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

United States Courts
Southern District of Texas
FILED
MAR 24 2004
Michael N. Milby, Clerk

MARK NEWBY,	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO.H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
	§	
Defendant.	§	
	§	

DEFENDANT HIRKO'S MOTION TO POSTPONE DISCOVERY AND TO STAY ANSWER DURING PENDENCY OF CRIMINAL PROCEEDINGS

Defendant Joseph M. Hirko ("Hirko") moves this Court for an order postponing discovery against him and to stay his obligation to file pleadings in response to complaints in any and all of the lead, consolidated, coordinated or related cases in these proceedings pending the conclusion of the criminal proceedings against him.

I. INTRODUCTION

Mr. Hirko was a Chief Executive Officer of Enron Broadband Services ("EBS"). He is a defendant in numerous civil cases, including *Newby,* and he has been indicted on matters central to the civil litigation. *See United States v. Kenneth Rice, Joseph Hirko, Kevin Hannon, et al*; H-03-93-01, filed April 29, 2003, superceded by *United States v. Kenneth Rice, Joseph Hirko, Kevin Hannon, et al*, H-03-93-03, filed November 14, 2003. (*See* Exhibit A) This Court recently denied Mr. Hirko's motion to dismiss Lead Plaintiff's First Amendment Consolidated Complaint in *Newby*. (*See* Order of March 15, 2004, attached as Exhibit B) In so doing, this Court took judicial notice of the criminal allegations in *United States v. Rice*, noting that they are "based on the same scheme alleged in detail in the *Newby* complaints." (Exhibit B at 5, 11)

Mr. Hirko now seeks an order staying both discovery against him and the filing of his answer in these actions. Such relief is necessary to avoid the severe prejudice that would result if Mr. Hirko is forced to decide between providing admissions that could be used against him in the criminal case or taking the Fifth Amendment. Indeed, as this Court is aware, it already has granted similar relief to Defendants Kenneth Rice and Kevin Hannon, both of whom are Mr. Hirko's co-defendants in *United States v. Rice.* (*See* Exhibit C). Moreover, when Defendant Andrew Fastow requested this Court to postpone his obligation to provide discovery, it determined that "a stay is necessary" for an indicted defendant when the clear overlap of issues in the criminal and civil cases make "the potential for self incrimination more likely." (See Order of March 24, 2003 at 22, attached as Exhibit D). This Court later concluded that requiring "Fastow to file an answer in *Newby*, now that his motion to dismiss has been denied" would require him to "choose between invoking his Fifth Amendment privilege and risking severe prejudice in the civil action...." (*See* Order of April 28, 2003, at 2, attached as Exhibit E)

Mr. Hirko seeks the same relief already granted to Defendants Rice, Hannon, and Fastow. As these cases and the criminal case are "based on the same scheme alleged in detail in the *Newby* complaints," Mr. Hirko would suffer the same severe prejudice as those Defendants unless this court orders a stay of his obligation to file an answer and provide discovery.

I. FACTS

A. The Criminal and Civil Case Allegations Against Mr. Hirko Are Based on the Same Alleged Scheme Involving EBS

Plaintiffs' allegations against Mr. Hirko in the consolidated civil actions relate to his tenure with EBS. *See, e.g., Newby*, First Amended Consolidated Complaint, ¶¶ 88, 214(h)-(l), 276, 300 (h)-(o), 309, 317, 339(h)-(o), 992, 993. In that regard, this court has ruled that the criminal allegations in *United States v. Rice* are "based on the same scheme alleged in detail in

the *Newby* complaints," that is, a scheme to use EBS as part of a fraudulent scheme to deceive Plaintiffs and to enrich himself. (Exhibit B at 5, 11) And as noted, this court already has granted Defendants Rice and Hannon a stay in these cases, based on their status as defendants in *United States v. Rice* and the similarity of the factual allegations in that case and *Newby*.

B. Mr. Hirko Is Confronted With A Constitutional Predicament

Plaintiffs in *Newby* and the MDL No. 446 actions seek responsive pleadings and discovery from Mr. Hirko regarding his role at EBS and related matters. If Mr. Hirko answers the complaints and responds to civil discovery, he may jeopardize his Fifth Amendment privilege against self-incrimination by creating the possibility that his answers will aid in the criminal prosecution of him. In addition, if Mr. Hirko invokes his Fifth Amendment privilege, he risks severe prejudice in the civil actions that could amount to a forfeiture of his rights to due process. *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976) (when litigant chooses to invoke the Fifth Amendment privilege in a civil suit, an adverse inference can be drawn by the trier of fact). Mr. Hirko thus faces an impossible choice, a so-called Hobson's choice, where selection of either alternative will damage a constitutional right.

Due to the overlap between the criminal and civil cases, Mr. Hirko cannot respond to discovery in the consolidated civil actions without providing information to the government for use in its criminal investigation. To avoid providing direct assistance to the criminal investigation, Mr. Hirko would have to invoke his Fifth Amendment privileges in response to civil discovery. However, even if Mr. Hirko was to exercise his Fifth Amendment privileges in response to discovery, his invocation of the privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of him, and he would

face the possibility of a negative inference being drawn in the civil cases from that invocation of the Fifth Amendment.

II. ARGUMENT

A. Fifth Circuit Law Requires Postponement Of Discovery To Protect The Constitutional Rights Of Litigants Subject To Criminal Proceedings

When confronted with a party facing the Hobson's choice described above, both this Court and the Fifth Circuit have fashioned a remedy that balances the interests of litigants in pursuing their civil damages claim while still protecting the rights of an individual subject to criminal investigation. *See Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088-89 (5th Cir. 1979); *Kmart Corp. v. Aronds et. al.*, Civ. No. H-96-1212, p.4-6 (S.D. Tex. Dec. 11, 1996); *Brumfield v. Shelton*, 727 F. Supp. 282, 284 (E.D. La. 1989). That remedy postpones responsive pleadings, discovery and, if necessary, trial, until after conclusion of all criminal proceedings.

In *Kmart*, this Court wrote: "Courts have the inherent authority to stay civil proceedings during the pendency of parallel criminal prosecutions when required by the interests of justice." *Kmart*, Civ. No. H-96-1212, p.4. This Court then stayed civil proceedings against all defendants in the *Kmart* action, because some civil defendants faced "criminal indictments and many of the others involved in the alleged scheme to defraud Kmart face[d] a real risk of self-incrimination." *Kmart*, Civ. No. H-96-1212, p. 6. Similarly, in *Wehling*, the Fifth Circuit held that the district court should have postponed the civil action for three years, rather than placing one of the parties in the position of having to invoke the Fifth Amendment in response to discovery. *See Wheling*, 608 F.2d at 1088-89. The Fifth Circuit noted that a district court should abate discovery in a civil action when proceeding with that discovery would force a litigant to choose between responding to that request and exercising the Fifth Amendment privilege. *Wehling*, 608 F.2d at 1087-88.

An individual party to a civil action has, "in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action." *Id.* "The [Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence...." *Id.* at 1088 (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). A district court may not follow a procedure that "require[s] a party to surrender one constitutional right to assert another." *Id.* Forcing a litigant to invoke the Fifth Amendment in the course of civil litigation amounts to a forfeiture of the due process right to a judicial determination of the civil action. *Id.* at 1087-88; *see also Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (*en banc*); *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1138-39 (S.D.N.Y. 1993).

B. The Pending Criminal Indictment Against Mr. Hirko Requires A Stay Of Any Discovery Sought From Him In the Civil Action

"The first question to be resolved is the extent to which the issues in the criminal case overlap with those present in the civil case, since self-incrimination is more likely if there is significant overlap." *Plumbers & Pipefitters*, 886 F. Supp. at 1139. There cannot be more overlap between the criminal prosecution and the civil cases than exists here. As noted, this court already has granted a stay to Mr. Hirko's co-defendants, and has recently ruled that the criminal allegations in *United States v. Rice* are "based on the same scheme alleged in detail in the *Newby* complaints." (Exhibit B at 5, 11) That alleged scheme – using EBS as part of a fraudulent scheme to deceive Plaintiffs and to enrich himself, is at the heart of both the *Newby* and the criminal actions.

The nexus between the civil allegations and the criminal prosecution satisfies the requirements for postponing Mr. Hirko's obligation to respond to discovery. In the absence of a

discovery postponement, Mr. Hirko would wrongfully and unnecessarily be forced into a choice of sacrificing his Fifth Amendment privilege or invoking that privilege and risking severe prejudice in the defense of this civil action.

The balancing of interests in this case also favors a postponement of discovery as to Mr. Hirko. Mere "inconvenience and delay to plaintiffs" does not provide a sufficient basis to make a showing of undue burden required for denial of a stay. *See Volmar Distribs., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40 ("[U]nder settled authority the Fifth Amendment is the more important consideration"). Although postponement of discovery may cause some delay in Plaintiffs' prosecution of claims against Mr. Hirko, the delay will be minimal, as Mr. Hirko only seeks a stay of discovery against him. Plaintiffs may still proceed against other individuals and entity defendants and obtain discovery from them.

C. Fifth Amendment Privilege Applies At Every Stage Of The Proceeding, Including The Pleading And Answer Stage

The Fifth Amendment privilege applies at every stage of a civil proceeding, including the pleading stage. *See, e.g.*, *North River Ins. Co. v. Strefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983); *Nutramax Lab., Inc. v. Twin Lab., Inc.*, 32 F. Supp.2d 331, 333-34 (D. Md. 1999). The privilege "protects an individual not only from involuntarily becoming a witness against himself in a criminal proceeding but also from answering specific allegations in a [civil] complaint . . . where the answers might incriminate him in future criminal actions." *North River Ins. Co.*, 831 F.2d at 486-87. A paragraph-by-paragraph answer to any amended complaint, as required under Rule 8, compels Mr. Hirko to make judicial admissions or denials that might later be used against him in the criminal proceeding. *See id.; National Acceptance Co.*, 705 F.2d at 927 n.5. Thus, when a civil

defendant faces parallel criminal charges, as Mr. Hirko does, he may invoke the Fifth Amendment in lieu of admitting or denying the allegations of the complaint, just as he may invoke the Fifth Amendment in response to discovery requests. *See National Acceptance Co.*, 705 F.2d at 927.

D. A Stay Of Mr. Hirko's Answer Is Appropriate

Whether to answer allegations or plead the Fifth Amendment in a civil suit raises the same constitutional dilemma as responding to discovery. *Wehling*, 608 F.2d at 1098; *see also Baxter*, 425 U.S. at 318-19 (when litigant chooses to invoke the Fifth Amendment privilege in a civil suit, an adverse inference can be drawn by the trier of fact). Because of the potential prejudice involved, the choice between answering allegations and invoking the Fifth Amendment presents the same dilemma that was before this Court and the Fifth Circuit in *Kmart* and *Wehling*, respectively. This court recognized that similarity when it granted Defendant Fastow's motion to postpone filing his answer, concluding that "requiring Fastow to file an answer in *Newby*, now that his motion has been denied, would have the same effect" as requiring him to respond to discovery requests. (*See* Exhibit E at 1-2)

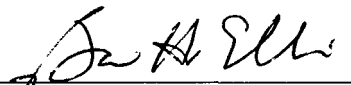
IV. CONCLUSION

This Court acknowledged the constitutional dilemma confronting Mr. Hirko in its orders staying the civil cases against Defendants Fastow, Rice, and Hannon. Accordingly, Mr. Hirko respectfully requests that this Court postpone Mr. Hirko's obligation to respond to discovery, and stay Mr. Hirko's obligation to file an answer in *Newby* and the transferred MDL No. 1446 actions, until the criminal proceedings against them are concluded. In addition, to the extent Mr. Joseph M. Hirko becomes obligated to respond to any discovery in the consolidated *Tittle* cases, H-01-CV-3913, or in any actions made a part of MDL No. 1446, that obligation is stayed pending conclusion of the criminal case pending against him.

In the event that this Court denies Mr. Hirko's motion, Mr. Hirko respectfully requests that this Court provide additional time to object and/or respond, answer and to seek other appropriate relief.

Dated: March 23, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the pleading was served on all counsel of record on the Service List on March ___, 2004 via posting to *www.esl3624.com* in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website.

Joanna V. Hamrick /mad

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The Exhibit(s) May

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