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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. CR-H-02-0597
	)	
DAVID BERMINGHAM,	)	
GILES DARBY and	)	
GARY MULGREW,	)	
	)	
Defendants.	)	

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States of America, by and through Jonathan Lopez and Wes Porter, Trial Attorneys for the Fraud Section of the Criminal Division of the United States Department of Justice, and David Bermingham (the "Defendant") agree to the following:

1. The Defendant will plead guilty to Count 4 of the Indictment, charging him with wire fraud, a violation of 18 U.S.C. § 1343. The Defendant agrees that he is pleading guilty because he is guilty, and that the facts contained in the Statement of Facts attached as Exhibit A and incorporated herein are true and constitute a sufficient factual basis for his plea. At the time the Defendant committed this offense, the offense of wire fraud carried the following maximum statutory penalties:

Count 4 – Wire Fraud

(a) Maximum term of imprisonment: Five years.
(18 U.S.C. § 1343)

(b) Maximum supervised release term: Three years, to follow any term of imprisonment; if the Defendant violates a condition of release, the

Defendant may be sentenced to up to two additional years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision.
(18 U.S.C. §§ 3583(b) & (e))

(c) Maximum fine: $250,000 or twice the gross gain or gross loss, whichever is greater.
(18 U.S.C. §§ 3571(b)(3) & (d)

(d) Restitution: As determined by the Court pursuant to statute.
(18 U.S.C. §§ 3663, 3663A, and 3664)

(e) Mandatory Special Assessment: $100
(18 U.S.C. § 3013)

Sentencing Guidelines

2. The Defendant acknowledges and understands that upon entry of his guilty plea, the Court will direct the U.S. Probation Office to prepare a Pre-Sentence Investigation Report ("PSR"). The Defendant further acknowledges and understands that the Court, in deciding whether to accept this Plea Agreement under Rule 11(c)(1)(C), will consider the information in the PSR, including the Probation Office's calculations of an advisory sentencing range under the United States Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines").

3. Although not binding on the Court, the parties agree to the following offense level calculations in accordance with Section 6B1.4 of the Sentencing Guidelines[1]:

(a) Section 2F1.1 (Fraud and Deceit) is the applicable guideline for wire fraud as charged in Count 4. Pursuant to Section 2F1.1(a), the base offense level is 6.

(b) The aggregate value of the money, property, or services unlawfully taken is $19 million. Pursuant to Section 2F1.1(b)(1)(P)(loss greater than $10 million, but less than $20

[1] All calculations are based on the 1998 Federal Sentencing Guidelines Manual.

million), the offense level is increased by 15.

(c) The offense involved more than minimal planning. Pursuant to Section 2F1.1(b)(2)(A), the offense level is increased by 2.

(d) The Defendant abused a position of private trust in order to facilitate the commission and concealment of the offense. Pursuant to Section 3B1.3, the offense level is increased by 2.

(e) The offense level is reduced by three levels pursuant to Section 3E1.1 based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility for his offense.

(f) The sentencing guideline level applicable to the Defendant's offense conduct is reduced by one level to reflect factors not adequately taken into consideration by the Sentencing Commission when formulating the Sentencing Guidelines, including the efficient use of government and judicial resources afforded by a simultaneous plea of all three defendants. (U.S.S.G. § 5K2.0)

(g) The Defendant's resulting adjusted total offense level is 21, which corresponds to a range of imprisonment of 37-41 months (assuming that the Defendants's Criminal History Category is I).

4. Pursuant to FRCP Rule 11(c)(1)(C), the Defendant and the United States agree that a sentence of 37 months' imprisonment is the appropriate disposition of the case. The parties agree that the charge to which the Defendant is pleading guilty adequately reflects the seriousness of the actual offense and that the Court's acceptance of this Plea Agreement will not undermine the statutory purposes of sentencing. The parties agree that if the Court refuses to accept the terms of the Plea Agreement in their entirety, the Plea Agreement will be null and void. If the Court rejects

the Plea Agreement, the Court shall, on the record, inform the parties of this fact, advise the defendant personally that the Court is not bound by the Plea Agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the Plea Agreement.

Restitution and Other Monetary Penalties

5. The Defendant agrees that he shall be jointly and severally liable with co-defendants Giles Darby and Gary Mulgrew (the "co-defendants") to pay restitution to the Royal Bank of Scotland ("RBS"), the victim bank, in the amount of $7,352,626.

(a) The Defendant shall pay $500,000 of that amount to RBS on or about the date that he submits to the custody of the U.S. Bureau of Prisons.

(b) The Defendant further agrees to consent to and cause the entry of a joint and several civil judgment in the Courts of the United Kingdom against the Defendant and his co-defendants in favor of RBS in an aggregate amount of $6,102,626, which represents the remaining amount of monies due RBS after the agreed-upon payments of the Defendant and his co-defendants.

6. Defendant shall pay the mandatory special assessment of $100.00 by check payable to the Clerk of Court at or before sentencing. 18 U.S.C. § 3013(a)(2)(A); U.S.S.G. § 5E1.3.

Defendant's Obligations

7. As discussed in paragraph 5 above, the Defendant agrees to make the payment and take steps to cause the entry of the civil judgment for the remainder of the restitution owed to RBS in the Courts of the United Kingdom.

8. The Defendant agrees that he is under a continuing duty to correct any inaccuracies

in the financial disclosures already provided to the United States and the Probation Office and to supplement such financial disclosures if new information becomes available to him. The Defendant further agrees to provide supporting documents and information regarding such financial disclosures if requested to do so by either the United States or the Probation Office. If the Defendant does not possess the materials or information requested by the United States or the Probation Office, the Defendant agrees to use his best efforts to obtain such information. The Defendant authorizes all financial information provided to the United States to be disclosed to RBS.

United States' Obligations

9. The United States agrees to dismiss the remaining counts of the Indictment at the time of sentencing. Defendant understands, however, that the United States will provide all of its investigative reports and requested information to the U.S. Probation Office, including reports and information relating to the dismissed counts.

10. The Untied States agrees that it will bring no further criminal charges against the Defendant relating to the conduct, committed before the date of this Plea Agreement, which is described in the Indictment or the attached Statement of Facts.

11. If the Defendant meets all the terms and conditions set forth in this Plea Agreement, including the provisions in paragraph 5, the Fraud Section agrees that it will advise the Office of Enforcement Operations ("OEO") of the Criminal Division of the Department of Justice that it supports the Defendant's application to the international prisoner transfer program and will use best efforts to effect a timely transfer of the Defendant. The Defendant understands, however, that authority to effect such a transfer rests with the OEO.

Waiver of Rights

12. The Defendant is aware that he has the right to appeal or collaterally attack the sentence imposed in this case. Acknowledging this, and in exchange for the undertakings made by the United States in this Plea Agreement, if the Court accepts the Plea Agreement pursuant to Rule 11(c)(1)(C) and sentences the Defendant to the stipulated sentence of 37 months, the Defendant hereby waives all rights conferred to appeal or collaterally attack any sentence imposed, including any restitution order, except that the Defendant may collaterally challenge the sentence imposed based on a claim of ineffective assistance of counsel. By signing this Plea Agreement, the Defendant acknowledges that he has discussed the appeal waiver set forth in this Plea Agreement with his attorney. The Defendant further agrees, together with the United States, to request that the District Court conduct an inquiry and, if appropriate, make a finding on the record that the Defendant's waiver of his right to appeal or collaterally attack the sentence in this case was knowing and voluntary.

13. The Defendant agrees that he has consulted with his attorney and fully understands all of his rights with respect to the pending Indictment. Further, the Defendant agrees that he has been advised concerning and fully understands all of his rights with respect to the provisions of the Sentencing Guidelines which may apply in an advisory capacity in his case. The Defendant, by his signature affixed below, attests that he has read this Plea Agreement and carefully reviewed every part of it with his attorney, that he is satisfied with his attorney's advice and representation regarding his decision to enter into this Plea Agreement, and that he knowingly and voluntarily agrees to be bound by every term and condition set forth herein.

Hyde Amendment Waiver

14. The Defendant agrees that with respect to all charges contained in the Indictment in the above-captioned action, 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.

Breach of Plea Agreement

15. This Plea Agreement is being entered into by the United States on the basis of the Defendant's express representation that he has made a full and complete disclosure of all assets over which he exercises direct or indirect control, or in which he has any financial interest and is in compliance with the obligations set forth in paragraph 8.

16. If the United States determines in its sole discretion that the Defendant has: (1) failed in any way to fulfill completely all of the obligations under this Plea Agreement; (2) misrepresented facts to the government prior to entering this Plea Agreement; (3) failed to cooperate fully with the Probation Office; (4) committed any misconduct after entering into this Plea Agreement, including, but not limited to, committing a state or federal offense, or violating any term or condition of release; or (5) made false statements or misrepresentations to any governmental entity or official, then the United States will be released from this Plea Agreement and may reinstate prosecution on the remaining counts of the Indictment. In that event, the Defendant may not withdraw his guilty plea to Count 4. Additionally, any information and documents that have been disclosed by the Defendant, whether prior or subsequent to this Plea Agreement, and all leads derived therefrom, may be used against the Defendant, without limitation, in any prosecution.

17. This Plea Agreement is conditioned upon co-defendants Giles Darby and Gary Mulgrew entering into, and the Court accepting, a Rule 11(c)(1)(C) guilty plea to Count 4. If any

of the co-defendants do not satisfy this condition, or they violate any provision of their respective Plea Agreements with the United States, then the United States may move the Court to set aside the guilty pleas of any and all of the defendants and may reinstate prosecution against them.

Complete Agreement

18. This, in conjunction with the Statement of Facts contained in Exhibit A, is the entire agreement and understanding between the United States and the Defendant. There are no other agreements, promises, representations, or understandings.

Subscribed and sworn to before me on
November 28, 2007

MICHAEL N. MILBY
UNITED STATES DISTRICT CLERK

By: Joyce Hancock
Deputy United States District Clerk

APPROVED:

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

By: _____
Jonathan E. Lopez

By: _____
Wes R. Porter

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By: _____
David Bermingham
Defendant

By: _____
Dan L. Cogdell, Esq.
Attorney for the Defendant

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

PLEA AGREEMENT – ADDENDUM

I have fully explained to the Defendant his rights with respect to the pending Indictment. I have reviewed with the Defendant the relevant provisions of the Sentencing Guidelines and have explained to the Defendant the provisions of those Guidelines which may apply in this case. Further, I have carefully reviewed every part of this Plea Agreement with the Defendant. To my knowledge, Defendant's decision to enter into this agreement is an informed and voluntary one.

Dated: November 21, 2007

Dan L. Cogdell, Esq.
Attorney for the Defendant

EXHIBIT A

STATEMENT OF FACTS

1. As set forth more fully below, on or about March 17, 2000, in the Southern District of Texas and elsewhere, defendants DAVID BERMINGHAM ("BERMINGHAM"), GILES DARBY ("DARBY"), and GARY MULGREW ("MULGREW") (collectively "the defendants") 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 a foreign wire communication in furtherance of the scheme, all as a result of which the defendants collectively received $7,352,626 in proceeds, in violation of Title 18, United States Code, Sections 1343 and 2.

Entities and Persons Involved:

2. 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.

3. LJM Cayman, L.P. ("LJM Cayman") was a Cayman Islands partnership whose operations were overseen by Enron's Chief Financial Officer Andrew Fastow ("Fastow") and by Michael Kopper ("Kopper"), Enron's Managing Director for Global Finance. Kopper also served as LJM Cayman's Managing Director.

4. National Westminster Bank Plc ("NatWest"), now known as the Royal Bank of Scotland ("RBS"), was a financial institution headquartered in London, England, which also had an office in Houston. NatWest had a division called Greenwich NatWest ("GNW Division") that had offices in London, England, and Greenwich, Connecticut. GNW had a division that engaged in structured finance.

5. Defendants DAVID BERMINGHAM ("BERMINGHAM"), GILES DARBY ("DARBY"), and GARY MULGREW ("MULGREW") (collectively "the defendants") worked for NatWest in the London office of its GNW Division. The defendants worked with Enron on behalf of NatWest on various financial transactions.

NatWest's Investment in LJM Cayman and Swap Sub (1999):

6. From time to time, Enron invested in other companies, including start-up ventures. One such investment was in Rhythms NetConnections, Inc. ("Rhythms Net"), an internet company. In approximately April 1999, Rhythms Net conducted an initial public offering (an "IPO") of its shares. At the time of the IPO, Enron owned approximately 5.4 million Rhythms

Net shares, but was subject to a lock up agreement that prohibited Enron from selling its Rhythms Net shares for approximately six months. Following the Rhythms Net IPO, Enron was at risk for price fluctuations in the market for Rhythms Net's shares. Because Enron was restricted from selling its Rhythms Net shares until November 1999, it considered strategies to reduce the impact on Enron's reported financial results of the volatility of Rhythms Net stock.

7. In or about June 1999, Enron engaged in a series of transactions with LJM Cayman designed to "hedge" its investment in Rhythms Net shares. This "hedging" allowed Enron to reduce the risk of financial loss to Enron before the sale restriction was lifted. As part of this hedging effort, LJM Cayman created a subsidiary named "Swap Sub."

8. In or about June 1999, Fastow offered NatWest's GNW Division the opportunity to become one of two limited partners in LJM Cayman. NatWest's GNW Division, through Campsie, Ltd. ("Campsie"), an investment vehicle wholly-owned by NatWest, invested $7.5 million and became a limited partner in LJM Cayman. Credit Suisse First Boston ("CSFB"), a New York-based investment bank, also invested and became the other limited partner through its own investment entity. Through their limited partnership interests in LJM Cayman, NatWest and CSFB acquired an indirect interest in Swap Sub.

9. The defendants were the NatWest employees in the GNW Division principally responsible for representing NatWest's interest with respect to its LJM Cayman investment.

Re-Structuring the Swap Sub Investment and the RBS Takeover:

10. In or about October and November 1999, NatWest, in connection with an overall restructuring of LJM Cayman, "hedged" its own investment in LJM Cayman, and, as a result, was able to realize a return of in excess of $20 million on its initial $7.5 million investment. At the same time, Natwest continued to hold an interest in LJM Cayman and, indirectly, in Swap Sub ("the "residual interest") through Campsie.

11. In the Fall of 1999, RBS initiated a hostile takeover bid to gain control of NatWest, including the GNW Division. As part of its defense to the takeover bid, NatWest sought to strengthen its balance sheet and embarked on a program to divest itself of certain business units (including GNW Division) and assets. Among other things, NatWest arranged to add a portion of all GNW Division profits, including profits from GNW Division asset sales, to the employee bonus pool for the GNW Division for the first quarter of 2000.

12. During the first quarter of 2000, the defendants contemplated leaving NatWest.

Defendants' Obligations to NatWest:

13. At all relevant times, NatWest and the GNW Division had policies, compliance procedures, ethical standards, and conflict of interest rules restricting employees' use of

confidential corporate information and mandating that employees avoid conflicts between their personal interests and the interests of NatWest or the GNW Division (collectively "NatWest's conflict policies"). The defendants were aware of and bound by NatWest's conflict policies.

14. At all relevant times, the defendants knew that they owed a fiduciary duty to NatWest and the GNW Division obligating them to negotiate and to act in their employers' best interests during their dealings with Enron, Fastow, and Kopper, including in any transaction involving NatWest's residual interest in Swap Sub.

Valuation of NatWest's Interest in Swap Sub:

15. At all relevant times, the defendants knew that for various accounting and financial reasons NatWest assigned no value to its residual interest in Swap Sub in its own financial statements.

16. By late January 2000, BERMINGHAM realized and subsequently communicated to DARBY and MULGREW that due to recent increases in Enron's stock price, NatWest's residual interest in Swap Sub had "quite some value." BERMINGHAM told DARBY and MULGREW by email that the "trick would be capturing it."

17. In addition, and as the defendants knew, Swap Sub was structured so that if its liabilities exceeded its assets, there was no recourse against its partners. Therefore, the value of NatWest's residual interest in Swap Sub could not be negative.

18. The defendants also knew, however, that the ability of NatWest to realize any value from its interest in Swap Sub depended in large part on the price of Enron stock and Rhythms Net stock, and the exercise of discretion by Fastow, Kopper, and Enron.

Defendants' Actions in Concert with Fastow and Kopper:

19. On or about February 22, 2000, the defendants met with Fastow and other LJM Cayman employees in Houston, Texas. At the February 22, 2000, meeting, the defendants presented ideas as to how Swap Sub could be restructured to capture the recent increase in Enron's stock price, and to reduce the risk that Swap Sub's assets would be insufficient to cover the Rhythms Net hedge. Fastow ultimately rejected defendants' proposal.

20. Thereafter, in late February or early March 2000, Fastow contacted MULGREW and offered to purchase NatWest's residual interest in Swap Sub. Fastow asked MULGREW whether he intended to remain at NatWest in light of the RBS takeover and then offered MULGREW an unspecified financial opportunity if he were to leave. MULGREW discussed this opportunity with DARBY and BERMINGHAM. The defendants knew that any discussions about financial opportunities with Fastow were inconsistent with NatWest's conflict policies.

21. On or about March 6, 2000, Kopper sent a letter to DARBY, in DARBY'S capacity as the Managing Director, Energy, of the GNW Division, in which Kopper proposed that a company he controlled purchase NatWest's residual interest in Swap Sub for $1 million.

22. On or about March 7, 2000, defendant MULGREW signed off on a memorandum drafted by DARBY and another NatWest employee, which recommended that NatWest accept the $1 million offer. MULGREW approved the recommendation contained therein, even though he and DARBY knew that the memorandum did not contain all material information regarding the sale, including failing to disclose that Fastow had offered the financial opportunity to the defendants.

23. In early to mid-March 2000, Fastow told MULGREW to ask BERMINGHAM to speak with Kopper about the investment opportunity that had been raised by Fastow. On or about March 14, 2000, BERMINGHAM traveled to New York to meet with Kopper and other Enron and LJM Cayman employees at the offices of the law firm that represented LJM Cayman. During these meetings, BERMINGHAM learned that the investment opportunity previously raised by Fastow involved acquiring a portion of NatWest's residual interest in Swap Sub through the acquisition of another entity. In response, BERMINGHAM informed Kopper that none of the defendants could acquire an interest in such an entity while still employed by NatWest. BERMINGHAM suggested that Kopper give the defendants an option to acquire the entity, which could be exercised if the defendants left NatWest. Kopper agreed, and an option agreement was drafted.

24. Between March 14 and March 20, BERMINGHAM discussed acquiring NatWest's residual interest with MULGREW and DARBY. Believing that they could likely make money if they were able to acquire the residual interest for themselves, the defendants decided to pursue the option agreement allowing them to acquire approximately one-half of NatWest's interest in Swap Sub.

25. During this time, Kopper set up an entity, named Southampton L.P. to purchase NatWest's interest in Swap Sub. Fastow and Kopper also set up, for the eventual benefit of the defendants, Southampton K. Co., which would become the limited partner in Southampton L.P., and be entitled to approximately one-half of NatWest's interest in Swap Sub.

26. On or about March 17, 2000, via an email from London to Houston, and as referenced in Count 4 of the Indictment, DARBY distributed for signature the final sales documents to effectuate the sale of NatWest's residual interest in Swap Sub to Southampton L.P. for $1 million. At or about the time, the defendants knew that they had not provided NatWest with all material information regarding the sale, including failing to disclose that they were pursuing a purchase of the same interest that they were tasked with selling, in violation of NatWest's conflict policies.

27. On or about March 20, 2000, defendants and Kopper executed an option agreement which granted defendants the opportunity to acquire all of the equity in Southampton K. Co. for $250,000. The option and partnerships were structured so that if the defendants exercised the option, the defendants would own Southampton K. Co., and therefore one-half NatWest's former interest in Swap Sub.

28. By the time they executed the option agreement, DARBY and MULGREW had each learned from BERMINGHAM that Southampton K. Co. was the limited partner in Southampton L.P., and therefore owned a portion of NatWest's interest in Swap Sub. The defendants' receipt of an option to acquire for their own personal interest a portion of the NatWest interest in Swap Sub that they had been tasked with selling violated NatWest's conflict policies. The defendants concealed from NatWest their acquisition of the option, and their eventual acquisition of NatWest's residual interest in Swap Sub.

Completion of the Scheme

29. On or about March 22, 2000, and unbeknownst to the defendants, Fastow, acting on behalf of LJM Cayman, secured an agreement from Enron to pay LJM Cayman/Swap Sub $30 million to close out the Rhythms Net hedge and to recover the Enron shares used to fund Swap Sub. To obtain Enron's agreement, Fastow represented to Enron that one of the limited partners would receive $10 million, and falsely represented that the other limited partner would receive $20 million.

30. On or about March 28, 2000, BERMINGHAM circulated a letter to MULGREW and DARBY discussing their option to purchase NatWest's residual interest. BERMINGHAM recommended that the defendants give notice that they would exercise the option on April 21, 2000. However, because DARBY and MULGREW would still be working for NatWest when the option was exercised (and BERMINGHAM would not), BERMINGHAM proposed that they indicate on their option exercise notice that BERMINGHAM was buying all of the shares of Southampton K. Co. The effect of this was to conceal the involvement of DARBY and MULGREW, and to give them time to decide whether they wanted to participate in the transaction. BERMINGHAM proposed that he grant an option to DARBY and MULGREW to buy into Southampton K. Co. at any time up to August 31, 2000.

31. In furtherance of the scheme, on or about April 21, 2000, all three defendants notified Kopper that BERMINGHAM would exercise their right under the option agreement to purchase Southampton K. Co. Using funds provided in part by MULGREW, BERMINGHAM subsequently directed a wire transfer of $251,993 from BERMINGHAM's account in England to an account in Houston as payment to Kopper.

32. The defendants also instructed Kopper to transfer all of the equity in Southampton K. Co. to BERMINGHAM, who ceased to be an employed by NatWest the day before.

33. On or about May 1, 2000, Kopper caused a wire transfer of $7,352,626 in scheme proceeds to be sent from Houston to a Southampton K. Co. bank account established by BERMINGHAM at the Bank of Bermuda (Cayman) Limited. BERMINGHAM subsequently divided the proceeds by directing wire transfers of $2.38 million each to both MULGREW and DARBY, and keeping the balance for himself. But for the actions of the defendants, the right to realize proceeds from the residual interest would have belonged to NatWest. Moreover, the defendants were not entitled to receipt of any of the proceeds for their own account. Meanwhile, Fastow, Kopper and others received a total of approximately $12.3 million through Southampton, L.P., as their share of scheme proceeds.

The defendants undertook these actions, in violation of Title 18, United States Code, Sections 1343 and 2.

By: _____
David Bermingham
Defendant

By: _____
Giles Darby
Defendant

By: _____
Gary Mulgrew
Defendant