

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

UNITED STATES OF AMERICA

v.

KEVIN HOWARD,

Defendant.

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Cr. No. H-03-93 (Gilmore, J.)

PLEA AGREEMENT

The United States of America, by and through Steven A. Tyrrell, Chief of the Fraud Section, Criminal Division, United States Department of Justice, and Jonathan E. Lopez and Laura N. Perkins, Trial Attorneys, and the Defendant, Kevin Howard, by and through his counsel, Barry J. Pollack, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, state that they have entered into an agreement, the terms and conditions of which are as follows:

The Defendant's Agreement

1. The Defendant agrees to plead guilty to Count 5 of the Sixth Superseding Indictment charging him with falsifying books and records, in violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5) and 78ff. The Defendant, by entering this plea, agrees that he is waiving any right to have the facts that the law makes essential to the punishment charged in the Sixth Superseding Indictment proven to a jury or proven beyond a reasonable doubt.

2. The Defendant agrees not to accept remuneration or compensation of any sort,

directly or indirectly, for the dissemination through books, articles, speeches, interviews, or any other means, of information regarding his work at Enron or the investigation or prosecution of any civil or criminal cases against him. The Defendant further agrees not to otherwise accept any remuneration or compensation resulting from his employment at Enron.

3. The Defendant agrees that this Plea Agreement binds only the Criminal Division of the U.S. Department of Justice and the Defendant; it does not bind any United States Attorney or any other Division of the Department of Justice.

Punishment Range

4. The statutory maximum penalty for a violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5) and 78ff, is imprisonment for a term of not more than ten years and a fine of not more than \$1,000,000 or twice the gross pecuniary gain to the Defendant or loss to the victim(s), whichever is greater. Title 15, United States Code, Section 78ff; Title 18, United States Code, Sections 3571(b)(1) and (d). Additionally, the Defendant may receive a term of supervised release after imprisonment of up to three years. Title 18, United States Code, Section 3583(b). The Defendant acknowledges and understands that should he violate the conditions of supervised release which may be imposed as part of his sentence, then the Defendant may be imprisoned for an additional term of up to two years, without credit for time already served on the term of supervised release prior to such violation. Title 18, United States Code, Section 3583(e)(3). The Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he eligible for parole.

Mandatory Special Assessment

5. Pursuant to Title 18, United States Code, Section 3013(a)(2)(A), immediately after sentencing, the Defendant will pay to the Clerk of the United States District Court a special assessment in the amount of one hundred dollars (\$100.00). The payment will be by cashier's check or money order payable to the Clerk of the United States District Court, c/o District Clerk's Office, P.O. Box 61010, Houston, Texas 77208, Attention: Finance.

Waiver of Appeal

6. The Defendant is aware that Title 18, United States Code, Section 3742, affords a Defendant the right to appeal the sentence imposed. Additionally, the Defendant is aware that Title 28, United States Code, Section 2255 affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or sentence has become final. If the Court accepts the Plea Agreement and sentences the Defendant within the agreed-upon sentencing range as set forth in paragraph 12, the Defendant agrees to waive the right to appeal the sentence imposed or the manner in which it was determined, and the Defendant waives the right to contest his conviction or sentence by means of any post-conviction proceeding.

7. In agreeing to these waivers, the Defendant is aware that a sentence has not yet been determined by the Court. The Defendant is also aware that any promise, representation, or estimate of the possible sentencing range under the Sentencing Guidelines that he may have received from his counsel, the United States, or the Probation Office is a prediction, not a promise, and is not binding on the United States, the Probation Office, or the Court, other than as provided in paragraph 12. The Defendant further understands and agrees that the Sentencing Guidelines are "effectively advisory" to the Court. *United States v. Booker*, 125 S. Ct. 738

(2005). Accordingly, the Defendant understands that, although the Court must consult the Sentencing Guidelines and must take them into account when sentencing the Defendant, the Court is not bound to follow the Sentencing Guidelines and is not required to sentence the Defendant within the calculated guideline range. However, if the Court accepts this Plea Agreement, the Court is bound by the sentencing provision in paragraph 12.

8. The Defendant understands and agrees that all waivers contained in the agreement are made in exchange for the concessions made by the United States in this Plea Agreement. If the Defendant instructs his attorney to file a notice of appeal of his sentence or of his conviction, or if the Defendant instructs his attorney to file any other post-conviction proceeding attacking his conviction or sentence, the Defendant understands that the United States will seek specific performance of the Defendant's waivers in this Plea Agreement of the Defendant's right to appeal his conviction or sentence and of the Defendant's right to file any post-conviction proceedings attacking his conviction or sentence.

The United States' Agreements

9. If the Defendant complies fully with all of his obligations under this Plea Agreement, the United States agrees to dismiss the remaining counts of the Sixth Superseding Indictment and any underlying indictments at the time of sentencing and to recommend that the Defendant be sentenced within the agreed upon sentencing range set forth in paragraph 12.

United States' Non-Waiver of Appeal

10. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right:

- (a) to bring its version of the facts of this case, including its evidence file and any

investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report;

- (b) to set forth or dispute sentencing factors or facts material to sentencing;
- (c) to seek resolution of such factors or facts in conference with the Defendant's counsel and the Probation Office;
- (d) to file a pleading relating to these issues, in accordance with U.S.S.G. Section 6A1.2 and Title 18, United States Code, Section 3553(a); and
- (e) to appeal the sentence imposed or the manner in which it was determined in the event that the Court sentences the Defendant outside of the range set forth in paragraph 12.

Sentence Determination

11. The Defendant is aware that the sentence will be imposed after consideration of the Sentencing Guidelines, which are only advisory, as well as the provisions of Title 18, United States Code, Section 3553(a). The United States and the Defendant agree that the applicable Sentencing Guidelines range exceeds the agreed-upon sentencing range contained paragraph 12.

12. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States and the Defendant agree that a sentence within the range of 4-12 months of home confinement, probation, or some combination thereof, is the appropriate disposition of the case. The Defendant understands that, if the Court rejects the Plea Agreement, the Court must (i) inform the parties that the Court rejects the Plea Agreement, (ii) advise the Defendant personally that the Court is not required to follow the Plea Agreement and give the Defendant the opportunity to withdraw the plea, and (iii) advise the Defendant personally that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the Defendant than the Plea Agreement contemplated.

Rights at Trial

13. The Defendant represents to the Court that he is satisfied that his attorneys have rendered effective assistance. The Defendant understands that by entering into this Plea Agreement, he surrenders certain rights as provided in this Plea Agreement. The Defendant understands that the rights of a defendant include the following:

- (a) If the Defendant persisted in a plea of not guilty to the charges, the Defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the Defendant, the United States, and the court all agree.
- (b) At a trial, the United States would be required to present witnesses and other evidence against the Defendant. The Defendant would have the opportunity to confront those witnesses and his attorney would be allowed to cross-examine them. In turn, the Defendant could, but would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for the Defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.
- (c) At a trial, the Defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the Defendant desired to do so, he could testify on his own behalf.

Factual Basis for Guilty Plea

14. The Defendant agrees to plead guilty because he is in fact guilty of the offense charged in Count 5 of the Sixth Superseding Indictment. If this case were to proceed to trial, the United States would prove each element of that offense beyond a reasonable doubt. The Defendant understands that the United States would submit testimony and physical and documentary evidence that would establish the following facts:

- (a) As set forth more fully below, Defendant, Kevin Howard, through his participation in the "Braveheart" transaction, which closed on December 22, 2000, knowingly and willfully directly or indirectly caused Enron's Form 10K

for the year-ending 2000 to be falsified, in that the 10K did not accurately and fairly reflect, in reasonable detail, the transactions and dispositions of the assets of Enron, in violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5) and 78ff.

- (b) Enron Corp. (“Enron”), an Oregon corporation headquartered in Houston, Texas, was a publicly-traded company and issuer of securities under Section 78l of Title 15, United States Code, with its shares listed on the New York Stock Exchange. As a publicly-traded company, Enron was required to file financial statements and reports pursuant to Section 78o(d) of Title 15, United States Code. These financial statements and reports include what is known as a Form 10K (or “10K”), a year-end report detailing Enron's financial condition and results of its business operations. Arthur Andersen (“Andersen”) was Enron's outside accountant during the relevant time period.
- (c) At an analyst conference in January of 2000, Enron officially unveiled Enron Broadband Services (“EBS”) to the public as Enron's newest “core” business group. Jeffrey Skilling, Enron's then Chief Executive Officer, announced to the public at that analyst conference that EBS would achieve a certain earnings target for year-end 2000. Specifically, Skilling stated that EBS would report a loss of \$60 million.
- (d) Howard was the Chief Financial Officer and Vice President of Finance at EBS throughout the year 2000. Howard was responsible for supervising all aspects of structured finance transactions at EBS.
- (e) By the fourth quarter of 2000, EBS had failed to generate any significant revenue and was in danger of missing its publicly declared earnings target. Howard and others at EBS and Enron knew that absent a large revenue-generating transaction, EBS would miss its previously announced target by a wide margin. While Howard did not believe the failure of EBS to meet its earnings target would have a monetary impact on him personally, it was important to him and others at EBS that EBS meet its earnings target.
- (f) During this same time frame, EBS was attempting to launch a video on demand (“VOD”) business. The core of EBS's VOD business was a 20-year agreement between EBS and Blockbuster, which EBS valued in the hundreds of millions of dollars over the life of the contract.
- (g) In an attempt to generate earnings sufficient to meet the previously announced earnings target, Howard asked employees at EBS to examine the Blockbuster agreement to see if EBS could recognize future earnings from the agreement in the fourth quarter of 2000. Howard and others at EBS

structured a transaction known as "Project Braveheart" designed to "monetize" or book a portion of the future earnings and cash flow from the Blockbuster agreement in the fourth quarter of 2000.

- (h) In order for EBS to legitimately recognize future earnings from the Blockbuster agreement, EBS and Andersen agreed that EBS had to: (1) form a joint venture with an outside party that contributed equity to the joint venture that was at-risk; (2) assign the Blockbuster agreement and VOD business to the joint venture; and (3) sell a portion of its interest in the joint venture. Monies from the sale of that interest could then be used to fill the earnings gap EBS faced.
- (i) As of November 2000, EBS did not yet have an outside party for the joint venture and the earnings gap EBS faced continued to widen. Consequently, in November 2000, Howard and others at EBS approached nCube, a small VOD technology company based in Beaverton, Oregon, and asked the executives at nCube if nCube would be willing to be EBS's joint venture partner so that EBS could meet its earnings target for the year 2000.
- (j) Through several discussions with Howard and others at EBS, nCube understood that it would not suffer financially in any way from participating in Project Braveheart as EBS's joint venture partner. Indeed, nCube was told by Howard and others that all legal fees and other transaction costs would be paid by Enron. In addition, Howard informed nCube that EBS wanted it as a short-term participant in the joint venture. This suited nCube, as Howard knew that nCube was cash poor at the time and could not risk tying up its money in a joint venture for the long-term. Howard and others at EBS informed nCube that EBS was going to arrange for nCube to be bought out of the joint venture by a third party the very next quarter. Howard explained to nCube that nCube's participation in the joint venture was simply a "bridge mechanism" to get EBS into the next quarter.
- (k) nCube, eager to please Enron and hoping to secure its position as a vendor for future contracts, agreed to be the joint venture partner based on their belief, resulting from conversations with Howard and others, that it would not suffer financially and would be bought out in the next quarter.
- (l) Project Braveheart closed on December 22, 2000, and EBS subsequently sold a portion of its interest in the joint venture and booked, with Andersen's agreement, \$53 million in earnings from this transaction in the fourth quarter of 2000. Project Braveheart enabled EBS to meet the projected \$60 million loss goal previously set by Skilling and this loss amount was reported in Enron's 10K for the year 2000.

- (m) Prior to the closing of Project Braveheart, Howard learned that Andersen would probably not have agreed with EBS's recognition of earnings from Project Braveheart if it had known that nCube intended to exit the joint venture in the first quarter of 2001 as Howard and others had previously discussed with nCube. Howard further understood that Andersen agreed with Enron's accounting for the transaction, in part, because it viewed nCube as a strategic partner that intended to remain in the joint venture indefinitely, which was not actually the case.
- (n) Howard knowingly and willfully failed to inform Andersen or cause Andersen to be informed that nCube's expectation was that its participation in the joint venture was purely a mechanism for EBS to recognize earnings in the fourth quarter and that it expected to exit the joint venture the very next quarter. Howard understood that Andersen viewed these facts as material to their analysis of the structure of Project Braveheart and EBS's ability to recognize earnings.
- (o) Similarly, Howard knowingly and willfully failed to inform nCube prior to the close of the transaction that he had learned that nCube could not be bought out in the first quarter as originally discussed. At the time, Howard knew that this was an important fact for nCube, yet he and others at EBS failed to disclose it to them.
- (p) As a result of Howard's failure to disclose material facts to both nCube and Andersen, Howard indirectly caused to be falsely recorded as revenue earnings from Project Braveheart, in that Enron's books and records, specifically, Enron's 10K for the year 2000, failed to accurately and fairly reflect, in reasonable detail, the transactions and dispositions of the assets of Enron.
- (q) Howard undertook these actions in violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5) and 78ff.

Breach of Plea Agreement

15, If the Defendant should fail in any way to fulfill completely all of the obligations under this Plea Agreement, the United States will be released from its obligations under the Plea Agreement, and the Defendant's plea and sentence will stand. Whether the Defendant has breached any provision of this Plea Agreement shall be determined solely by the United States through the Fraud Section of the Criminal Division

of the United States Department of Justice, whose judgment in that regard is final.

Hyde Amendment Waiver

16. The Defendant agrees that with respect to all charges contained in the Sixth Superseding Indictment in the above-captioned action, as well as all prior indictments in this matter, he is not a “prevailing party” within the meaning of the Hyde Amendment, Section 617, PL 105-119 (Nov. 26, 1997), and will not file any claim under that law.

Complete Agreement

17. This written Plea Agreement, including the attached addendum of the Defendant and his attorney, constitutes the complete Plea Agreement between the United States, the Defendant, and his counsel. No promises or representations have been made by the United States except as set forth in writing in this Plea Agreement. The Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

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18. Any modification of this Plea Agreement must be in writing and signed by all parties.

Filed at Houston, Texas, on June 1, 2009.


Kevin Howard
Defendant

Subscribed and sworn to before me on June 7, 2009.

MICHAEL N. MILBY
UNITED STATES DISTRICT CLERK

By: 
Deputy United States District Clerk

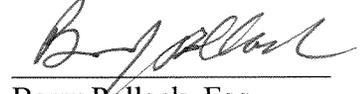
APPROVED:

STEVEN A. TYRRELL
Chief, Fraud Section, Criminal Division
United States Department of Justice

By: 
Jonathan E. Lopez
Senior Trial Attorney

By: _____
Laura N. Perkins
Trial Attorney


Kevin Howard
Defendant


Barry Pollack, Esq.
Attorney for the Defendant

United States Dept. of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005
Phone: (202) 307-0846
Fax: (202) 514-0152

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UNITED STATES OF AMERICA §

v.

KEVIN HOWARD,

Defendant.

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Cr. No. H-03-93 (Gilmore, J.)

PLEA AGREEMENT - ADDENDUM

I have fully explained to the Defendant his rights with respect to the Sixth Superseding Indictment, including Count 5. I have reviewed the provisions of the United States Sentencing Guidelines and I have fully and carefully explained to the Defendant the provisions of those Guidelines which may apply in this case. I have also explained to the Defendant that the Sentencing Guidelines are only advisory. Further, I have carefully reviewed every part of this Plea Agreement with the Defendant. To my knowledge, the Defendant's decision to enter into this Plea Agreement is an informed and voluntary one.



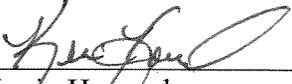
Barry Pollack, Esq.
Attorney for the Defendant

6/1/09

Date

PLEA AGREEMENT - ADDENDUM

I have consulted with my attorney and fully understand all my rights with respect to the Sixth Superseding Indictment, including Count 5, against me. My attorney has fully explained and I understand all my rights with respect to the provisions of the United States Sentencing Guidelines which may apply in my case. I have read and carefully reviewed every part of this Plea Agreement with my attorney. I understand this Plea Agreement and I voluntarily agree to its terms.



Keyin Howard
Defendant

6/1/09

Date