

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
10-14-08
MICHAEL N. MILEY, CLERK
BY DEPUTY

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. H-03-93
)	
JOSEPH HIRKO,)	
)	
Defendant.)	
_____)	

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 Jack B. Patrick, Trial Attorneys, and the Defendant, Joseph Hirko, by and through his counsel, David Angeli and Per Ramjford, 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 4 of the Seventh Superseding Indictment charging him with wire fraud, in violation of Title 18, United States Code, Section 1343. 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 Seventh Superseding Indictment proven to a jury or proven beyond a reasonable doubt.

2. Provided this Court accepts the Plea Agreement, the Defendant will, within three business days of such acceptance, dismiss the pending petition for a writ of certiorari that he has filed in the United States Supreme Court in *Hirko v. United States*, No. 08-40 ("Cert. Petition") in accordance with United States Supreme Court Rule 46. The Defendant agrees to dismiss his Cert. Petition regardless of whether the United States Supreme Court has granted the Cert. Petition or granted the petitions for a writ of certiorari filed by Scott Yeager in *Yeager v. United States*, No. 08-67, or Rex Shelby in *Shelby v. United States*, No. 08-58. The Defendant further agrees not to attempt to reinstate the Cert. Petition or to file any other claim for relief on double jeopardy or collateral estoppel grounds with this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court should either Scott Yeager or Rex Shelby prevail on the merits of their double jeopardy and collateral estoppel claims in the United States Supreme Court in connection with their respective petitions.

3. 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.

4. Defendant agrees that this Plea Agreement binds only the United States Attorney's Office of the Southern District of Texas, 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

5. The statutory maximum penalty for a violation of Title 18, United States Code, Section 1343 is imprisonment for a term of not more than five years and a fine of not more than \$250,000, or twice the gross pecuniary gain to the Defendant or loss to the victim(s), whichever is greater. Title 18, United States Code, Sections 1343, 3571(b)(3) 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 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

6. 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.

Restitution, Forfeiture, and Fines

7. The Defendant agrees to forfeit \$7,000,000 in criminal proceeds, to be satisfied from funds in Goldman Sachs Account 026-38602-9, which contains sufficient funds for this purpose and which constitutes proceeds of the offense to which defendant will plead guilty pursuant to this Plea Agreement. The Defendant warrants that he is the sole owner of all property listed above and he agrees to hold the United States, its agents, and employees harmless from any claims whatsoever in connection with the seizure or forfeiture covered by this Plea Agreement. The Defendant further agrees to withdraw and relinquish for all purposes, and not re-institute directly or indirectly, all rights to his interest in the settlement awarded to the Defendant in connection with the liquidation of the

Defendant's claim in Enron's bankruptcy (In Re Enron Corp et al., Case No. 01-16034 (S.D.N.Y.)). This amount consists of approximately \$1,323,468 located in U.S. Bank Account # 119-374-00, and approximately \$437,011.38 currently classified as an unsecured claim in the Enron Creditors Recovery Corp. disputed claim reserve account, and all interest accrued thereon (together, with the \$7,000,000 referenced above, the "Forfeited Assets"). The Defendant agrees to relinquish any other claim he may have to deferred compensation, severance, or any other form of payment related to his employment by Enron or any related entity.

8. The Defendant agrees to consent to the entry of orders of forfeiture for all Forfeited Assets to the United States Marshal Service, or any other entity deemed appropriate by the United States, for the benefit of the Securities and Exchange Commission's Enron Fair Fund. The Defendant acknowledges that he understands that the forfeiture of assets is part of the sentence that may be imposed in this case and waives any failure by the Court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted. The Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this agreement on any grounds, including that the

forfeiture constitutes an excessive fine or punishment. The Defendant agrees to take all steps as requested by the United States to pass clear title to the Forfeited Assets to the United States, and to testify truthfully in any related judicial proceeding. The Defendant agrees not to seek a refund from the United States Treasury of the amount that he paid in taxes in connection with the receipt of \$7,000,000 in proceeds from the offense to which he will plead guilty, and waives his right, title, and interest to the taxes paid on that amount.

9. The Defendant understands that under the United States Sentencing Guidelines, the Court may order the Defendant to pay a fine to reimburse the government for the costs of any imprisonment or term of supervised release. To the extent that the Court orders forfeiture consistent with paragraph 7, the United States agrees to recommend that the Court not impose a fine.

10. The United States agrees that, provided the Defendant fulfills the financial and other obligations imposed by this Plea Agreement, it will recommend that no additional fine, forfeiture or restitution be ordered by the Court against the Defendant at the time the Defendant is sentenced. The United States agrees that this amount is appropriate and fully satisfies the fine, forfeiture, and restitution provisions of the law.

Cooperation

11. The Defendant understands and agrees that “fully cooperate,” as used herein, includes providing all information relating to any criminal activity known to the Defendant. The Defendant understands that this includes providing information about all federal and state law offenses about which he has knowledge. In that regard:

- (a) Defendant agrees to testify truthfully as a witness before a grand jury or in any other judicial or administrative proceeding when called upon to do so by the United States. Defendant further agrees to waive his Fifth Amendment privilege against self-incrimination for the purpose of this agreement;
- (b) Defendant agrees to voluntarily attend any interviews and conferences as the United States may request on reasonable notice;
- (c) Defendant agrees to provide truthful, complete and accurate information and testimony and understands any false statements made by the Defendant to the Grand Jury or at any court proceeding (criminal or civil), or to a government agent or attorney can and will be prosecuted under the appropriate perjury, false statement or obstruction statutes; and
- (d) Defendant agrees to provide, in response to specific requests from the United States, all non-privileged documents within his possession, custody, or control, that are responsive to such requests.

12. The Defendant understands and agrees that under the terms of this Plea Agreement and Rule 11(c)(1)(C), regardless of any cooperation that the Defendant provides, the Defendant will not move for a downward departure or other

reduction in sentence on any grounds and that no such grounds are applicable.

Waiver of Appeal

13. 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 20, 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.

14. Further, if the Court accepts the Plea Agreement and sentences the Defendant within the agreed-upon sentencing range as set forth in paragraph 20, the Defendant waives any right to raise or persist in claims of double jeopardy or collateral estoppel on direct review or collateral attack before the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit, or this Court, regardless of the outcomes of the respective petitions for a writ of certiorari filed by Scott Yeager in *Yeager v. United States*, No. 08-67, or Rex Shelby in

Shelby v. United States, No. 08-58.

15. 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 United States 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 20. The Defendant further understands and agrees that the United States 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 United States Sentencing Guidelines and must take them into account when sentencing the Defendant, the Court is not bound to follow the United States 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 20.

16. 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

17. 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 Seventh Superseding Indictment and any underlying indictments at the time of sentencing and to recommend that the Defendant be sentenced to a term of imprisonment at the low-end of the agreed upon sentencing range set forth in paragraph 20.

United States' Non-Waiver of Appeal

18. 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.

Sentence Determination

19. The Defendant is aware that the sentence will be imposed after consideration of the United States Sentencing Guidelines and Policy Statements, 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 of 12-16 months' imprisonment.

20. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States and the Defendant agree that a term of imprisonment within the range of 12-16 months' 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. The Defendant agrees that he will not seek a sentence below 12 months' imprisonment, and the Defendant understands that the United States is not obligated to, and will not at any time in the future, file any motion for a reduction in Defendant's sentence under U.S.S.G. § 5K1.1, 18 U.S.C. § 3553, or Fed. R. Crim. P. 35, based on information provided by Defendant related directly or indirectly to Enron, any entity related to Enron, or any transaction involving Enron or any entity related to Enron.

Rights at Trial

21. 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

22. The Defendant is pleading guilty because he is guilty of the charge contained in Count 4 of the Seventh 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, on or about May 15, 2000, in the Southern District of Texas and elsewhere, the Defendant, Joseph Hirko, with an intent to deceive, participated in a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and caused the transmission of an interstate wire communication in furtherance of the scheme, in violation of Title 18, United States Code, Section 1343.

- (b) Enron Corp. ("Enron") was a publicly-traded Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the (a) purchase and sale of natural gas, (b) construction and ownership of pipelines and power facilities, (c) provision of telecommunication services, and (d) trading in contracts to buy and sell various commodities.
- (c) In or about July 1, 1997, Enron acquired a public utility, Portland General Corporation, based in Portland, Oregon. As part of that acquisition, Enron acquired Portland General's telecommunications division, FirstPoint Communications, Inc. Enron re-named the telecommunications business Enron Communications, Inc., otherwise known as "ECI". ECI was later renamed Enron Broadband Services, or "EBS."
- (d) Hirko was President and Chief Executive Officer of EBS from approximately July 1, 1998, to July 28, 2000. Hirko shared CEO responsibilities with Kenneth Rice from approximately July, 1999 to February, 2000.
- (e) EBS's vision was to find ways to differentiate itself from its competitors in the broadband market. One of these ways was to create an "intelligent network." Throughout 1999 and 2000, EBS hired numerous engineers, programmers, and other staff as part of its effort to develop this "intelligent network" and related software.
- (f) On or about January 20, 2000, Enron held its annual analyst conference in Houston, Texas. At this conference, Skilling introduced EBS as one of Enron's "core" units and touted EBS's network as the "superior network." Hirko participated in the analyst conference presentations as well. Relying on information provided to him by EBS employee Rex Shelby and others associated with Shelby, Hirko affirmed the existence of EBS's "intelligent network."
- (g) In addition to touting the network itself, Skilling also announced the development of a Broadband Operating System or "BOS." The BOS was meant to be an intelligent operating system and was described as,

among other things, a standard protocol for accessing real-time bandwidth.

- (h) Following the analyst conference, development of the BOS continued. As Hirko and others knew, however, the BOS remained in the development stage and never was deployed on EBS's network, never controlled EBS's network, and never was otherwise commercially available throughout Hirko's employment at Enron.
- (i) Despite the BOS's developmental status, Hirko, acting with a reckless indifference to the true facts, approved the issuance of a materially false and misleading press release which implied that the BOS was embedded on the Enron network and provided quality of service control and other features. In fact, the BOS remained in the development phase.
- (j) In the days prior to May 15, 2000, Hirko reviewed and approved a press release issued on or about that date, announcing the acquisition of Warpspeed Communications (the "Warpspeed Release"). The Warpspeed Release falsely represented the status of the BOS and implied that it was already embedded and functioning as a part of Enron's network. In particular, the Warpspeed Release stated, among other things, that the BOS "allows application developers to dynamically provision bandwidth on demand for the end-to-end quality of service necessary to deliver broadband content." Hirko reviewed and, acting with a reckless indifference to the true facts, approved this language even though it contained material inaccurate representations of the BOS's status – as Hirko knew that the BOS was still under development and could not dynamically provision bandwidth on demand or provide for the end-to-end quality of service necessary to deliver broadband content.
- (k) Hirko's approval of this and other press releases assisted in the maintenance of Enron's overall stock price, thereby improperly maintaining the value of Hirko's holdings of Enron stock.
- (l) Hirko undertook these actions in violation of Title 18, United States Code, Section 1343.

Breach of Plea Agreement

23. 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. If at any time the Defendant retains, conceals, or disposes of assets in violation of this Plea Agreement, or if the Defendant knowingly withholds evidence or is otherwise not completely truthful with the United States, then the United States may move the Court to set aside the guilty plea and reinstate prosecution. Any information and documents that have been disclosed by the Defendant, whether prior or subsequent to this Plea Agreement, and all leads derived therefrom, will be used against the Defendant in any prosecution.

24. 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

25. The Defendant agrees that with respect to all charges contained in the Seventh 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

26. 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.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

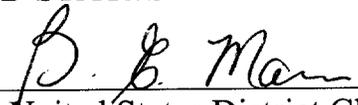
27. Any modification of this Plea Agreement must be in writing and signed by all parties.

Filed at Houston, Texas, on Oct. 14, 2008.


Joseph Hirko
Defendant

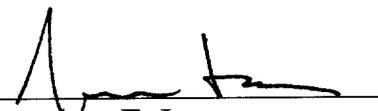
Subscribed and sworn to before me on Oct. 14, 2008.

MICHAEL N. MILBY
UNITED STATES DISTRICT CLERK

By: 
Deputy United States District Clerk

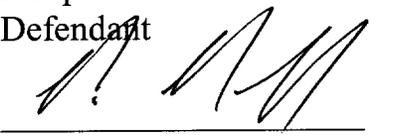
APPROVED:

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

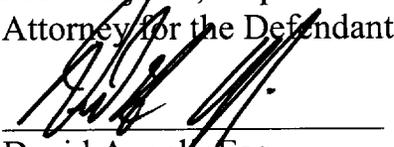
By: 
Jonathan E. Lopez
Senior Trial Attorney

By: 
Joseph Hirko
Defendant

By: 
Jack B. Patrick
Senior Litigation Counsel

By: 
Per Ramiford, 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

By: 
David Angell, Esq.
Attorney for the Defendant

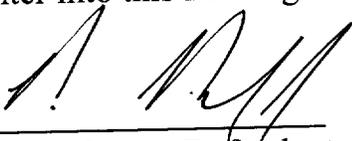
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JOSEPH HIRKO,)
)
Defendant.)
_____)

Criminal No. H-03-93

PLEA AGREEMENT - ADDENDUM

I have fully explained to the Defendant his rights with respect to the Seventh Superseding Indictment, including Count 4. 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.



Attorney for the Defendant

10/14/08
Date

I have consulted with my attorney and fully understand all my rights with respect to the Seventh Superseding Indictment, including Count 4, 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.


Defendant

10-14-08
Date