IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	**No. 05 CR 727**
v.	)	
	)	**Hon. Amy J. St. Eve**
CONRAD BLACK, et al.,	)	
	)	
Defendants.	)	

DEFENDANT BOULTBEE'S OBJECTIONS TO THE PSR

Pursuant to Rule 32(f)(1), F.R.Cr.P., Local Criminal Rule 32.1, and the Court's minute order, dated November 6, 2007, this submission sets forth the objections, clarifications and comments of defendant John A. Boultbee concerning the Probation Office's Pre-Sentence Report ("PSR"), dated November 2, 2007, and received by counsel on November 13, 2007. The numbering of the objections or clarifications below corresponds to the line-numbering in the PSR [1]

LL. 42-43. The PSR states that the government removed Canada from the third superseding information as an alleged victim "for lack of jurisdiction." If that statement is accurate, it was not the reason offered by the government at the time it deleted Canada as a victim. Doc. #305 at 1 ("in light of potential double jeopardy concerns"). We believe that the government deleted Canada as the alleged victim of a U.S. criminal offense because Mr. Boultbee committed no such offense against Canada.

---

1. Although counsel is unaware of the codefendants' objections to the PSR, Mr. Boultbee joins those objections to the extent they are consistent with his position reflected in this submission.

LL. 145-146, 161-62. Mr. Boultbee was International's CFO for only a limited period (1995-99) pre-dating the alleged scheme in this case. T. 6580.

LL. 146-147. While the PSR indicates that "[e]ach officer had ownership interests in Ravelston," it is worth keeping in mind that Mr. Boultbee's ownership interest in Ravelston was less then 1% in contrast to Mr. Black's 65% interest and Radler's 14% interest. GX Summary-2.

LL. 220-22. According to the PSR, the APC non-compete agreements were "essentially agreements for International not to compete with itself, and specifically, for Radler, Black, Boultbee and Atkinson, as officers of International, not to compete with one of their subsidiaries." As the Court is aware from having presided over the trial, the PSR's characterization of the APC non-compete agreements is erroneous. The APC non-compete agreement took effect only *after* Mr. Boultbee was no longer employed by International, and was therefore otherwise free to compete with his former employer, as the PSR correctly recognizes elsewhere. LL. 234-35. The APC transaction was not remotely an example of an agreement "for International not to compete with itself" or with one of its subsidiaries. The PSR no doubt got it wrong because the government misdescribed the APC non-compete agreement to the Probation Office, as it did at trial when it argued to the jury that APC was an example of the defendants "agreeing not to compete with themselves." T. 15,092. The government's erroneous characterization of the APC transaction was in turn probably the result of confusing the APC transaction with the Horizon transaction (Information Count One ¶15) where the "agreeing not to compete

with themselves" allegation was expressly made. Even the government conceded, however, that Mr. Boultbee had no interest and played no role in the Horizon transaction.

LL. 244, 248-49. Whether or not Radler was "mistaken" in his belief that the APC payments he authorized were innocent, as the PSR concludes, is beside the point. As to Mr. Boultbee, the only relevant question is whether the record contains any evidence from which to draw a reasonable inference that at the time he received the APC check he knew that Radler's belief was mistaken or that his belief differed from Radler's. There is no such evidence in the record, and the PSR points to none.[2] Nor does the fact that Mr. Boultbee signed the APC non-compete agreement support such a conclusion because, as with all other management fees, there was no dispute that the "source" of the payments was ultimately International (or a subsidiary).

LL. 289-309. The PSR reviews some of the trial evidence, as well as matters outside the record, relating to the $5.5 million in APC payments, and concludes that the $5.5 million "would otherwise have accrued to the benefit of International." As indicated above, the PSR's conclusion is irrelevant because it does not change the fact that Radler and the defendants believed otherwise. On the contrary, as the PSR recognizes, Creasey testified, *inter alia*, that the $5.5 million in APC payments was not accrued against management fees because of "what may have been an inadvertent accounting error." In

---

2. Far from suggesting that Radler's belief was "mistaken" (L.244), the fact that Radler testified to the same belief in the grand jury, as the PSR recognizes (L.287), demonstrates that the government fully adopted Radler's testimony on this important point and never attempted to correct it.

other words, Radler's testimony concerning his intent and belief in directing the distribution of the $5.5 million APC payments was supported by Creasey.

In an attempt to bolster a non-existent case based on the APC payments, the government has injected through the PSR the double hearsay of Duncan Forsythe, who purportedly told Agent Schindler that the $5.5 million had "nothing to do with management fees and was hidden in the CNHI II transaction." LL. 295-97. The claim that the APC payment was "hidden in the CNHI II transaction" is baseless, and contradicted by the evidence. It is worth remembering that Forsythe was on the government's witness list, but the government chose not to call him at trial where his testimony would have been tested by cross-examination.

Nor did the government ask Alan Funk, the witness through whom it introduced GX Funk CNHI 2 Tax, to explain the meaning of the handwritten additions to that document, including a reference to $5.5 million, a particularly significant omission in view of another document introduced through government witness Marilyn Stitt (DX JB KPMG 8), i.e., an auditor's "gain on sale" memorandum for the CNHI II transaction which omits any mention of the $5.5 million figure as part of the transaction. According to Stitt, this document (DX JB KPMG 8) reflects KPMG's review of the accounting records and reporting of the CNHI II proceeds, and KPMG's conclusion that "the CNHI [II] sale appears properly accounted for and the gain recognized on the sale appears fairly stated in all material respects." T. 5233-34. While the typewritten portion of GX Funk CNHI 2 Tax is consistent with DX JB KPMG 8 — both reflect $36 million cash proceeds

on the sale — nothing in the latter document corresponds to or is consistent with the handwritten notations in the former document. Certainly GX Funk CNHI 2 Tax does not support the new and inflammatory "hidden" claim concerning the APC payments.

The Court is entitled to draw the obvious negative inference from the government's attempt to bolster its position now through the backdoor of double hearsay in the PSR when the government declined to produce its witness (Forsythe) at trial or to question Stitt or Funk about the handwritten notations whose provenance and meaning are unknown. The significance the government now attributes to the notations in the document is unjustified.

In any event, Forsythe's double hearsay statement to Agent Schindler is irrelevant to the central question, i.e., Radler's, and therefore Mr. Boultbee's, contemporaneous belief concerning the APC payments. Moreover, Agent Schindler testified at trial that she was unable to make any definitive determination as to how the APC payments were treated on International's tax returns, and she offered no opinion as to whether any non-compete money was diverted from International to the defendants. T. 11,057-58, 11,082-84. Finally, if Agent Schindler was unable to determine by the time of trial the effect on International of the APC payments, despite the time and interest to do so, there is no basis or reason to credit Forsythe's hearsay statements to Agent Schindler.

L. 318. Contrary to the PSR, Mr. Boultbee did not intend to "defraud Canadian tax authorities." The government withdrew that allegation from the Information prior to trial, and made no attempt to prove it at trial. Mr. Boultbee has never been required to

defend against the government's abandoned "fraud on Canada" allegation, and this should not be the occasion for requiring him to do so.

LL. 319-321. The PSR quotes the Information's allegation, purportedly based on Delaware law, that Mr. Boultbee and his codefendants had a fiduciary duty that required them to "maximize International's financial potential and refrain from acting to International's detriment." The defense argued before and during trial that the Information misstated Delaware law. The Court instructed the jury only that a corporate officer like Mr. Boultbee was required to act "in the corporation's best interests, and . . . refrain from taking actions that either conflict with the corporation's interests or that harm the corporation." T. 15,169. The Court cannot rely on the Information or the PSR for a correct statement of Delaware law.

LL. 326-28. While the PSR notes an email from Mr. Black to Mr. Atkinson in January 2003 concerning Radler's view of International as "a vehicle for exacting money, as in the non-competes," the email was not admitted against Mr. Boultbee (T. 11,232-33), and there was no evidence that he was the recipient of that or any similar email.

L. 329. The evidence at trial established that Mr. Boultbee's non-compete agreement with APC was not "bogus," but a valid, enforceable agreement which provided International a distinct benefit, i.e., if and when he left International's employment, Boultbee could not use his extensive knowledge of International's operations and strategies to help a U.S. competitor. In fact, Mr. Boultbee's three-year APC non-compete agreement remained in full force and effect until last week.

LL. 402-19. The PSR recommends holding Mr. Boultbee responsible for the entire $6.1 million in APC and supplemental payments that all defendants and Radler received, rather than for only the $152,500 that Mr. Boultbee personally received. The PSR's loss conclusion is based on two incorrect and unsupported assumptions: 1) he knew that his codefendants also received money in those transactions, and 2) he was either aware of the amounts they received or their amounts were reasonably foreseeable to him. The PSR is mistaken on both scores. There is simply no evidence, direct or circumstantial, that Mr. Boultbee knew that his codefendants were receiving similar payments, or that he knew or could have foreseen the amounts they received.

With respect to the APC transaction, the PSR points to Mr. Kipnis's letter to Mr. Atkinson listing the amounts that the defendants were to receive. Mr. Boultbee was not copied on that letter, and there is no evidence that he ever received, saw or knew about it. Nor was there any evidence that Mr. Boultbee had a contemporaneous conversation with anyone about the payments received by his codefendants. With respect to the supplemental payments, Mr. Boultbee was not copied on McBride's memo reflecting the amounts that he and his codefendants were to receive, nor did Mr. Boultbee receive a memorandum, check stub or any other notice reflecting that his $15,000 check was connected with or pursuant to a non-compete payment.

In short, with respect to both payments, there was no evidence to support the inference that Mr. Boultbee knew or should have known what compensation, if any, his codefendants received, let alone that Black and Radler were receiving amounts close to

20 times what he received. On the contrary, the evidence showed that the defendants did not always receive bonuses simultaneously, and the disparity in the amounts of bonus compensation they received was nowhere near as great as the percentage differences in their APC and supplemental payments.[3]

For example, International's 2001 proxy reveals that Mr. Atkinson received a $50,000 performance incentive bonus in 2000, while Mr. Boultbee received no bonus that year, and Radler received a bonus of only $30,605, $20,000 less than Mr. Atkinson's. GX Filing 9E-2 at Disclosure Page 3. Similarly, in 2001, when Mr. Boultbee received a $50,000 performance incentive bonus, Mr. Black's bonus was only $250,000, five times more than Mr. Boultbee's, and Radler's bonus was only $150,000, three times the amount of Mr. Boultbee's. GX Filing 9G at Disclosure Page 28. The percentage differences in the bonuses paid by Ravelston to the defendants were even smaller. Mr. Black's bonus from Ravelston in 2001 was approximately $2 million, only slightly more than three times Mr. Boultbee's bonus of approximately $625,000, and Radler's bonus of about $1.8 million was slightly less than three times the amount of Mr. Boultbee's. GX Expense 7.

---

3. For these purposes, it is appropriate to compare the APC and supplemental payments with the defendants' bonus payments because the government advanced the claim at trial, and the PSR has adopted it, that the APC payments were a form of "bonus" and not management fees. *See, e.g.,* LL. 236-37. Nor was there any evidence to suggest that Mr. Boultbee believed that his $15,000 supplemental check was anything other than a bonus since he did not sign a non-compete agreement in connection with that payment and there was no writing or notation identifying his $15,000 as in any way connected with a non-compete agreement.

For these reasons, and for those set forth in Mr. Boultbee's Version of the Offense ("BV"), the only "loss" for which he should be held responsible is $152,500, the amount he personally received in APC and supplemental payments. BV at 11-12. Such a "loss" figure would subject Mr. Boultbee to a 7-level enhancement. USSG §2F1.1(b)(1)(H) (2000) ($120,000 and $200,000).[4]

LL. 427-30. The PSR recommends a two-level enhancement for more than minimal planning on the ground that Mr. Boultbee "was found guilty of having engaged in repeated acts of fraudulent conduct involving mailings in furtherance of a non-competition payments scheme, over a period of time, in Counts One, Six and Seven." The trial evidence failed to establish any planning at all, let alone more than minimal planning, on the part of Mr. Boultbee or his codefendants. The evidence showed nothing more than Mr. Boultbee's receipt and deposit of two checks, totaling $152,500, and his return through Mr. Atkinson of his executed non-compete agreement in the APC transaction.

The PSR captures Mr. Boultbee's lack of planning when it correctly notes that "the evidence reflects that defendant Boultbee was not the recipient of any correspondence with respect to either the APC or supplemental payments." LL. 496-97. As Mr. Boultbee

---

4. Alternatively, assuming there is sufficient evidence from which to infer that Mr. Boultbee was aware that his codefendants were also receiving payments at the same time — and there is no such evidence — the most that the evidence would support as reasonably foreseeable to Mr. Boultbee would be the amount received by Atkinson and an amount for Black and Radler three times more than Mr. Boultbee received, producing a "loss" figure of $1.2 million and an 11-level enhancement.

argued in his version of the offense, "[I]f ever there was a fraud conviction that did not warrant or support this enhancement, this is it." BV 12 n.10. *See United States v. Maciaga*, 965 F.2d 404, 407 (7th Cir. 1992) (more than minimal planning typically requires at least three acts).

LL. 496-97. Not only does the evidence show that Mr. Boultbee did not receive any correspondence concerning the APC or supplemental payments, as the PSR points out; it fails to show that he had any contemporaneous conversations with anyone about those transactions.

LL. 498-503. As Mr. Boultbee argued in his version of the offense (BV 12-13), the trial evidence demonstrated that he did nothing at all in regard to the APC and supplemental payments except receive and deposit the two checks, and sign the APC. non-compete agreement drawn by others. There was not a word of testimony nor any other evidence that Mr. Boultbee played any other role in the transactions on which he was convicted. As a result, he is entitled to at least a 3-level "minor role" reduction, not the 2-level reduction recommended by the PSR.

LL. 504-22. Enhancing Mr. Boultbee's sentence based on an abuse of a position of trust, an enhancement the PSR recommends, would be both legally and factually insupportable. Such an enhancement does not apply here as a matter of law since Mr. Boultbee has been convicted of committing "honest services" mail fraud, in violation of 18 U.S.C. §1346, for allegedly depriving International of its right to Mr. Boultbee's honest services. Section 3B1.3 provides that an abuse of trust enhancement "may not be

employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic."

In determining whether an abuse of trust is included in the "base offense level" within the meaning of §3B1.3, the test is whether the elements of the offense of conviction necessarily include an abuse of trust. *United States v. Dion*, 32 F.3d 1147, 1149-50 (7th Cir. 1994) (elements of the offense determine whether base offense level for embezzlement committed by postal worker, in violation of 18 U.S.C. §656, subsumes abuse of position of trust); *see also United States v. Georgiadis*, 933 F.2d 1219, 1225 (3d Cir. 1991) (same); *United States v. McElroy*, 910 F.2d 1016, 1027-28 (2d Cir. 1990) (same); *United States v. Trask*, 143 F. Supp. 2d 88, 90-92 (D. Mass. 2001) (declining to enhance for abuse of trust; "If I focused on the elements of the offense as defined in the statute [15 U.S.C. §78j(b)], I would not enhance [for abuse of trust] since churning necessarily involves abuse of a position of trust . . . I concluded that the Sentencing Reform Act and the rule of lenity require that I focus on the statute"); *but see United States v. Queen*, 4 F.3d 925, 927-28 (10th Cir. 1993) (noting conflict among 10th Circuit panels, one of which held that "whether an enhancement for abuse of trust was appropriate depended on the base offense level and specific offense characteristics assigned by the guidelines to the crime of conviction and not on the elements of the offense itself").

Here, applying the "elements" test, which is the law in the Seventh Circuit, a conviction under §1346 necessarily includes an abuse of a position of trust. Indeed, the

Court charged the jury to that effect. T. 15,171 (to convict of honest services mail fraud, jury required to find breach of fiduciary duty for personal gain). As in *Trask*, certainly there is sufficient ambiguity about whether the abuse of trust enhancement applies in the "honest services" context to trigger the rule of lenity as a "tie breaker" in Mr. Boultbee's favor. 143 F. Supp. 2d at 92.

Nor is an enhancement for abuse of trust justified by the facts. As the PSR recognizes, for the enhancement to be applicable, the abuse of trust must "significantly facilitate[] the commission or concealment of the offense." LL. 505-06. Here, even assuming that the APC and supplemental payments were not brought to the Board's attention for approval, a hotly disputed fact at trial, the evidence demonstrates overwhelmingly that the Board would have approved the payments had the Board been informed of them. Indeed, according to the testimony of Marilyn Stitt (T. 4944, 5126-29), Patrick Ryan (T. 12,612-14) and Chris Paci (12,826-27), when asked specifically whether the non-compete payments had been approved, Governor Thompson replied in the affirmative.

In any event, Mr. Boultbee concededly had no role or responsibility in seeking Board or Audit Committee approval for related party transactions. *See* PSR LL. 197-199 ("As a general practice, it was [another individual's] role to present all related party transactions to International's Audit Committee . . . "). As the PSR acknowledges, Ravelston, in which Boultbee had less than a 1% interest, only had the responsibility to "provide the details of any conflicts of interest to [International's] secretary." L. 139-140.

In other words, Mr. Boultbee's obligation, if any, was to bring such information to the attention of others who had the responsibility to convey it to the Audit Committee or Board. The information was in fact brought to the attention of the responsible party or parties. *See, e.g.,* GX APC 13; GX Supp. Payment 1.

Finally, the enhancement for abuse of trust is defendant-specific. USSG §3B1.3 ("If *the defendant* abused a position of trust . . .") (emphasis added). As the Seventh Circuit noted in the analogous context of *Pinkerton* liability under the USSG for a coconspirator's use of a minor to commit a crime:

> *Pinkerton* liability makes no sense in the context of the individualized enhancements set out in section 3B of the Guidelines, which seek to punish the particular behavior of individual members of a conspiracy. Indeed, the section's introductory note states that the part "provides adjustments to the offense level based upon the role *the defendant* played in committing the offense."

United States v. Acosta, 474 F.3d 999, 1003 (7th Cir. 2007) (original emphasis). According to *Acosta*, USSG §3B enhancements, which include the enhancement for abuse of a position of trust, require some affirmative conduct by a defendant before he can be saddled with one of the §3B enhancements.

Here, Mr. Boultbee took no such affirmative action in furtherance of an abuse of trust. In the context of the APC and supplemental payments, he did nothing more than deposit two checks he had received, and signed the APC non-compete agreement. The worst that can be said about Mr. Boultbee in the context of the abuse of trust enhancement is that, as the government put it, he should have questioned why he was

receiving a check and not "run to the bank to make a deposit." Doc. #904 at 19. In other words, according to the government, Mr. Boultbee committed "honest services" mail fraud by omission, and not by an affirmative act. Whether his omissions are sufficient to support his conviction, they are not enough to trigger an enhancement for abuse of a position of trust.

LL. 528 and 530. Based on the foregoing objections to the PSR, Mr. Boultbee's adjusted offense level and total offense level should be 10, and not 22.[5]

LL. 733, 776-781. According to the PSR, Mr. Boultbee is subject to restitution to International in the amount of $152,500. In fact, International has wrongfully refused to permit Mr. Boultbee to exercise his options the value of which far exceeds the restitution amount. Mr. Boultbee has sued International for the value of his options. Any restitution amount should be offset by the amount of the options, or Mr. Boultbee's restitution obligation should be stayed pending the outcome of that litigation.

LL. 747-48. Mr. Boultbee's USSG range, based on a total offense level of 10 in Criminal History Category I, would be 6-12 months in Zone B. If Mr. Boultbee's total offense level is 14 (*see* fns 3 & 4, *supra*), his USSG range would be 15-21 months in Zone D.

---

5. If Mr. Boultbee is held responsible for a "loss" exceeding the amount he personally received ($152,500), it should be no more than $1.2 million, resulting in an 11-level enhancement. *See* fn 3, *supra*. Mr. Boultbee's total offense level would then be 14.

LL. 758-59. Based on a total offense level of 10, the applicable USSG range is in Zone B, entitling Mr. Boultbee to a probationary term. USSG §5B1.1(a)(2).

LL. 774-75. Based on a total offense level of 10, the fine range for Mr. Boultbee would be $2000 to $20,000. Based on a total offense level 14, the fine range would be $4,000 to $40,000.

LL. 782-96. Counsel intends to set forth in his position paper as to sentencing factors all of the grounds for imposing a non-USSG sentence in Mr. Boultbee's case. For present purposes, the following additional considerations, not reflected in the PSR, should suffice:

A. Collateral Consequences. As a result of Mr. Boultbee's Canadian nationality and removable status, he will be ineligible to serve a term of confinement in a BOP minimum security camp or community confinement center; he will be ineligible for any early release program, including one year of credit for successful completion of an RDAP program for which he undoubtedly would otherwise be eligible; and he will be ineligible to serve his sentence in Canada under a treaty transfer while his appeal from the judgment of conviction is still pending and any fine or restitution obligation is outstanding. In other words, unless the Court imposes a non-USSG sentence, Mr. Boultbee will receive a sentence longer than necessary within the meaning of 18 U.S.C. §3553(a), and will suffer substantial additional, more severe and disproportionate punishment.

B. Extraordinary Assistance to the Victim. On the eve of trial, and at substantial personal jeopardy to his legal position in this case, Mr. Boultbee responded to International's request for cooperation in an arbitration in Toronto brought by CanWest against International in which CanWest has made a claim against International for approximately $50 million as a result of certain pension and benefit costs arising from CanWest's purchase of International's Canadian newspaper assets. Mr. Boultbee's cooperation was extensive and far beyond any legal obligation. It included several time-consuming meetings, both in-person and by video conference, with International's Canadian counsel to assist him in understanding the complicated and voluminous documents underlying the CanWest transaction, and the complex legal and factual issues underlying CanWest's multi-million dollar claim against International. Indeed, as reflected in a letter from Canadian counsel, to be attached as an exhibit to Mr. Boultbee's position paper as to sentencing factors, International could never have hoped to prevail without Mr. Boultbee's critically important cooperation. *See, e.g., United States v. Tsosie,* 14 F.3d 1438, 1443 (10th Cir. 1994) ("Rendering aid to a victim is a factor that is not considered by the guidelines. It was properly considered as a mitigating circumstance justifying a downward departure") *See also United States v. Gee*, 226 F.3d 885, 900-02 (7th Cir. 2000) (upholding downward departure where defendant "demonstrated a 'non heartland' acceptance of responsibility"); *United States v. Bean*, 18 F.3d 1367, 1368-69 (7th Cir. 1994) (downward departure available where defendant, although asserting innocence, had voluntarily repaid victim of fraud); *United States v. Sanchez*, 927 F.2d

1092, 1094 (9th Cir. 1991) (§5K2.0 authorizes downward departure for substantial assistance in related civil proceedings).

Here, any "loss" attributed to Mr. Boultbee is far outweighed by the value of his voluntary and critical cooperation with International in the CanWest arbitration, which is pending decision.

CONCLUSION

For the above-stated reasons, and for those set forth in the objections of Mr. Boultbee's codefendants which Mr. Boultbee now joins to the extent they are consistent with his position, the Court sentence Mr. Boultbee consistent with Mr. Boultbee's objections.

Dated: November 27, 2007

GUSTAVE H. NEWMAN
RICHARD A. GREENBERG
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG

by _____/s/_____
Richard A. Greenberg

950 Third Avenue
New York, New York 10022
(212) 308-7900

PATRICK A. TUITE
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7877

DONALD A. CORBETT
DICKSTEIN SHAPIRO, LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 277-6579

Attorneys for John A. Boultbee