant  
8 Defendants, and the Attorney Defendants' detailed  
9 knowledge of and access to all relevant documents and  
information, at all relevant times the Attorney Defendants  
knew full well that they were direct participants, aiders and  
abettors, and co-conspirators in a massive scheme to mislead  
and defraud Enron shareholders, potential investors, and the  
securities market as to *inter alia* the value of Enron's  
securities.

10 On information and belief, the Attorney Defendants  
11 issued several opinion letters (and related consents to use and  
12 dissemination) on the legality, independence, authenticity,  
13 and non-sham nature of, and/or other issues relating to, the  
14 SPE's at the heart of the subject fraud. On information and  
15 belief, when the Attorney Defendants issued those  
16 documents, and when they did all other work described  
below, the Attorney Defendants knew or recklessly failed to  
learn that the SPE's were created, owned, and/or controlled  
by Enron and certain Director and Officer Defendants and  
were being used for sham transactions to hide liabilities and  
overstate income of Enron in SEC filings that the Attorney  
Defendants intentionally, wilfully, or recklessly prepared.

17 ...  
18 On information and belief, on dates currently  
19 unknown, the Attorney Defendants secretly entered into an  
20 agreement, combination, and conspiracy with each other,  
21 with the Director and Officer Defendants, and with the  
Accountant Defendants, to commit, aid, abet, participate in,  
and/or further the fraudulent acts, omissions, and scheme set  
forth below, all with the intent of keeping Enron as a client  
and continuing to reap multi-million dollar fees.

22 On information and belief, the Attorney Defendants  
23 have engaged in a pattern of fraudulent concealment, by *inter*  
24 *alia* (a) condoning spoliation of evidence by the Director and  
25 Officer Defendants and the Accountant Defendants; (b)  
26 purporting to render (despite an actual conflict of interest) a  
27 favorable second opinion on their own legal work on  
28 questioned SPE's previously formed and structured by the  
Attorney Defendants themselves, in an attempt to thwart a  
disinterested review by independent counsel; (c) recklessly  
ignoring grave deficiencies and illegalities in the accounting  
practices and SEC filings of Enron, knowing full well that  
Enron shareholders, potential investors, and the securities  
market were relying, directly or indirectly, on the legality and  
reliability of those very accounting practices and SEC filings;

1 (d) continuing to perform legal services that delayed the  
2 public disclosure of and perpetuated the fraudulent acts,  
3 omissions, and scheme set forth below; and/or (e) continuing,  
4 without protest and without raising a “red flag,” to lend their  
5 good names, reputations, and prestige to the fraudulent acts,  
6 omissions, and scheme set forth below, of which the Attorney  
7 Defendants were an integral component.

8 *Id.* §§ 87-89, 92-93.

9 The Complaint avers specific documents whereby, and specific dates on which,  
10 the V&E Defendants participated in and furthered the fraud. *See e.g. id.* §§ 100, 115-17,  
11 121-23, 126, 129, 131-134, 137, 139-41, 144, 146-48, 151, 153-56, 162-64, 167, 169-72,  
12 175, 177-80, 182-184, 187, 189-91, 194, 196-98, 201, 203-06, 209, 211-13, 217-18,  
13 220-21, 231-33, 237-39, 241, 245, 247-49, 251, 253-55, 257, 259, 260, 263-67, 269, and  
14 276. It is obvious that their legal services were *inter alia* instrumental to the fraud.

15 In addition to the foregoing, the Complaint casts a broader net than the class  
16 actions in an attempt to hold accountable corrupt public officials who bear responsibility  
17 – and have legal liability under conspiracy principles – for facilitating and turning a blind  
18 eye to the fraud. All other groups of defendants – the Director and Officer Defendants,  
19 the Accountant Defendants, and the Attorney Defendants – were major contributors and  
20 were granted illegal favors and favorable treatment, which materially facilitated the fraud  
21 and without which the fraud either would have been impossible or could not have grown,  
22 continued, succeeded, and remained undetected for as many years as it was. *Id.* §§ 95-  
23 97, 99, 104-111, 291-294. Only after shareholders had lost billions of dollars and it had  
24 become politically impossible not to act did any corrupt officials, based on Machiavellian  
25 calculations, begin to turn on their former patrons and express a new-found concern for  
26 the shareholders whom they had previously helped to defraud. *Id.* §§ 295-96.

27  
28 Plaintiff Wilt will soon file a First Amended Complaint adding more plaintiffs.

1 The corrupt officials need to be identified through formal discovery because their  
2 corruption, acts, and omissions to help their benefactors – i.e. Enron, Arthur Anderson,  
3 V&E, and their officers, directors, and partners – occurred in secret. Plaintiff Wilt (and  
4 additional plaintiffs to be identified in Mr. Wilt’s imminent First Amended Complaint)  
5 will file a motion for leave to conduct limited discovery to identify and to add the Doe  
6 Defendants and Corrupt Officials as defendants herein by their true names.

7  
8 **3. LEGAL ARGUMENT AND ANALYSIS.**

9  
10 **A. Mr. Wilt’s Individual Case Was Properly Consolidated with *Newby*.**

11  
12 Federal Rule of Civil Procedure 42(a) (“Rule 42(a)”) provides that,

13  
14 When actions involving a common question of law or fact  
15 are pending before the court, it may order a joint hearing or  
16 trial of any or all the matters in issue in the actions; it may  
17 order all the matters consolidated; and it may make such  
18 orders concerning proceedings therein as may tend to avoid  
19 unnecessary costs or delay.

20 The Fifth Circuit articulated the strong public policy in favor of consolidation of  
21 cases involving a common question of law or fact in *Dupont v. Southern Pacific Co.*, 366  
22 F.2d 193 (5<sup>th</sup> Cir. 1966), where the Court explained that,

23 Trial judges are urged to make good use of Rule 42(a) of the  
24 Federal Rules of Civil Procedure where there is involved a  
25 common question of fact and law as to the liability of the  
26 defendant in order to expedite the trial and eliminate  
27 unnecessary repetition and confusion; and where the parties  
28 are represented by different counsel and the trial court  
permits full and complete development of the evidence by all  
parties, equal opportunity for argument, a clear and complete  
charge on the facts and the law applicable to the respective  
theories of all parties, the order of consolidation by the trial  
judge will not be disturbed on appeal except for abuse of  
discretion.

1                   However, in resorting to the use of Rule 42(a) the trial  
2 judge should be most cautious not to abuse his judicial  
3 discretion and to make sure that the rights of the parties are  
4 not prejudiced by the order of consolidation under the facts  
5 and circumstances of the particular case. Where prejudice to  
6 rights of the parties obviously results from the order of  
7 consolidation, the action of the trial judge has been held  
8 reversible error.

9 *Id.* at 195-96 (citations omitted).

10  
11                   The Fifth Circuit elaborated on the reasons for this strong public policy in *In re*  
12 *Air Crash Disaster*, 549 F.2d 1006 (5<sup>th</sup> Cir. 1977):

13                   A trial court has managerial power that has been described as  
14 “the power inherent in every court to control the disposition  
15 of the causes on its docket with economy of time and effort  
16 for itself, for counsel, and for litigants.” *Landis v. North*  
17 *America Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166, 81 L.  
18 Ed. 153, 158 (1936). See also reference in *MacAlister v.*  
19 *Guterma*, 263 F.2d 65, 69 (CA2, 1958) ..., to “the traditional  
20 exercise of the court’s inherent powers over the  
21 administration and supervision of its own business.”  
22 Managerial power is not merely desirable. It is a critical  
23 necessity. The demands upon the federal courts are at least  
24 heavy, at most crushing. Actions are ever more complex, the  
25 number of cases greater, and in the federal system we are  
26 legislatively given new areas of responsibility almost  
27 annually. Our trial and appellate judges are under growing  
28 pressure from the public, the bar, the Congress and from this  
29 court to work more expeditiously. In most cases these  
30 pressures reflect fully justified societal demands. But court  
31 resources and capacities are finite. We face the hard  
32 necessity that, within proper limits, judges must be permitted  
33 to bring management power to bear upon massive and  
34 complex litigation to prevent it from monopolizing the  
35 services of the court to the exclusion of other litigants.

36 ...  
37                   The trial court’s managerial power is especially strong  
38 and flexible in matters of consolidation.

39 *Id.* at 1012, 1013 (footnotes omitted).

40  
41                   The Fifth Circuit further explained the purposes and normal safeguards of  
42 consolidation in *Miller v. United States Postal Service*, 729 F.2d 1033 (5<sup>th</sup> Cir. 1984):

1 Rule 42(a) should be used to expedite trial and eliminate  
2 unnecessary repetition and confusion. A motion to  
3 consolidate is not required; the court may invoke Rule 42(a)  
4 *sua sponte*. Consolidation does not so completely merge the  
5 two cases as to deprive a party of any substantial rights that  
6 he may have had if the actions had proceeded separately, for  
7 the two suits retain their separate identities and each requires  
8 the entry of a separate judgment.

9 *Id.* at 1036 (citations omitted).

10 The Fifth Circuit has upheld consolidation when the cases involve different  
11 incidents months apart, disparate defendants, and distinct but overlapping injuries.  
12 *Bottazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50-51 (5<sup>th</sup> Cir. 1981).

13 The foregoing principles are national policy. The Manual for Complex Litigation  
14 recommends consolidation or at least coordination of related cases in complex litigation:

15 Complex litigation frequently involves two or more separate  
16 but related cases. All related cases pending or which may  
17 later be filed in the same court, whether or not in the same  
18 division, should be assigned at least initially to the same  
19 judge.... Pretrial proceedings in these cases should be  
20 coordinated or consolidated under Fed. R. Civ. P. 42(a), even  
21 if filed in more than one division of the court.

22 Manual for Complex Litigation § 20.123 (3<sup>rd</sup> 1995) (footnote omitted).

23 Rule 42(a) affords substantial flexibility in complex litigation. The District of  
24 Arizona recently discussed this flexibility:

25 Consolidation ... is a flexible procedural device. Actions may  
26 be consolidated for initial proceedings and some discovery  
27 and severed if and when the risks of confusion or prejudice  
28 outweigh the benefits in efficiency. Indeed, "the effect of  
such pretrial consolidation is not and cannot be to 'merge the  
suits into a single cause, or change the rights of the parties, or  
make those who are parties in one suit parties in another.'"

1                   The Court is confident that it can guard against any  
2 possible prejudice that the common stock purchasers might  
3 suffer from consolidation. While Mei and Belluomini are  
4 concerned about delay, the Court concludes from its  
5 familiarity with the pace and complexity of securities class  
6 action litigation that the addition or subtraction of a few  
7 claims or issues is not likely to affect the overall speed of the  
8 litigation.

9  
10 *Borenstein v. The Finova Group, Inc.*, 2000 U.S. Dist. LEXIS 14732, 13-14 (D. Ariz.  
11 2000) (citations omitted).

12           Mr. Wilt's individual action was properly consolidated with the class actions  
13 under the foregoing authorities and principles. The V&E Defendants' contention that  
14 Mr. Wilt's case does not have a "common core of operative facts" with the related class  
15 actions is frivolous. The class actions and Mr. Wilt's case are related and have multiple  
16 common issues of fact and law relating *inter alia* to the fraud committed by the common  
17 defendants, to wit, the Director and Officer Defendants and the Accountant Defendants.  
18 The V&E Defendants were intimately involved and directly participated in all the most  
19 critical acts, omissions, and concealment by those common defendants, including *inter*  
20 *alia* multiple securities transactions and SEC filings that were instrumental to the fraud.  
21 A civil conspiracy that inextricably intertwines the V&E Defendants with the other  
22 defendants is clearly alleged. Like it or not, the V&E Defendants are unavoidably caught  
23 up in many common factual and legal issues. A severance of the V&E Defendants would  
24 result in extensive duplication and repetition of discovery, motions, and other litigation  
25 involving not only the common defendants, but the V&E Defendants, too. If the V&E  
26 Defendants were freed from the Scheduling Order, they would undoubtedly undertake a  
27 classic "scorched earth" defense (on their own schedule), occupy an inordinate amount of  
28 this Court's time and attention (again, on their own schedule), and threaten inconsistent  
adjudications by forcing rulings in any severed action before the same or similar issues  
become ripe for decision in *Newby*. In sum, Mr. Wilt's case was wisely consolidated  
with *Newby*, and the requested severance would prove to be a management disaster.

1           **B.     The Severance of the V&E Defendants Would Frustrate Both the**  
2                           **12/12/01 Order of Consolidation and the 3/8/02 Scheduling Order.**

3  
4           The 3/8/2002 Scheduling Order recognizes that defendants, cross-defendants, and  
5 third-party defendants have yet to be named. The Court set a January 2, 2003 deadline to  
6 join new parties or file third-party complaints or cross-complaints. Therefore, the V&E  
7 Defendants' observation that they are not now named outside the *Wilt* case is true at the  
8 moment, but conveniently ignores that the parties have nine more months to bring V&E  
9 Defendants into the class actions or other individual actions. Meanwhile, it is extremely  
10 presumptuous and premature for the V&E Defendants to argue that they do not belong in  
11 a consolidated proceeding, and should be severed, because no one else has named them.  
12 Indeed, a recent New York Times article (see Exh. "A") notes that serious questions are  
13 being raised as to the critical role of Vinson & Elkins in the massive fraud at Enron.

14  
15           The V&E Defendants are correct in noting that Mr. Wilt's Complaint makes only  
16 fraud claims under Texas state law, whereas *Newby* asserts only federal securities claims.  
17 Nonetheless, both proceedings necessarily require the adjudication of the same or similar  
18 issues as to the degree and proportion of the V&E Defendants' fault. Even if no other  
19 existing party brings the V&E Defendants in as defendants, third-party defendants, or  
20 cross-defendants, the Private Securities Litigation Reform Act of 1995 established an  
21 elaborate statutory scheme for apportioning liability among the parties and "each of the  
22 other persons [such as the V&E Defendants] claimed by any of the parties to have caused  
23 or contributed to the loss incurred by the plaintiff..." 15 U.S.C. § 78u-4(f)(3)(A). The  
24 trial court "shall instruct the jury to answer special interrogatories ... concerning –

- 25           (i)     whether such person violated the securities laws;  
26           (ii)    the percentage of responsibility of such person,  
27                    measured as a percentage of the total fault of all  
28                    persons who caused or contributed to the loss incurred  
                  by the plaintiff; and  
                  (iii) whether such persons knowingly committed a  
                  violation of the securities laws.

1 *Id.* § 78u-4(f)(3)(A)(i)-(iii).

2  
3 The V&E Defendants are too mired in the Enron fraud and conspiracy to escape  
4 involvement in this complex litigation. The V&E Defendants will probably be named by  
5 other parties before the January 2, 2003 deadline. Even if everyone else should continue  
6 to show deference to the V&E Defendants, it would be wishful thinking to expect that no  
7 other defendant, cross-defendant, or third-party defendant would attempt to apportion a  
8 percentage of liability to V&E's empty chair under the Private Securities Litigation  
9 Reform Act of 1995. Thus, even if the V&E defendants somehow avoid involvement as  
10 a party in *Newby*, their acts, omissions, concealment, mental state, liability, proportion of  
11 fault, and involvement in the civil conspiracy are certain to be litigated and decided by  
12 the trier of fact in *Newby*. The same or similar issues arising from Texas state law claims  
13 will be litigated and decided by the jury in *Wilt*. It is well within this Court's managerial  
14 discretion to order consolidation, and to deny severance of the V&E Defendants, on the  
15 basis of this inextricably interwoven, Gordian knot of common issues of fact and law.

16  
17 The V&E Defendants attempt to avoid the foregoing realities of this complex  
18 litigation by citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S.  
19 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994), and arguing that they should be severed  
20 because they, as attorneys, cannot be sued under Section 10(b) of the 1934 Securities  
21 Exchange Act and SEC Rule 10b-5 promulgated thereunder. This argument is a gross,  
22 even frivolous, misconstrual of *Central Bank of Denver*. The Court there stated:

23  
24 Because the text of § 10(b) does not prohibit aiding and  
25 abetting, we hold that a private plaintiff may not maintain an  
26 aiding and abetting suit under § 10(b). The absence of §  
27 10(b) aiding and abetting liability does not mean that  
28 secondary actors in the securities markets are always free  
from liability under the securities Acts. **Any person or  
entity, including a lawyer, accountant, or bank, who  
employs a manipulative device or makes a material  
misstatement (or omission) on which a purchaser or seller of**

1 securities relies **may be liable as a primary violator** under  
2 10b-5, assuming *all* of the requirements for primary liability  
3 under Rule 10b-5 are met. In any complex securities fraud,  
4 moreover, there are likely to be multiple violators....

5  
6 511 U.S. at 191 (citations omitted).

7 In case anyone missed it, the Court reiterated the foregoing principles in *United*  
8 *States v. O'Hagan*, 521 U.S. 642, 117 S. Ct. 2199, 138 L. Ed. 2d 724 (1997), where an  
9 attorney who committed insider trading was prosecuted and convicted under Section  
10 10(b) and Rule 10b-5. After quoting the foregoing language from *Central Bank of*  
11 *Denver*, the Court explained that in using that language it had “sought only to clarify  
12 that secondary actors, although not subject to aiding and abetting liability, remain  
13 subject to primary liability under § 10(b) and Rule 10b-5 for certain conduct.”

14 Courts that have interpreted the primary liability of secondary actors have not  
15 granted professional defendants the license to defraud sought by the V&E Defendants.  
16 *See, e.g., In re Software Toolworks*, 50 F.3d 615, 628 n. 3 (9<sup>th</sup> Cir. 1994) (accountant  
17 may be primarily liable based on its “significant role in drafting and editing” a letter sent  
18 by the issuer to the SEC); *In re ZZZZ Best Securities Litigation*, 864 F. Supp. 960, 970  
19 (C.D. Cal. 1994) (an accounting firm that was “intricately involved” in the creation of  
20 false documents and their “resulting deception” is a primary violator of Section 10(b)).  
21 These same principles of primary liability apply to the V&E Defendants and invite their  
22 inclusion in the Consolidated Amended Complaint and the apportionment of liability.

23  
24 **C. The Crime-Fraud Exception to the Attorney-Client Privilege Will Be**  
25 **Disputed in *Wilt* and *Newby* and Calls for a Consolidated Resolution.**  
26

27 The V&E Defendants are not the holder of any attorney-client privilege for their  
28 communications with Enron. That privilege belongs to Enron, which does not object to

1 the inclusion of their former counsel in this action. (Enron may sue V&E and waive the  
2 privilege voluntarily.) It is doubtful whether the V&E Defendants can suffer *cognizable*  
3 prejudice from possible complications relating to *Enron's* attorney-client privilege.  
4

5 Disregarding *arguendo* whether the V&E Defendants are attempting to exploit  
6 another's privilege as their own sword, it is obvious that the attorney-client privilege  
7 and the applicability of the crime-fraud exception will be issues not only in *Wilt*, but  
8 also in *Newby*. Discovery will be required on these common issues of law and fact in  
9 both cases. Indeed, it would be necessary to litigate the entire series of transactions and  
10 SEC filings whereby, using the V&E Defendants' services, Enron and the Director and  
11 Officer Defendants perpetrated and concealed the massive fraud. The civil conspiracy  
12 also would need to be developed and presented in both cases. From the standpoint of  
13 complex case management, it would be unreasonably expensive, duplicative, time-  
14 consuming, and burdensome to litigate and adjudicate these issues more than once.  
15 That, however, would be the result of granting the V&E Defendants' motion to sever.  
16

17 The crime-fraud exception to the attorney-client privilege in Texas provides that  
18 there is no privilege "if the services of a lawyer were sought or obtained to enable or aid  
19 anyone to commit or plan to commit what the client knew or reasonably should have  
20 known to be a crime or fraud." Tex. R. Civ. Evid. 503(d)(1) The crime-fraud exception  
21 applies with equal force and effect to a claim of the attorney work-product privilege  
22 because Rule 166b(3)(a) of the Texas Rules of Civil Procedure protects the work  
23 product of an attorney from disclosure "subject to the exceptions of the Texas Rules of  
24 Civil Evidence 503(d)." *Id.*; *Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.  
25 1991)(crime-fraud exception applies to a claim of work-product privilege); Tex. R. Civ.  
26 P. 192.5(c)(5) (any work product created under circumstances within an exception to the  
27 attorney-client privilege in Rule 503(d) is not work product protected from discovery).  
28

///

1 The crime-fraud exception has two requirements; whether these requirements are  
2 satisfied is a question of law for the court. *Volcanic Gardens Mgt. Co. Paxson*, 847  
3 S.W.2d 343, 347 (Tex. App. 1993); *Freeman*, 820 S.W.2d at 853.

4  
5 To satisfy the first requirement, the proponent of the crime-fraud exception must  
6 present evidence to establish a *prima facie* case of fraud that was ongoing, or about to  
7 be committed, at the time of the communications at issue. *Granada Corp. v. First Court*  
8 *of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992), citing *Williams v. Williams*, 108 S.W.2d  
9 297, 299-300 (Tex. App.1937); *In re Nationsbank*, 2000 Tex. App. LEXIS 4158, 16-17  
10 (Tex. App. 2000); *In re Natural Gas Pipeline Co.*, 2000 Tex. App. LEXIS 7459, 6-7  
11 (Tex. App. 2000); *Cigna Corp. v. Spears*, 838 S.W.2d 561, 569 (Tex. App.1992);  
12 *Freeman*, 820 S.W.2d at 861-62. The trial court determines whether an adequate *prima*  
13 *facie* showing has been made to satisfy the first element. *Williams*, 108 S.W.2d at 300.

14  
15 To satisfy the second requirement, the proponent of the crime-fraud exception  
16 must show a nexus or relationship between the communications at issue and the fraud.  
17 *Granada Corp.*, 844 S.W.2d at 227; *Freeman*, 820 S.W.2d at 861. This second element  
18 requires only that the proponent show that the attorneys' services were obtained in aid  
19 of committing or perpetrating the fraud. Tex. R. Evid. 503(d)(1); *In re Natural Gas*  
20 *Pipeline Co.*, 2000 Tex. App. LEXIS 7459 at 7.

21  
22 The pervasive involvement of the V&E Defendants in the massive Enron fraud  
23 presents a straightforward, textbook case for application of the crime-fraud exception.  
24 First, that a massive fraud was committed is universally conceded by all. Second, it will  
25 be relatively simple to show, after discovery, that the V&E Defendants' services were  
26 instrumental to the commission and concealment of that fraud. Hence, all the concerns  
27 raised by the V&E Defendants about the attorney-client privilege and special procedures  
28

1 supposedly needed to handle attorney-client information will vanish when the crime-  
2 fraud exception is established at the appropriate time in the consolidated proceeding.

3  
4 **D. The Presence of Disparate Defendants Does Not Undermine the**  
5 **Consolidation or Support the Severance of the V&E Defendants.**

6  
7 The V&E Defendants argue that they should be severed because the *Wilt* action  
8 includes defendants – them and the Corrupt Officials – who are not parties in other  
9 cases. This argument has no merit. Rule 42(a) requires only “a common question of  
10 law or fact,” not identical parties. “As long as common questions of law and fact exist,  
11 consolidation is not barred simply because the actions to be consolidated allege claims  
12 against different parties.” *Skwartz v. Crayfish Co.*, 2001 U.S. Dist. LEXIS 15532, 6  
13 (S.D.N.Y. 9/28/2001), following *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F.  
14 Supp. 1196, 1211 (S.D.N.Y. 1992) (“[t]he fact that there are different parties in this  
15 action does not mean that this case should not be consolidated”); *Feldman v. Hanley*, 49  
16 F.R.D. 48, 50 (S.D.N.Y. 1969) (class action naming additional defendants who were not  
17 parties to related class actions was properly consolidated where additional defendants’  
18 possible liability is intimately related to transactions involving the other defendants).

19  
20 As noted above, the Fifth Circuit has upheld consolidation when the consolidated  
21 cases involve different incidents several months apart, disparate defendants, and distinct  
22 but overlapping injuries. *Bottazzi*, 664 F.2d at 50-51. The common issues in *Bottazzi*  
23 were more attenuated than the strong commonality that dominates *Wilt* and *Newby*:

24  
25 Mr. Bottazzi filed separate suits less than two months apart  
26 seeking recovery for damages resulting from each of these  
27 two [separate helicopter] accidents. Petroleum Helicopters,  
28 Inc. (“PHI”), the operator of the helicopters, was a common  
defendant in each suit, with other disparate parties. In each,  
Bottazzi claimed physiological and psychiatric damage. On  
his motion, the court consolidated the cases for trial. DDA

1 ["the manufacturer of the engine whose failure occasioned  
2 the first accident"] complains to us of this action by the trial  
3 court, asserting the absence of any such "common question  
4 of law or fact" as Rule 42(a) ... requires for consolidation.

5 We think the consolidation ordered was within the  
6 trial court's broad discretion in such matters. As a basis for  
7 our ruling, we need seek no further than the suits' allegations  
8 regarding Mr. Bottazzi's psychological condition. Each  
9 complaint counts for psychological damage. Thus, in each  
10 case Mr. Bottazzi's mental state was a fact issue. "Mind" is a  
11 slippery concept, mental and psychological states and their  
12 causes more so; but surely the psychological state of a given  
13 person at a given time is a unitary matter. We think the  
14 question of what that state is and will be, present and future,  
15 presents a sufficient common question of fact to support the  
16 consolidation of these two cases, in each of which Mr.  
17 Bottazzi's mental infirmities, if any, and their causes were at  
18 issue.

19 *Id.* at 50-51.

20 In *Quintel Corp. v. Citibank, N.A.*, 100 F.R.D. 695 (S.D.N.Y. 1983), the same  
21 plaintiffs filed a federal securities case against a bank relating to a business transaction  
22 and a legal malpractice case against attorneys who represented them in that transaction.  
23 The attorneys were parties to the legal malpractice case, but not to the bank case. All  
24 parties except the attorney defendants supported consolidation of the two cases. The  
25 court found common questions of fact because "virtually the entire series of events  
26 leading to the acquisition will have to be presented in each case." *Id.* at 697. The court  
27 also found common issues of law because "the nature of the duties owed by Citibank  
28 will be an issue in each of the actions." *Id.* Based on these common issues of fact and  
law, the court ordered consolidation of the two actions despite a disparity of parties.

At bottom, the V&E Defendants would have this Court grant them preferential  
treatment, and allow them to walk away from complex litigation for which they are  
themselves legally responsible, for no other reason than because they are attorneys. No  
such special dispensation was granted to the defendant law partnership in *Werner*,  
*supra*, where the attorneys were alleged to have acted as general counsel to a defunct

1 underwriter of tax exempt housing bonds, participated in sham bond closings and a  
2 public offering of the defunct entity's stock, and assisted in preparing the registration  
3 statement and prospectus for the offering, which omitted material information. 797 F.  
4 Supp. at 1200. Based on a case-by-case analysis, the Southern District of New York  
5 rejected the argument that the attorney defendants were too peripheral for consolidation:

6  
7 Defendant's argument that the facts of the two cases are  
8 different does not prevent consolidation. While there will be  
9 some facts in the original case that do not apply to the  
10 defendant here and some facts that do not apply to the  
11 parties in *In re Mathews & Wright* (two of whom, the  
12 plaintiffs here, are the same), there are numerous areas  
13 where the facts of the two cases overlap.

14 *Id.* at 1211. Similarly, as a result of the civil conspiracy and the pervasive and intimate  
15 involvement of the V&E Defendants in the fraud, including *inter alia* the structuring  
16 and use of "special purpose entities" to hide hundreds of millions of dollars of liabilities  
17 and years of materially incomplete, misleading, and fraudulent SEC filings (see Part II  
18 *supra*), the common factual and legal issues are manifold, predominant, and inexcisable.

19 The V&E Defendants argue that they should be severed because corrupt officials  
20 are named as Doe defendants in *Wilt* but not in *Newby*. *Skwartz, Werner, Feldman*, and  
21 *Bottazzi* are controlling on the issue of disparate parties. The Texas state law of civil  
22 conspiracy will control whether or not the corrupt officials will remain as parties.

23 **E. The Presence of State Law Claims for Securities Fraud, Common**  
24 **Law Fraud, and Civil Conspiracy in *Wilt* Does Not Undermine**  
25 **Consolidation or Support Severance of the V&E Defendants.**

26 The V&E Defendants argue that they should be severed because the *Wilt* action  
27 includes only state law claims, but the class actions include only federal securities  
28

1 claims. This argument lacks merit. The Court faced the same situation in *Primavera*  
2 *Familienstiftung v. Askin*, 173 F.R.D. 115 (S.D.N.Y. 1997), where the defendants in a  
3 non-class action opposed consolidation with a class action. The class action asserted  
4 federal securities claims but the non-class action asserted common law claims, including  
5 fraud and aiding and abetting. The Court rejected the argument that the variety of state  
6 and federal claims made consolidation inappropriate:

7  
8 [T]he ABF plaintiffs [non-class action] express concern that  
9 their common law fraud claims will somehow be “tainted”  
10 by the federal securities law issues raised by the Primavera  
11 Complaint [class action]. However, the presence of the  
12 federal securities law claims does not weigh heavily against  
13 consolidation here. The court in *Discount Bank*  
14 consolidated an individual action alleging a RICO claim in  
15 addition to securities fraud claims with related securities  
16 class actions that did not contain RICO claims. The court  
17 reasoned that consolidation was appropriate where the  
18 predicate acts were the same acts alleged in the securities  
19 fraud class actions. Similarly, the federal securities law  
20 claims here are based on essentially the same conduct as  
21 alleged in support of the common law claims in the ABF  
22 action. Moreover, federal securities law and common law  
23 fraud claims share substantial similarities, and differences  
24 encountered in pretrial proceedings will be taken into  
25 consideration by this Court. The question of consolidation  
26 for trial, where the risk of confusion of issues may be  
27 greater, is not raised by this motion.

19 173 F.R.D. at 130 (citations omitted).

21 The court faced a much more substantial disparity of claims in *Quintel Corp. v.*  
22 *Citibank, N.A.*, 100 F.R.D. 695 (S.D.N.Y. 1983), where the court rejected the argument  
23 of attorneys who were defendants in one case but not in another that the cases should  
24 not be consolidated because a disparity of claims threatened jury confusion:

26 Alperstein and Goldstick [attorney defendants] argue that  
27 consolidation will result in jury confusion because of the  
28 different elements required to be applied in the action for a  
securities law violation as opposed to an action for attorney  
malpractice. This type of danger exists, of course, in many

1 multi-defendant, multicount trials. It is a tenet of the jury  
2 system that jurors follow the court's instructions and can  
3 apply different standards to several defendants. There is  
4 nothing extraordinary about these cases, such as inevitably  
5 conflicting findings, that would make the danger of  
6 confusion paramount. The expected judicial economy  
7 resulting from consolidation outweighs the risk of confusing  
8 the jury. Indeed it may well be possible to minimize any  
9 such confusion by separate partial verdicts and  
10 accompanying charges.

11 *Id.* at 697.

12 **F. The Modest Size of Mr. Wilt's Claim Supports Consolidation.**

13 The only significant legal issue involving the size of Mr. Wilt's modest claim is  
14 whether he has the requisite \$75,000.00 in controversy for diversity jurisdiction under  
15 28 U.S.C. § 1332(a). Mr. Wilt seeks and expects to recover more than \$75,000.00 in  
16 punitive damages under Texas law because of the severity of the fraud in this litigation.  
17 Complaint §§ 3, 5, 306, 316. In the Fifth Circuit it is settled that punitive damages, if  
18 pled, are included in the amount in controversy if they are recoverable under Texas law  
19 and it cannot be said to a legal certainty that plaintiff would not be entitled to recover  
20 the jurisdictional amount. *St. Paul Reinsurance Co. v. Greenberg*, 134 F.2d 1250,  
21 1253-54 (5<sup>th</sup> Cir. 1998). The V&E Defendants make no effort to discount punitive  
22 damages, nor can they when faced with a fraud as egregious as that in this litigation.

23 The V&E Defendants would have this Court sever them from the consolidated  
24 proceeding so that, freed from the Scheduling Order, they could immediately lower the  
25 full weight of their power, wealth, and wounded pride upon Mr. Wilt. Such disparity of  
26 power and resources is a sound reason to deny the requested severance, to ensure that all  
27 related claims are similarly handled, rather than singling out one for special treatment.

28 ///

///

1           **G.     The V&E Defendants Rely on Inapposite Case Law.**

2  
3           The V&E Defendants give a string citation of cases in an attempt to establish the  
4 purported necessity of procedures to handle and prevent unnecessary dissemination of  
5 attorney-client information, resulting in what the V&E Defendants contend would be  
6 inordinate management difficulties absent the requested severance. The cases cited by  
7 the V&E Defendants ignore the probability that the crime-fraud exception will apply.  
8 Even if the crime-fraud exception is disregarded *arguendo*, the cases are all inapposite.

9  
10           In *Doe v. A Corp.*, 709 F.2d 1043 (5<sup>th</sup> Cir. 1983), the lawyer was not a defendant.  
11 Rather, he changed sides and tried to serve as lead counsel for a class action or at least  
12 as lead plaintiff against a former client. The court allowed him to maintain his personal  
13 claim against his former client, but refused to let him disclose the confidential fruits of  
14 his former attorney-client relationship. *Doe* was decided under standard ethical rules and  
15 did not involve any attorneys sued as direct, knowing participants in their clients' fraud.  
16 The court did not address the crime-fraud exception, which should be decisive here.

17  
18           In *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118 (7<sup>th</sup> Cir. 1976), the lawyer was  
19 not a defendant. Rather, he changed sides, sued his former client, and included a claim  
20 for his own attorneys' fees with the claims of his new clients. The attorney was ordered  
21 disqualified under standard ethical rules and a separate trial was ordered for his claim  
22 for attorneys' fees, but the attorneys' fees claim was not severed. The case proceeded as  
23 a single integrated action for all pre-trial purposes. In no way does *Cannon* support the  
24 severance requested by the V&E Defendants at the inception of this complex litigation.

25  
26           In *United States v. Walters*, 913 F.2d 388 (7<sup>th</sup> Cir. 1990), the lawyer was not a  
27 defendant. Rather, the case involved two criminal defendants who had consulted the  
28 same counsel in advance about the legality of their actions. One defendant wanted to

1 use the advice-of-counsel defense to disprove criminal intent; the other defendant did  
2 not want to disclose the content of counsel's advice, believing that would be a disaster.  
3 The court refused to order separate criminal trials of the two defendants and, as a result,  
4 the defendant who did not want to waive the attorney-client privilege was forced to sit  
5 through a trial where the privilege was waived, could not effectively put on the defense  
6 that he wanted to use, and was convicted. On appeal, for reasons of criminal law and  
7 procedure, the Seventh Circuit held that it had been prejudicial error, necessitating a  
8 new and separate trial, for the trial court to refuse separate trials so that each defendant  
9 could put on the inconsistent defenses that each wanted to use. *Walters* is inapposite to  
10 a civil action where the crime-fraud exception is expected to have critical importance.  
11

12 In *United States v. Alexander*, 735 F. Supp. 923 (D.Minn. 1990), the attorney and  
13 former client were criminal defendants. The former client at first invoked the attorney-  
14 client privilege to obtain a severance of the two defendants. The trial court says little  
15 about the earlier severance. Later, the client changed his mind and tried to force his  
16 former attorney to testify. However, the attorney invoked the Fifth Amendment and  
17 refused to testify. The former client then moved to remove the attorney from jeopardy  
18 by granting him immunity over the government's objection, or dismissing the criminal  
19 charge against him. The client's attempt to have his cake and eat it, too, was rejected:  
20

21 Defendant's pretrial invocation of the attorney-client  
22 privilege further undermines his suggestion that this  
23 situation is "extraordinary." Although the Court recognizes  
24 defendant's right to maintain and even change his various  
25 theories of defense, Alexander's invocation of the attorney-  
26 client privilege in support of severance has, to a certain  
27 degree, placed him in the predicament in which he now finds  
28 himself. As such, his claim that these circumstances are  
"extraordinary" is somewhat disingenuous. Defendant chose  
to use the privilege as a shield at the pretrial stage. Having  
done so, it would be improvident to allow him to use it as a  
sword at this time.

28 *Id.* at 926.

1           **H.     *Ad Hominem* Attacks against Mr. Wilt’s Counsel Must Be Ignored.**

2  
3           In their moving papers, the V&E Defendants try to interject improper political  
4 animosity toward Mr. Wilt’s counsel, Judicial Watch, Inc., based on other unrelated  
5 cases and a Judicial Watch press release noting that Mr. Wilt’s Complaint is unlike  
6 others in seeking to hold Corrupt Officials liable for wrongful actions.<sup>1</sup> Such partisan  
7 political attacks must have no place in the management of this complex litigation. The  
8 determination of whether the V&E Defendants and the Corrupt Officials are held liable  
9 on the theories averred in *Wilt* must be made on the basis of the law and the facts.

10  
11           When counsel for the V&E Defendants applied for admission *pro hac vice*, they  
12 undertook to abide by the local rules of this Court, including *inter alia* the mandate to  
13 “Avoid disparaging remarks and acrimony toward counsel, and [to] discourage ill will  
14 between the litigants. Counsel must abstain from unnecessary references to opposing  
15 counsel, especially peculiarities.” Local Rules, App. C, N. The wilful interjection of  
16 improper animosity toward counsel violates this rule and must be ignored.

17  
18           **3.     CONCLUSION.**

19  
20           It cannot be denied in good faith that the requirements for consolidation of *Wilt*  
21 with *Newby* under Rule 42(a) are satisfied. Many common issues of fact and law exist.  
22 The V&E Defendants were pervasively, intimately, and directly involved in virtually all  
23 acts, securities offering documents, and SEC filings whereby the fraud was committed  
24 and concealed. The direct participation of the V&E Defendants in many specific events  
25 and their involvement in a civil conspiracy are averred in detail. The V&E Defendants  
26 cannot be severed without requiring the same case to be litigated and tried twice.

27  
28           

---

  
          <sup>1</sup> They ignored the Judicial Watch motto: “***Because no one is above the law!***”

1 The V&E Defendants provide no good reason to sever them from *Newby*. On the  
2 contrary, compelling reasons of complex case management support the inclusion of the  
3 V&E Defendants in that related lead action. Therefore, the V&E Defendants' Objection  
4 to Consolidation should be overruled, and their Motion to Sever should be denied.

5  
6 Dated: March 21, 2002

7  
8 Respectfully Submitted,  
9 JUDICIAL WATCH, INC.

10  
11 

12 By:

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In Re ENRON CORP. SECURITIES  
LITIGATION

---

RALPH A. WILT, JR.,

Plaintiff,

v.

ANDREW S. FASTOW, et al.,

Defendants.

---

) Consolidated Lead Case No. H-01-3624

) Civil Action No. H-02-0576

**ORDER DENYING SEVERANCE OF VINSON & ELKINS DEFENDANTS**

Pending before the Court in the above-referenced action is a Motion of the Vinson & Elkins Defendants to Oppose Consolidation and to Sever the Claims against Them. Based on a review of the pleadings, moving papers, responsive papers, and oral argument of counsel, the Court finds (a) that common issues of fact and law exist in the *Wilt* action and the *Newby* action, (b) that the Vinson & Elkins Defendants have failed to show any cognizable prejudice from the Order of Consolidation entered on February 20, 2002, and (c) that the requested severance of the Vinson & Elkins Defendants would be contrary to the objectives of complex case management. For these reasons, the Court

ORDERS that the motion is DENIED.

SIGNED at Houston, Texas, this \_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
MELINDA HARMAN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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\_\_\_\_\_  
MELINDA HARMAN  
UNITED STATES DISTRICT JUDGE