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

THE UNITED STATES OF AMERICA	§	
	§	
V.	§	CR. NO. H-03-363
	§	
DANIEL O. BOYLE	§	
	§	

MEMORANDUM IN SUPPORT OF DANIEL O. BOYLE'S PETITION FOR A WRIT OF ERROR *CORAM NOBIS*

Date: February 24, 2012

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I. Nature and Stage of the Proceeding

This is a post-trial petition for a writ of error *coram nobis*.

II. Issue to be Ruled Upon and Standard of Review

The issue presented is whether the $295,000 restitution obligation this court imposed upon Dan O. Boyle, jointly and severally with his co-defendants, has been discharged and/or satisfied. The Court may issue the writ if it is necessary to avoid "manifest injustice," *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972) *aff'd*, 478 F.2d 835 (5th Cir. 1973), or "to implement an earlier order which the district court had authority to issue." *United States v. Friedman*, 143 F.3d 18, 22 (1st Cir. 1998).

The government has informed Mr. Boyle that it does not oppose the relief sought.

III. Introduction and Summary of Argument

When this Court sentenced Mr. Dan Boyle after his conviction in the Enron "Nigerian Barges" case, it stated that his was a "very difficult sentencing, indeed." Boyle Sentencing Transcript, May 5 2005 at 34:14, Ex. 1 ("Sentencing Trans."). This difficulty extended to crafting appropriate restitution for the honest-services fraud[1] convictions among Mr. Boyle and his co-defendants. Compared to the other defendants, the Court found, Mr. Boyle had "the least ability to pay restitution and his family [was] likely to have the greatest financial need." *Order*, May 17, 2005 (dckt #802) ("Restitution Order"). The Court thus intentionally crafted a restitution order that made Mr. Boyle's co-defendants jointly and severally responsible for his

[1] Mr. Boyle and some of his co-defendants were also convicted of obstruction of justice, crimes for which there is no restitution, and which are not the subject of this pleading.

share of the total. "[B]arring totally unforeseen circumstances," this Court concluded, Mr. Boyle would not have to pay at all. *Id.* at 1-2.

Mr. Boyle accepted his sentence and agreed not to appeal. His co-defendants then won their respective appeals on the grounds that no honest-services fraud had occurred. The co-defendants were duly released from prison and the government returned their restitution payments. Mr. Boyle served his sentence in full and returned home long after his co-defendants had been released.

Now, however, the Boyle family faces a $295,000 lien on their home to collect the $295,000 originally due jointly and severally with the others. But the restitution obligation is fully satisfied, factually and legally, because the government has collected significantly more in compensatory damages for the Nigerian barges incident in parallel proceedings by the Securities Exchange Commission. Accordingly, Mr. Boyle seeks extraordinary relief for this extraordinary circumstance in the form of a writ of error *coram nobis*, declaring Mr. Boyle's restitution discharged.[2]

Mr. Boyle therefore respectfully prays that this court grant the relief sought.

[2] The restitution obligation is legally discharged and otherwise unenforceable, under these unique circumstances, for additional reasons not presented in this memorandum. The government has agreed through counsel to the reasoning presented herein, but that it will also agree to full briefing on the additional arguments if the Court does not find relief merited on the agreed grounds. Mr. Boyle has, therefore, refrained from briefing those separate arguments here in reliance on the government's commitment.

IV. Factual and Procedural Background

A. Mr. Boyle's Conviction and Waiver of Appeal

On November 3, 2004, Mr. Boyle and four co-defendants were convicted of "honest services" fraud under 18 U.S.C. §1346 for their participation in Enron's "Nigerian Barges" transaction. Boyle filed a notice of appeal, but emotionally drained and financially ruined, he decided to withdraw it almost immediately. The government, however, had filed its own notice of appeal concerning his sentence, and the price of dismissing its cross appeal was an agreement under which Mr. Boyle relinquished both his appellate rights and all rights to collaterally attack his conviction.

Mr. Boyle surrendered to federal custody and served his entire sentence, less time off for good behavior. In all, he spent twenty-eight months in custody. *See* Boyle Order to Surrender, Jul 19. 2005, dckt #857; Letter, Kathleen S. Lee, U.S. Probation Officer, Mar. 4, 2008, Ex. 4 ("Passport Order"). Mr. Boyle paid a $25,000 fine and $400 special assessment, *see* Sentencing Trans., at 33, Ex. 1; Receipt, July 5, 2005, Ex. 2.[3]

B. This Court's Restitution Orders

The Court also ordered the five convicted defendants to pay a total of $1,475,000 in fraud-related restitution to Enron, calculated based on the total fees to Enron's counterparties from the Nigerian Barges transactions. Sentencing Trans. at 11-13, Ex. 1. The Court ordered each of the five defendants to pay one fifth of the total, or $295,000. But it ordered Mr. Boyle's

[3] The government's lien on the Boyle home is in the amount of $320,000 – the sum of the $295,000 restitution award plus the $25,000 penalty – despite the fact that Boyle paid the $25,000 penalty personally. Receipt, July 5, 2005, Ex. 2.

obligation to be shared jointly and severally among all five. It *then* ordered defendants Brown and Bayly to pay their obligations first. The end result was that Messrs. Brown and Baily were to pay Mr. Boyle's share. Restitution Order at 2.

The Court subsequently expressly confirmed its intentions in a written order, explaining that "Defendants Bayly and Brown were shown to have far more assets and ability to pay restitution than the other three Defendants." Restitution Order at 1. The Court further found that "Defendant Boyle has by far the least ability to pay restitution and his family is likely to have the greatest financial need. When he enters prison he will leave four minor children and a wife whose chronic illness precludes her from working full time." *Id.* Thus, the Court "anticipated that, barring totally unforeseen circumstances, the restitution for which Defendant Boyle was adjudged liable, jointly and severally with his Co-Defendants, would be paid in full by Defendant Bayly and/or Brown by May 21, 2005, *thereby discharging for Boyle and the other Co-Defendants that particular portion of the financial penalties imposed upon them.*" *Id.* at 1-2 (emphasis added).

On May 20, 2005, in addition to their individual restitution obligations, Bayly and Brown paid the $295,000 constituting Mr. Boyle's share of the restitution. *See* Notice of Restitution. Bayly paid $221,250 of that total, and James Brown paid the remaining $73,750.00. *Id.*

C. Civil Actions Related to Nigerian Barges

While one arm of the government pursued criminal cases over the Nigerian Barges, another pursued civil actions. In particular, on March 19, 2003, Merrill Lynch paid $80 million to the SEC to settle a civil securities case regarding Enron based in part on its role in the Nigerian barge transactions. *See* U.S. Securities and Exchange Commission, Litigation Release

No. 18038, Mar. 17, 2003, Ex. 3 ("SEC Release"). The $80 million settlement comprised $37.5 million in disgorgement, $5 million in prejudgment interest, and $37.5 million as a civil penalty. *Id.* The entire settlement amount was deposited into the Enron victims' distribution fund. *Id.* In addition, the SEC recovered $300,001 *each* from Bayly, Furst, and McMahon – over $900,000 in total – in cases predicated in whole or in part on their roles in the Nigerian Barge transactions. *See* Final Judgment as to Defendant Robert S. Furst, *U.S. Sec. and Exch. Comm'n v. Merrill Lynch & Co.,* Civ. Action H-03-0946, May 10, 2010 "Furst Judgment"; Final Judgment as to Defendant Daniel H. Bayly, *U.S. Sec. and Exch. Comm'n v. Merrill Lynch & Co.,* Civ. Action H-03-0946, Dec. 31, 2009 ("Bayly Judgment"); Final Judgment, *U.S. Sec. and Exch. Comm'n v. Jeffrey McMahon,* Civ. Action H-07-2051, Jul. 5, 2007 ("McMahon Judgment"). The funds recovered by the SEC also were deposited into the Enron victims' distribution fund. Furst Judgment at 5; Bayly Judgment at 5; McMahon Judgment at 6.

D. Post-Conviction Events

While in prison, Mr. Boyle watched with close interest but with no public comment, as his co-defendants successfully pursued the appeal he had dropped, winning the reversal of their fraud convictions because the "honest services" fraud statute did not criminalize the conduct at issue. *United States v. Brown,* 459 F.3d 509 (5th Cir. 2006). Each was released from prison early,[4] while Boyle alone served the entire sentence for the conviction.

[4] None of the other defendants served even half as long as Mr. Boyle's 28 months in prison. Bayly served less than twelve months. *See* Bayly Sentencing Order, Apr. 22, 2005, dckt #767; Bayly Order to Surrender, Jul. 1, 2005, dckt #856; Order Granting Bayly Release, Jun. 7, 2006, dckt #879. Brown served just over twelve months. *See* Brown Sentencing Order, Apr. 22, 2005, dckt #769; Brown Order to Surrender, Jun. 24, 2005, dckt #852; Order Granting Brown Release, Aug. 8, 2006, dckt #886. Fuhs served seven months. *See* Fuhs Sentencing Order, May 12, 2005, dckt #797; Fuhs Order to Surrender, Oct. 27, 2005, dckt #868; Order Granting Fuhs Release,

Mr. Boyle was released from prison on December 28, 2007, returned to his family, found work in a new field, completed probation, and worked hard to rebuild his life. The Bureau of Prisons, in seeking permission to return Mr. Boyle's passport, advised Mr. Boyle and the Court that he had been released from confinement and "all monetary penalties have been paid in full." Passport Order, Ex. 4.

To date, Dan Boyle has had nothing public to say about these developments because he has served his sentence and hoped for nothing more than to overcome the personal and professional ruin of his Enron experience and live out the balance of his life in service and peace. But in May 2011, the Boyle's learned that the Enron case was not over for them after all.

The Boyle family in 2011 decided to sell the house that had become freighted with the memories of the Enron case and move to a new home. But when a title search was done to prepare for closing, they discovered that the government in October, 2007, had recorded a lien on their family home in the amount of $320,000. Department of Justice, Notice of Lien for Fine and/or Restitution, Oct. 23, 2007, Ex. 5. The lien is apparently intended to collect the restitution debt that had been satisfied in May 2005, but then returned to the fortunate co-defendants in the aftermath of their appeal.[5]

Mar. 30, 2005, dckt #876 . Furst served less than ten months. *See* Furst Sentencing Order, May 12, 2005, dckt #784; Furst Order to Surrender, Sept. 20, 2005, dckt #863; Order Granting Furst Release, Jun. 7, 2005, dckt #877.

[5] After the successful appeal of Bayly, Brown, Fuhs, and Furst, the government repaid the amounts paid by those Defendants, including the restitution amounts. In particular, the government repaid Bayly the amount of $766,550.00, *see* Order Returning Bayly Payment, Dec. 18, 2006, dckt #909; Brown the amount of $369,050.00, *see* Order Returning Brown Payment, Nov. 27, 2006, dckt #902-1; Fuhs the amount of $370,300.00, *see* Order Returning Fuhs Payment, Oct. 24, 2006, dckt #890; and Furst the amount of $370,300.00, *see* Order Returning Furst Payment, Dec. 22, 2006, dckt #911-5.

V. Argument

An additional Nigerian-barge restitution collection would be as unlawful as it would be extraordinary. The restitution obligation at issue was fully satisfied and thus discharged through civil settlement payments to the victims, pursuant to 18 U.S.C. § 3664(j)(2). The government, through the Securities Exchange Commission, has recovered for Enron shareholders, *specifically for any harm caused by the Nigerian Barge transactions*, many multiples of the restitution ordered by the court in this case.

A. The Court Can Address This Matter Via a Writ of Error *Coram Nobis*

The Court has broad "inherent authority to issue all writs necessary in aid of its jurisdiction under the All Writs Act, 28 U.S.C. § 1651, authority which certainly includes the power to issue a subsequent order which is needed to implement an earlier order which the district court had authority to issue." *Friedman*, 143 F.3d at 22. The Courts of Appeals have approved district courts' use of the All Writs Act to resolve post-conviction disputes over criminal restitution and other financial penalties. *See, e.g., id.* at 24 (approving district court's use of All Writs Act authority to rule on distribution of restitution proceeds, over government objection).

The writ of error *coram nobis*, in particular, allows the court to govern post-conviction financial penalties in cases like Mr. Boyle's. *See United States v. Lewis*, 478 F.2d 835 (5th Cir. 1973). In *Lewis*, a defendant who had pled guilty to and been convicted of tax fraud returned to court over a decade later and sought return of restitution because the Supreme Court had, after his original conviction, declared the offense of conviction unconstitutional. *See United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972) (setting forth facts and posture). The Court specifically endorsed the use of the writ of error *coram nobis* to order refund of the financial penalties,

rejecting the government's argument that the writ's scope extended only to vacating the conviction and the financial penalty had to be contested in a separate proceeding, explaining

> We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines. This it could do without requiring the bringing of another action.

Lewis, 478 at 836. *See also United States v. Venneri*, 782 F. Supp. 1091, 1095 (D. Md. 1991) (where "honest services" fraud statute under which defendant was convicted was later declared unconstitutional, court used *coram nobis* to both vacate the conviction and order return of restitution).[6]

B. Boyle's Restitution Obligation Was Fully Satisfied by the Restitution Paid in the Corresponding SEC Settlement Agreements

Mr. Boyle's restitution obligation was fully satisfied through other defendants' civil settlement payments to victims for any damages caused by the Nigerian Barges transactions. The statute governing the issuance and enforcement of orders of restitution provides:

> Any amount paid to a victim under an order of restitution *shall* be reduced by any amount later recovered as compensatory damages for the same loss by the victim in, (A) any Federal civil proceeding.

18 U.S.C. § 3664(j)(2)(A) (emphasis added). This provision was drafted to prevent double recovery by victims. *United States v. Stanley*, 309 F.3d 611, 613 (9th Cir. 2002) (stating that

[6] The authority cited shows that the writ of error *coram nobis* empowers the court to vacate the underlying conviction, but Mr. Boyle waived the right to collaterally attack his conviction or sentence in the agreement disposing of both sides' appeals; Parties Joint Motion for Dismissal of Appeal, *United States v. Daniel O. Boyle*, Cr. No. 05-20319, U.S.C.A. 5th Cir., Jul. 12, 2005. Honoring that agreement, he forgoes a collateral attack on the conviction itself and instead seeks the lesser relief of an order construing the restitution obligation to be extinguished because it has been fully paid and discharged.

"[t]he purpose of § 3664(j)(2) is to prevent double recovery by a victim .... To prevent double recovery, payments such as those made by [the] co-defendants are subtracted from the amount of the victim's loss."); *United States v. Coleman*, 997 F.2d 1101 (5th Cir. 1993); *United States v. Rico Indus.*, 854 F.2d 710, 715 (5th Cir. 1988).

The Fifth Circuit has held that orders of criminal restitution must be reduced where: (1) a civil settlement covers the same acts of the defendants as those that are predicated on their criminal convictions; (2) the government is involved; and (3) the payment satisfies the penal purposes the district court sought to impose. *Id.* at 715. All three of those elements are satisfied in Mr. Boyle's case.

1. The Acts are the Same

The settlement agreements cover the exact transactions, and thus the same losses, as those involved in the criminal case. Indeed, the language of the criminal complaint and the SEC cases is almost identical.

- In the criminal case, Messrs. Boyle, Bayly, Furst and Brown were charged with mail and wire fraud based on the allegedly fraudulent sales of Nigerian barges to Merrill Lynch. The Complaint alleged that "as part of a scheme to manipulate Enron's reported earnings, Enron and Merrill Lynch executives engaged in a year-end 1999 deal that involved the 'parking' of Enron assets with Merrill Lynch." *See* Third Superseding Indictment at 3, Jul. 22, 2004, dckt #937. "Merrill Lynch's purchase of Nigerian barges allowed Enron executives to record improperly $12 million in earnings." *Id.* at 4.
- The SEC's civil complaint reads much the same. It charged Messrs. Bayly, Furst and an additional Enron executive, Jeffrey McMahon, with securities fraud based on the sale of

Nigerian barges to Merrill Lynch.[7] The SEC complaints alleged that Messrs. Bayly, Furst and McMahon "participat[ed] in a[] asset parking arrangement." *See* Complaint, *U.S. Sec. and Exch. Comm'n v. Jeffrey McMahon,* Civ. Action 07-2051, U.S.D.C., S.D. Tex., Jun. 20, 2007 ("McMahon SEC Complaint"); Complaint, *U.S. Sec. and Exch. Comm'n v. Merrill Lynch & Co.,* Civ. Action H-03-0946, U.S.D.C., S.D. Tex., March, 2003 "Merrill Lynch Complaint"). The transaction involved the sale of an interest in a Nigerian power generating barges to Merrill Lynch that allowed Enron to book $12 million in allegedly improper profits in the fourth quarter of 1999. *See* McMahon SEC Complaint; Merrill Lynch Complaint.[8]

- So too with the SEC's parallel complaint against Merrill Lynch for the same completed sale of Nigerian barges.[9] The complaint alleges that Merrill Lynch and its former executives helped manipulate Enron Corp.'s earnings by engaging in two fraudulent year-end transactions in 1999. *See Id.* at 1. The SEC alleged that the transactions had the purpose and effect of overstating Enron's reported financial results. The first transaction was alleged as an asset-parking arrangement, whereby on December 29, 1999, Merrill Lynch bought an interest in certain Nigerian barges from Enron with an expressed understanding that Enron would arrange for the sale of this interest by Merrill Lynch within six months at a specified rate of return.

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[7] McMahon was not charged in the criminal case, but the Fifth Circuit allows for non-defendants, involved parties' settlements to count toward restitution. *See Coleman*, 997 F.2d at 1107 (including other parties FDIC's settlements in reduction of Coleman's restitution).

[8] The SEC also charged Furst for his involvement in an energy trade. *See* Merrill Lynch Complaint at 7. The SEC also charged McMahon with several alleged lies intended to mislead credit ratings agencies. *See* McMahon SEC Complaint at 1.

[9] The SEC also charged Merrill Lynch with involvement in energy trades. *See* Merrill Lynch Complaint at 1-2.

It is indisputable that both the criminal case and the SEC civil cases against Messers. Bayly, Furst, McMahon, and Merrill Lynch were based on the same facts and the same theory of fraud: that the barge sale to Merrill Lynch was a sham, and that any profit booked from it was fraudulent.

2. The Parties are the Same

The SEC civil settlements and the criminal case involved the exact same parties.

The Government. The civil settlement agreements at issue here were negotiated by the SEC, a government agency. *See* U.S. Sec. and Exch. Comm'n, Litigation Release No. 18038, Mar. 17, 2003 ("Litigation Release"); Consent and Undertaking of Jeffrey McMahon, *U.S. Sec. and Exch. Comm'n v. Jeffrey McMahon,* Civil Action No. H-07-2051, Jun. 20, 2007. For purposes of Section 3664, *all* branches of the federal government are considered to be a single entity – the government. In *Coleman*, the Federal Deposit Insurance Corporation ("FDIC"), another government agency (working in close connection with the U.S. Attorney's Office), negotiated a civil settlement with the defendant covering the same transactions at issue in the criminal case. The Fifth Circuit's decision in *Coleman* turned on the fact that "the same parties were involved in both criminal and civil proceedings." 997 F.2d at 1107. The Court defined the FDIC and the US Attorney's Office both as "the government" for section 3664 purposes. "[A]s Coleman stressed, it was the fact that *the government* negotiated the settlement with the defendants that created an estoppel issue." *United States v. Sheinbaum*, 136 F.3d 443, 448 (5th Cir. 1998).

The Victims. Given that the SEC settlement and the criminal case cover the Nigerian barges transaction, the victims, as described under section 3664(j)(2), are the same in the SEC

settlement and the criminal case: Enron and its shareholders. All the SEC settlement funds were deposited into the Enron's Victim's Compensation Fund.[10] The Government justified the consolidation of recoveries in the Enron SEC cases into one fund as a way to "promote efficiency and maximize the funds returned to *investors*." Plaintiff SEC's Combined Motion and Supporting Memorandum to Transfer Funds for Distribution to Victims, *U.S. Securities and Exchange Comm'n v. Merrill Lynch & Co.*, Civ. Action H-03-0946, U.S.D.C., S.D. Tex, Jan. 24, 2007 (dckt #46) at 3 (emphasis added). The government also promised that consolidating the money recovered from a Nigerian barge case with other Enron civil fraud cases would speed "distribution of funds to *shareholders* victimized by the Enron fraud." *Id.* (emphasis added).

Similarly, this Court found that the victims in the criminal case – the parties to whom any restitution would go – were "Enron and derivatively to its shareholders." *See* Sentencing Trans. at 13:3-4. The victims at issue in either the civil or the criminal cases over Enron's Nigerian barges are, of course, the same: Enron's shareholders.

The Defendants. Messrs. Bayly and Furst were directly charged, and eventually convicted, co-defendants in the criminal case. *See* Bayly Judgment, May 4, 2005, dckt #779, Furst Judgment, May 25, 2005, dckt #816. Merrill Lynch was a key player in the criminal case and settled with the SEC in March 2003, just a few months before the third superseding indictment as filed in the criminal case. Litigation Release. McMahon was also a key person in the transactions that were the basis of the criminal case. *See* McMahon SEC Complaint at 2-4. The government also dismissed the criminal charges against Bayly and Furst immediately after their settlements with the SEC, implicitly recognizing the substantive identity of the cases. *See* Bayly Dismissal, Jan. 11, 2010, dckt #110-1, Furst Dismissal, May 23, 2011, dckt #1277.

[10] The settlement fund is also referred to as the Enron Fair Fund.

3. The Civil Payments Satisfied the Penal Purpose of Sentencing

Messrs. Boyle, Furst, Bayly, Fuhs and Brown, when sentenced in the criminal case, were held jointly and severally liable for the loss amount from the Nigerian barges transaction. But, as described above, the careful manner in which the Court imposed joint and several liability – such that Messrs. Brown and Baily were to pay Mr. Boyle's share – demonstrates a "penal purpose" of differentiating among the liability among the defendants. The Court stated, "[t]his is as the Court intended…. Defendant Boyle has by far the least ability to pay restitution and his family is likely to have the greatest financial need." Restitution Order at 1. Recovery of the losses from the other defendants thus fulfills this Court's twofold penal intent of *both* compensating for the loss *and* placing the responsibility of restitution on the defendants with the greatest culpability and ability to pay.

The offset is also necessary to prevent a double recovery. *Rico*, 854 F.2d at 715; *United States v. Rhoads*, 159 F.3d 1355 (5th Cir. 1998) (finding that the combined restitution did not meet the overall loss to the victim). The SEC civil settlements compensate the victims for their actual losses, and more. This Court calculated the relevant loss figure as $1,475,000, the sum of $775,000 (fees Merrill Lynch earned from the barge transaction) and $700,000 (LJM2's fees from the transaction). Merrill Lynch alone paid *$80 million dollars* in its settlement to settle charges related to both the Nigerian barges sale and unrelated energy trades. McMahon, Furst and Bayly *each* paid $300,000 in their settlements. Even were the entirety of all the settlements

not attributed to the Nigerian barges transaction, it is clear that the settlement more than compensates for the loss occurred by the victims.[11]

VI. Conclusion

Dan Boyle's restitution obligation has been more than satisfied by the government's recovery of a much greater amount in civil settlements in the Enron Nigerian Barges cases, making further recovery an unlawful double recovery. Therefore, Mr. Boyle respectfully requests that this writ be granted.

Date: February 24, 2012

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[11] Although the SEC settlements do not specify the particular transaction to which each settlement dollar is connected to, a conservative estimate shows that the SEC settlements far exceed the Court's loss determination. The Court found that Merrill gained $775,000 from the transaction. *See* Boyle Sentencing at 12:23, Ex. 1. Merrill Lynch's eighty million dollar settlement clearly covers this loss many times over. The Court also found a $700,000 gain to LJM2 from the transaction. *Id.* The $900,000 settlement agreement total from Bayly, McMahon and Furst more than covers this amount.