UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY K. SKILLING, and KENNETH L. LAY, Defendants.	)	Crim. No. H-04-25 (Lake, J.)

DEFENDANT JEFFREY SKILLING'S MOTION FOR A JUDGMENT OF ACQUITTAL

Renewing his motions of March 28, May 8, and May 10, 2006,[1] defendant Jeffrey Skilling hereby moves pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal on all counts for which the jury returned a verdict of guilty: Counts 1, 2, 14, 16-20, 22-26, 31-32, 34-36, and 51. In the alternative, Mr. Skilling requests a new trial pursuant to Rule 33. *See* FED. R. CRIM. P. 33; *United States v. South*, 28 F.3d 619, 624 n.1 (7th Cir. 1994) ("a motion for acquittal and a motion for new trial can be, and often are, combined").

Rule 29 provides: "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM P. 29(a), (c). The Court must grant a Rule 29 motion where the government, even with the evidence viewed in the light most favorable to it, has not established an essential element of the

[1] *See* Def. Jeffrey Skilling's Mot. for a Judgment of Acquittal on Counts 14-21, 33 (Mar. 28, 2006), Trial Tr. at 10300:8-25 (Rule 29 motion at close of government's case); Trial Tr. at 17421:20-17422:10 (Rule 29 motion at close of defense case); Trial Tr. at 17595:25-17596:9 (Rule 29 motion at close of all evidence). While Mr. Skilling's initial motion was limited to Counts 14-21 and 33, the others were general motions for acquittal on all remaining counts in the Indictment. *See* 2A Charles A. Wright, FED. PRAC. & PROC. § 466 ("A general motion for a judgment of acquittal is a proper method to challenge the sufficiency of the evidence. . . . Specificity is not required by Rule 29."); *Huff v. United States*, 273 F.2d 56, 60 (5th Cir. 1959). All three motions were summarily denied by the Court without argument.

crime alleged. *See United States v. Strong*, 371 F.3d 225, 231-32 (5th Cir. 2004). Judgment of acquittal is also appropriate where the evidence presented "provides equal circumstantial support to . . . innocence," *United States v. Schuchmann*, 84 F.3d 752 (5th Cir. 1996), or where the government proved an essential element of its case, but on the "basis of a set of facts different from the particular facts alleged in the indictment," *United States v. Chambers*, 408 F.3d 237, 241 (5th Cir. 2005). Here, the evidence presented at trial was insufficient to sustain a conviction on each and every count remaining in the Indictment.

A. Count 1: Conspiracy

With respect to Count 1, the evidence was insufficient to sustain a conviction for conspiracy under 18 U.S.C. § 371. As a matter of law, the Task Force failed to establish:

- that Mr. Skilling and at least one other person made an agreement to commit the crime of securities fraud or wire fraud as charged in the Indictment;
- that Mr. Skilling knew the unlawful purpose of the agreement and joined in it willfully, with the intent to further the unlawful purpose;
- that one of the alleged conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Indictment, in order to accomplish some object or purpose of the conspiracy; and
- that Mr. Skilling acted with the specific intent to defraud.[2]

B. Counts 2, 14, 16-20, 22-26: Securities Fraud

With respect to Counts 2, 14, 16-20, and 22-26, the evidence was insufficient to sustain a conviction for securities fraud under 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. As a

[2] The elements for the crime of conspiracy discussed above and the elements of all the counts on which defendants move in this motion derive from the Court's jury instructions. For the reasons defendants previously have stated in pleadings and in argument before the Court, Skilling objected to and continues to object the Court's jury instructions.

matter of law, the Task Force failed to establish:

- that Mr. Skilling knowingly did any one or more of the following:
  - (1) employed a device, scheme, or artifice to defraud;
  - (2) made an untrue statement of a material fact or omitted to state a material fact that made what was said, under the circumstances, misleading;
  - (3) engaged in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon members of the investing public;
- that Mr. Skilling did so in connection with the purchase or sale of the securities of Enron Corporation;
- that Mr. Skilling acted willfully and with the intent to defraud; and
- that Mr. Skilling used or caused to be used, any means or instruments of transportation or communication in interstate commerce, or the mails, or the facilities of a national securities exchange, in furtherance of the fraudulent conduct.

In addition to the general insufficiency of the evidence, Count 14 (securities fraud regarding Enron's 1999 Form 10-K) suffers from another fatal flaw: material variance. Two of the primary allegations concerning Enron's 1999 financial results centered on alleged "side deals" in the Cuiaba and Nigerian Barges transactions. There was a significant difference, however, between the Indictment's allegation of these side deals and the evidence elicited at trial. The Indictment alleges that Andrew Fastow and *Rick Causey* entered the secret oral side deal on Cuiaba, *see* Indict. ¶ 35, and that Skilling's *"conspirators"—not* Skilling himself—promised Fastow he would not lose money on Barges, *see id.* ¶ 38. At trial, the Task Force and Fastow contradicted the Indictment and said that *Skilling* gave the alleged "bear hugs" on these deals. *See* Trial Tr. at 372:16-373:15, 6464:21-6466:13, 6488:16-6489:4, 17778:24-17779:3.

This material variance entitles Skilling to a judgment of acquittal on Count 14. The Indictment misled Skilling about the nature of the charges against him and the importance of the "Global Galactic" document, which supposedly memorializes aspects of each alleged side deal. Had Skilling known that Fastow and the Task Force would accuse him of making the alleged side deals, he would have sought to have the Global Galactic document forensically examined and would not have relied on Mr. Causey and his legal team to address and respond to the document. *See United States v. Eaton*, 501 F.2d 77, 79-80 (5th Cir. 1974) (in order to serve as the basis for a judgment of acquittal, the variance must be material—*i.e.*, prejudice the defendant's substantial rights); *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983) ("With variance, [the] concern is whether the indictment . . . has so informed a defendant that he can prepare his defense without surprise . . . .").

Because the Indictment and the Task Force made clear that Global Galactic and the alleged side deals had been made by *Causey*, and because the Task Force before trial, in its own words, "*d[id] not even charge Skilling* with being part of the Global Galactic agreement,"[3] Skilling did not seek to have a forensic examiner inspect the Global Galactic document until after Causey pled guilty and the Task Force refused to remove its Global Galactic allegations from the case. When the Task Force refused to allow Skilling's expert to examine the document, he immediately sought court intervention. *See* Defs.' Mot. for Access to Originals of Task Force Trial Exs. (filed Jan. 17, 2006). The Court ruled Skilling's request was too late, and denied him access to the original copy of the document in the Task Force's possession. *See* Order (filed Jan.

[3] Govt.'s Mem. of Law in Response to Def. Skilling's Mot. for the Identification and Production of *Brady* and Rule 16 Materials at 34 n.25 (filed Oct. 13, 2004) (Task Force: "The Indictment *does not even charge Skilling* with being part of the Global Galactic agreement.") (emphasis added); Defs.' Further Supplement In Support Of Their Emergency Mots. Of Last Week And In Support Of A Request To Strike Matters And Evidence 2, 12 (filed Jan. 23, 2006).

25, 2006). The Task Force then changed its "side deal" theory of the case during trial to focus on Skilling—thereby materially deviating from the Indictment and causing Skilling obvious prejudice. This is further grounds for a judgment of acquittal on Count 14.

C. Counts 31-32, 34-36: False Statements to Auditors

With respect to Counts 31-32 and 34-36, the evidence was insufficient to sustain a conviction for false statements to auditors under 15 U.S.C. §§ 78m(a), 78m(b)(2), 78ff, and 17 C.F.R. § 240.13b2-2. As a matter of law, the Task Force failed to establish:

- that Mr. Skilling, directly or indirectly, made or caused to be made a materially false or misleading statement, or omitted to state, or caused another person to omit to state, a material fact necessary to make the statement, in light of all the circumstances under which it was made, not misleading to an accountant in connection with the audit, examination, preparation, or filing of the Enron financial statements described in the Indictment;
- that Mr. Skilling acted knowingly and willfully; or
- that Mr. Skilling was criminally liable as an aider and abettor; in other words, the Task Force failed to establish:
  - (1) that these offenses were committed by some other person;
  - (2) that Mr. Skilling associated with the criminal venture, with the intent to violate the law;
  - (3) that Mr. Skilling purposefully participated in the criminal venture; and
  - (4) that Mr. Skilling sought by action to make that venture successful.

D. Count 51: Insider Trading

With respect to Count 51, the evidence was insufficient to sustain a conviction for insider trading under 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. As a matter of law, the Task Force failed to establish:

- that Mr. Skilling knowingly employed a device, scheme, or artifice to defraud, including the device of insider trading; in other words, the Task Force failed to establish:
  - (1) that Mr. Skilling was an "insider" at Enron;
  - (2) that Mr. Skilling possessed material, non-public information about Enron or its securities; and
  - (3) that Mr. Skilling sold Enron stock, as alleged in Count 51, on the basis of the material, non-public information;
- that Mr. Skilling acted willfully and with the intent to defraud; and
- that Mr. Skilling used or caused to be used, any means or instruments of transportation or communication in interstate commerce, or the mails, or the facilities of a national securities exchange, in furtherance of the fraudulent conduct.

E. Conclusion

In short, the evidence presented at trial was legally insufficient as to every element of every count in dispute. For this reason, Mr. Skilling respectfully requests that the Court set aside the jury's verdict and enter a judgment of acquittal on Counts 1, 2, 14, 16-20, 22-26, 31-32, 34-36, and 51. In the alternative, the Court should vacate the judgment and order a new trial.

Dated: June 20, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to verify that true and correct copies of the following documents (Defendant Jeffrey Skilling's Motion For A Judgment Of Acquittal) have been served on this 20th day of June, 2006 on counsel listed below.

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[PROPOSED] ORDER

Having considered Defendant Jeffrey Skilling's Motion For A Judgment Of Acquittal, the papers filed in response thereto, all other argument on the motion, and the entire record in this case, it is hereby ORDERED that the motion is:

GRANTED _____

DENIED _____.

SIGNED on the _____ day of _____, 2006.

_____
UNITED STATES DISTRICT JUDGE

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