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

United States Courts
Southern District of Texas
FILED

SEP 0 2 2003

Michael N. Milby, Clerk

In re Enron Corporation Securities Litigation and "Erisa" Litigation	)	
MARK NEWBY, et al. Plaintiff	)	
v.	)	Consolidated Lead No. H-01-3624 and Consolidated Cases
ENRON CORPORATION, et al	)	

DEFENDANT DAVID B. DUNCAN'S MOTION TO POSTPONE AND/OR STAY DISCOVERY DURING PENDENCY OF CRIMINAL PROCEEDINGS

INTRODUCTION

Defendant David B. Duncan ("Duncan") moves to postpone discovery propounded to him in any and all of the lead, consolidated, coordinated or related cases in these proceedings.

Such a postponement is essential to preserve Duncan's constitutional rights. This Court has previously granted such a motion for another individual defendant in these cases, and a similar Motion is pending at this time for at least one other Defendant. Although Duncan has pleaded guilty to certain charges in an information filed against him, he remains in substantial jeopardy until he is sentenced. The law recognizes that the protections afforded by the Fifth Amendment to the United States Constitution remain every bit as strong, and are fully available to him through sentencing.

Furthermore, public interest would be best served by granting the motion to stay, which would allow Duncan to preserve his

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constitutional rights and simultaneously protect ongoing governmental investigations. Duncan has entered into an agreement to cooperate with the government's continuing investigation into Enron-related matters. Requiring him to participate in discovery could compromise the government's investigation in that it would reveal the substance of his cooperation with the government and interfere with such cooperation.

I. Procedural Status

Duncan is a former Partner of Arthur Andersen. On April 9, 2002, Duncan entered a plea of guilty to one count of obstruction of justice, 18 USC § 1512(b). Duncan did so pursuant to a Cooperation Agreement with the Enron Task Force of the United States Department of Justice. A copy of Duncan's Cooperation Agreement is attached as Exhibit A. The Cooperation Agreement provides, among other things, that "Defendant agrees not to reveal his cooperation, or any information derived therefrom to any third party without prior consent of the [Justice] Department, and to instruct his attorneys to do the same. By Order of this Court, Duncan's sentencing has been rescheduled from it original date, to a current date of November 21, 2003. A copy of such Order is attached at Exhibit B.

As this Court knows, Duncan is a named Defendant in Civil Action No. H-01-3624, *Newby vs. Enron Corp*, as well as approximately fifty (50) other consolidated, coordinated or related cases, including *Title vs. Enron*.

Duncan files this motion in light of this Court's July 11, 2003, Scheduling Order, which provides for certain discovery to

proceed in not only the lead cases, but also in the consolidated, related and coordinated cases. The Court's Scheduling Order (Docket No. 128 in MDL 1446) includes new deadlines for discovery and a procedure for the prosecution of the lawsuits consolidated, related or coordinated with the lead cases of *Newby* and *Tittle*. Pursuant to the Scheduling Order, discovery may now proceed in all consolidated, related or coordinated actions. In fact, Duncan has recently received an extensive document request from the Tittle Plaintiffs, and expects to receive additional discovery requests in the near future.

In light of the July 11, 2003, Scheduling Order, Duncan seeks the Court's assistance to protect his constitutional rights.

II. Argument and Authorities

This Court has Authority to Stay Civil Proceedings Until A Parallel Criminal Proceeding is Completed

As this Court has acknowledged in its Order granting a similar Motion by Defendant Andrew Fastow ("Fastow"),

> [a]lthough the Constitution generally does not mandate that civil proceedings be stayed, pending the outcome of criminal proceedings against a Defendant, a court in its discretion may stay civil proceedings 'when the interests of justice seem to require such action.' The decision to stay should be made 'in light of the particular circumstances and competing interests involved in the case.'

Memorandum and Order re Motions filed by Enron Insider Defendant Andrew S. Fastow at 11-12 (Docket No. 1298 in *Newby,* entered on March 25, 2003)(citations omitted). In determining whether to stay an action the "[f]actors to be considered include (1) Lead Plaintiff's [and absent class members'] interests in proceeding expeditiously and the potential prejudice that might result from a

delay; (2) the extent to which [defendant's] Fifth Amendment privilege is implicated; (3) the burden on any particular aspect of any proceeding on [defendant]; (4) the convenience of the Court in the management of its cases and the efficient use of judicial resources; (5) the interest of absent class members and other persons not parties to the Enron litigation; and (6) the interest of the public in the pending civil and criminal litigations, if any." See also: *Golden Quality Ice Cream Co. vs. Deerfield Specialty Papers, Inc.*, 87 FRD 53 (E.D. Pa. 1980) and The Right Against Self-Incrimination in Civil Litigation, ABA, Section on Antitrust Law, pages 135, 136, 200, (2001).
Id. Applying these factors to the circumstances surrounding the Enron litigation, the Court concluded that the stay requested by Fastow was necessary.

That Duncan has entered a guilty plea to one count of obstruction of justice does not affect his ability to invoke the protections of the Fifth Amendment. *Mitchell vs. United States*, 526 U.S. 314,326 (1999) ("Where the sentence has not yet been imposed a defendant may have legitimate fear of adverse consequences from further testimony."); see also *United States vs. Kuku*, 129 F.3d 1435 (11th Cir. 1997) ("[A] defendant retains the Fifth Amendment privilege against self-incrimination prior to sentencing despite having entered a guilty plea, because of the possible impact that compelled testimony may have on the defendant's as yet undetermined sentence."); *United States vs. Hernandez*, 962F.2d 1152,11661 (5th Cir 1992) ("[I]mpending sentencing may furnish grounds for a legitimate fear of incurring additional

criminal liability from testifying, in which case the privilege should remain in effect.")

B. The Court Should Grant a Stay of Discovery and Further Pleadings from Duncan

Duncan faces severe prejudice in connection with the sentencing phase of his criminal proceeding and his obligations to the Enron Task Force under his Cooperation Agreement in the absence of a stay. "Procedures which require a party to surrender one constitutional right in order to assert another [have been disapproved by the courts]. Similarly, the [Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence." *Wehling vs. Columbia Broadcasting Sys*. 608 F2d 1084 (5th Cir. 1979). "Without questions, the stakes are high" for the defendant at the time of sentencing. *Mitchell*, 526 U.S. at 329. As Fastow has argued, absent such a postponement or stay, Duncan is faced with a "Hobson's Choice" of prejudicing one constitutional right versus another, i.e. invoking the Fifth Amendment in a civil case, thus risking a loss there, or answering questions in the civil context, thus risking subsequent and additional criminal prosecution. See also *Brock vs. Tolkow*, (109 FRD 116, 119, E.D.N.Y. 1985). *Maness vs. Meyers*, 419 US949 (1975) and *Baxter vs. Palmigiano* 425 US308, 318 (1976). The interest of justice would be best served by staying and/or postponing discovery against Duncan until the outcome of the criminal issues is resolved.

The requested stay is unlikely to significantly impair the efforts of Plaintiffs to prepare for trial against other parties.

Much of the information which could theoretically be obtained from Duncan through discovery can also be successfully sought from other witnesses, from documents in the possession, custody, or control of corporate entities, and from the ongoing investigations into Enron.

Moreover, especially in light of Duncan's ongoing commitments under the Cooperation Agreement, which includes an agreement "to be fully debriefed and to attend all meetings at which his presence is requested by" the Justice Department, Exhibit A at 3, the interest of the public would not be disserved by such a stay. In fact, the public interest would be best served by avoiding situations in which Duncan would be called upon to divulge aspects of his cooperation or the substance of his cooperation with the government "or any information derived therefrom." *See e.g. Roviaro vs. United States*, 77 S. Ct. 623 (1957) (noting that the purpose of protections afforded to cooperating witnesses "is the furtherance and protection of the public interest in effective law enforcement"); *United States vs. Haese*, 162 F.3d 359,366 (5th Cir.1998)(noting that the reliance of the government on cooperating witnesses is "ingrained in our criminal justice system").

WHEREFORE, PREMISES CONSIDERED, Defendant David B. Duncan respectfully requests that this Court stay all discovery against Duncan in the lead, consolidated, related or coordinated case pending before this Court.

Respectfully submitted,

LAW OFFICE OF BARRY G. FLYNN, P.C.

BY: _____

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OF COUNSEL:

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CERTIFICATE OF SERVICE

This pleading was served in compliance with the Court's service order, on August 28, 2003.

_____
BARRY G. FLYNN

LC:AW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

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UNITED STATES OF AMERICA

COOPERATION AGREEMENT

Cr. No. _____

- against -

DAVID DUNCAN,

Defendant.

- - - - - - - - - - - - - - - - -X

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the Department of Justice, by the Enron Task Force (the "Department") and David Duncan (the "defendant") agree to the following:

1. The defendant will waive indictment and plead guilty in the Southern District of Texas to an information charging him with obstruction of justice, in violation of 18 U.S.C. § 1512(b), which carries the following statutory penalties.

a. Maximum term of imprisonment: ten years (18 U.S.C. § 1512).

b. Minimum term of imprisonment: zero years (18 U.S.C. § 1512).

c. Maximum supervised release term: three years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to two years without credit for pre-release imprisonment or time previously served on post-release supervision

Exhibit "A"

(18 U.S.C. §§ 3583 (b), (e)).

d. Maximum fine: $250,000
(18 U.S.C. § 3571(b)(3)).

e. Restitution: As provided by statute
(18 U.S.C. § 3663 & A).

f. $100 special assessment
(18 U.S.C. § 3013).

2. The defendant's sentence is governed by the United States Sentencing Guidelines. The Department will advise the Court and the Probation Department of information relevant to sentencing, including all criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant's sentence. Based on information known to it now, the Department will not oppose a downward adjustment of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

3. The defendant will provide truthful, complete and accurate information and will cooperate fully with the Department. This cooperation will include, but is not limited to, the following:

a. The defendant agrees to be fully debriefed and to attend all meetings at which his presence is requested by the Department, concerning his participation in and knowledge of all criminal activities.

b. The defendant agrees to furnish to the Department all documents and other material that may be relevant to the investigation and that are in the defendant's possession or control.

c. The defendant agrees not to reveal his cooperation, or any information derived therefrom to any third party without prior consent of the Department, and to instruct his attorneys to do the same.

d. The defendant agrees to testify at any proceeding in the Southern District of Texas, or elsewhere as requested by the Department.

e. The defendant consents to adjournments of his sentence as requested by the Department and agrees that his obligations under this agreement continue until the Department determines that his cooperation is concluded.

f. The defendant agrees to cooperate fully with the Internal Revenue Service in the ascertainment, computation and payment of his correct federal income tax liability.

g. The defendant agrees not to receive remuneration for any dissemination, directly or indirectly, by him of information concerning his work at Arthur Andersen LLP, including but not limited to books, articles, speeches, and interviews, but not including professional services performed by him in the course of any full-time employment.

4. The Department agrees that:

a. Except as provided in paragraphs 1, 8, and 9, no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity; and

b. No statements made by the defendant during the course of this cooperation will be used against him except as provided in paragraphs 2, 8, and 9.

5. The defendant agrees that the Department may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings. Upon request of the defendant, the Department will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Department's ability to provide such notice will vary according to time constraints and other circumstances. The Department may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Department's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Department in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.

6. If the Department determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Department will file a motion pursuant to

U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) with the sentencing Court setting forth the nature and extent of his cooperation. Such a motion will permit the Court, in its discretion, to impose a sentence below the applicable Sentencing Guidelines range and also below any applicable mandatory minimum sentence. In this connection, it is understood that a good faith determination by the Department as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, and the Department's good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him. The defendant agrees that, in making this determination, the Department may consider facts known to it at this time. The Department will not recommend to the Court a specific sentence to be imposed. Further, the Department cannot and does not make a promise or representation as to what sentence will be imposed by the Court.

7. The defendant agrees that with respect to all charges referred to in paragraphs 1 and 4(a) he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law. The defendant waives any right to additional disclosure from the government in connection with the guilty plea.

8. The defendant must at all times give complete,

truthful, and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. Should it be judged by the Department that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, the defendant will not be released from his plea of guilty but the Department will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of three levels for acceptance of responsibility described in paragraph 2 above, and (b) to file the motion described in paragraph 6 above. Moreover, the Department may withdraw the motion described in paragraph 6 above, if such motion has been filed prior to sentencing. The defendant will also be subject to prosecution for any federal criminal violation of which the Department has knowledge, including, but not limited to, the criminal activity described in paragraph 4.

9. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon: (a) any statements made by the defendant to the Department or to other law enforcement agents on or after January 14, 2002; (b) any testimony given by him before any grand jury or other tribunal, whether before or after the date this agreement

is signed by the defendant; and (c) any leads derived from such statements or testimony. Prosecutions that are not time-barred by the applicable statutes of limitation on the date this agreement is signed may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions. Furthermore, the defendant waives all claims under the United States Constitution, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, that statements made by him on or after January 14, 2002, or any leads derived therefrom, should be suppressed.

10. This agreement does not bind any federal, state, or local prosecuting authority other than the Department, and does not prohibit the Department from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant.

11. No promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes any prior promises, agreements or conditions between the parties. To become effective, this agreement must be signed by all signatories listed below.

Dated: Brooklyn, New York
April 6, 2002

Respectfully submitted,

ENRON TASK FORCE

LESLIE CALDWELL
Director

By: _____
ANDREW WEISSMANN
Special Attorney
Enron Task Force

Agreed and consented to:

_____
Defendant David Duncan

Approved by:

_____
Counsel to Defendant
Samuel Seymour, Esq.

United States Courts
Southern District of Texas
ENTERED

MAY 09 2003

Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIM. NO. H-02-CR-00209-001
	)	
DAVID DUNCAN	)	
	)	

ORDER RESETTING SENTENCING

On motion of the United States Government, made with the consent of defendant David Duncan, it is hereby ORDERED:

That the sentencing of defendant David Duncan, now scheduled for May 16, 2003, be and hereby is continued until November 21, 2003, at 2:00 p.m.

DATED: ~~April 29,~~ May 6 2003
Houston, Texas

Melinda Harmon
THE HONORABLE MELINDA HARMON
UNITED STATES DISTRICT JUDGE

[cc: U S Probation Officer]

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Exhibit "B"