UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

GOVERNMENT'S CONSOLIDATED OBJECTIONS TO PRESENTENCE INVESTIGATION REPORTS

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, U.S. Attorney for the Northern District of Illinois, submits its Consolidated Objections to the Presentence Investigation Reports concerning Conrad Black, Peter Atkinson, Jack Boultbee, and Mark Kipnis.

A. The 2007 *Guidelines Manual* Should Be Used for All Defendants

The government objects to the probation office's use of the 2000 *Guidelines Manual* for defendants Boultbee, Atkinson, and Kipnis. For the reasons set forth in the Government's November 5, 2007 filing (docket #931), the government requests that the Court use the current *Guidelines Manual* for all defendants.

B. The Loss Amount Should Be $32.15 Million for All Defendants

Under Guideline § 2B1.1, the Court must determine the loss amount attributable to defendants' conduct. The Court's loss-amount calculation should include not only the amounts tied to the counts of conviction, but also losses attributable to all relevant criminal conduct, which includes acts and omissions that were part of the same course of conduct or general scheme of wrongdoing. Guideline § 1B1.3(a)(2); *United States v. Frith*, 461 F.3d 914, 917 (7th Cir. 2006). To qualify, the acts must "be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." Guideline § 1B1.3, n. 9(A); *see also United States v. Matthews*, 116 F.3d 305, 307 (7th Cir. 1997)

(cases in this circuit advocate a broad interpretation of relevant conduct).

Moreover, the relevant-conduct analysis should consider not only convicted conduct, but also acquitted and uncharged criminal conduct that is proved by a preponderance of evidence. "Loss amount for purposes of the guidelines must be calculated on the basis of the conduct of conviction and relevant conduct; relevant conduct must be criminal or unlawful conduct, though it need not have been charged. . . . Conduct underlying an acquitted charge may be included as long as that conduct is proved by a preponderance of the evidence." *Frith*, 461 F.3d at 917 (citations omitted); *see also United States v. Schaefer*, 384 F.3d 326, 331-33 (7th Cir. 2004) (holding that district court correctly included convicted, acquitted, and uncharged relevant conduct in loss-amount calculation, based on preponderance of evidence).

Viewed in the context of the entire trial, defendants' criminal conduct concerning the APC and supplemental non-compete payments may be the most blatant examples of defendants' fraud scheme, but they were not isolated incidents. The evidence at trial showed by a preponderance of the evidence that these fraudulent payments were the last chapter in an ongoing scheme by defendants to insert themselves into U.S. community newspaper transactions and thereby divert money from International to Ravelston, Inc. and the senior executives. The government, therefore, objects to the PSR's conclusion that the loss amount from defendants' fraud scheme is limited to the $6.1 million received by Black, Radler, Boultbee and Atkinson for the APC and supplemental non-compete payments.

The PSR recognizes that the loss amount attributable to defendants at sentencing can and should be based on not only the counts of conviction but all relevant conduct established by a preponderance of the evidence. Black PSR at 10. And yet, without any discussion of the months

of testimony and dozens of exhibits establishing the common scheme among all the U.S. community non-compete payments, the PSR simply states that "a preponderance of evidence is lacking to establish any relevant conduct within the meaning of § 1B1.3 constituting part of a common scheme or plan as the counts of conviction." *Id*. The government maintains that the evidence at trial established defendants' guilt beyond a reasonable doubt of fraud in all the U.S. community non-compete payments, and that the jury's verdict on Count One covers the entire $32.15 million loss from the U.S. community non-compete scheme. At a minimum, a preponderance of evidence at trial showed that the loss amount attributable to these non-compete payments is relevant conduct.

Take the $12 million non-compete payment to Inc. in the CNHI (1) transaction as an example. The evidence showed that, just as in the case of APC and Forum and Paxton, CNHI never asked for or required that Inc. be included as a non-compete covenantor, let alone that Inc. receive $12 million for its non-compete. Tr. 1824, 2048-49. Indeed, the evidence showed that – following discussions between Black and Radler, and then between Radler and Kipnis – defendant Kipnis asked CNHI to include Inc. as a non-compete covenantor and allocate $12 million that otherwise would have gone to International for the sale of its assets. Tr. 1825-26, 2059-60. The Audit Committee of International was never told about this payment, nor were the Board of Directors or the shareholders. While defense counsel spent weeks of cross-examination on SEC disclosures that mentioned non-compete payments to individual executives, not a single SEC disclosure ever mentioned that $12 million was diverted from International to its controlling shareholder, Inc. This $12 million fraud was part of the charged scheme on which all defendants were convicted, and the preponderance of evidence establishes this as part of the loss amount. The same is true for the other Inc. non-compete payments: $2 million from the *American Trucker* transaction, $1.2 million from

the Horizon deal, $750,000 from CNHI(2), $100,000 from Forum, and $500,000 from Paxton, for a total of $16.55 million in fraudulent payments to Inc.

In addition, defendants should also be held responsible for the $9.5 million in purported non-compete payments made to Black, Radler, Boultbee, and Atkinson in connection with the CNHI(2) transaction. The trial evidence showed that CNHI never requested or required the executives' individual non-compete agreements, and didn't even know who Boultbee and Atkinson were. Tr. 1837-39, 2095-97. The contract called for only $3 million in non-compete agreements, to be divided between International and Inc. Tr. 1848-49, 2292. The $9.5 million figure came from Black and Radler, via Kipnis, who wrote in the dollar amount on the final deal papers, after the CNHI representatives refused to transfer deal proceeds directly to the executives or alter the paperwork. Tr. 1848-49, 1856, 2160-62, 2292. This is $9.5 million that was part of the money International's shareholders should have received for selling major newspaper assets to CNHI. But the government proved, at least by a preponderance, that defendants stole this money for the top executives, for no reason at all, other than to pay themselves more money. Then, they lied to the shareholders about it – first concealing that any non-compete payments had been made, and then, years later, lying about the reasons why the money was paid.

In total, the U.S. community newspaper scheme charged in Count One resulted in an actual loss to International of $32.15 million, including $16.55 million to Inc. and $15.6 million to the top executives. This loss flows directly from the first count of conviction, and should be included in the Court's loss calculation as a direct loss from the scheme. Even if the Court considered only the APC and supplemental payment money as direct loss from the counts of conviction, the remaining money should be included as loss attributable to relevant conduct. As to the Guidelines' imperative on

relevant conduct, *i.e.*, that the conduct at issue be connected by "at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*," the U.S. community Inc. and individual non-compete payments qualify on every score. The common victim is International. The common accomplices are Black, Radler, Boultbee, Atkinson, and Kipnis. The common purpose was to enrich Black and, in the case of the individual payments, the other executives. And the non-compete device was the unique *modus operandi* of this scheme, repeated through every one of the U.S. transactions and for the APC and supplemental payments. The government has proved by a preponderance that all the defendants should be held responsible for a loss amount of $32.15 million.

C. There Should Be a Two-Level Increase Because a Substantial Part of the Scheme Was Executed from Outside the United States

The Guidelines, pursuant to § 2B1.1(b)(9)(B), allow for a two-level enhancement if a substantial part of a fraudulent scheme was committed from outside of the United States. The Guideline commentary explains that this enhancement exists because these types of offenses are "difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts." Guideline § 2B1.1 cmt. (background). The Seventh Circuit has held that this enhancement should apply even where the fraudulent activities "were all completed within the United States." *United States v. Arnaout*, 431 F.3d 994, 999 (7th Cir. 2005). The Court explained that where the fraud was aimed at diverting resources to an entity outside of the United States, the fraudulent conduct is not competed until the money is delivered to the outside entity. *Id.*

Here, a large portion of defendants' conduct was aimed at diverting International's sales

proceeds to Inc. and Ravelston – Canadian companies.[1] The fact that many of these transactions took place within the United States does not affect the applicability of the enhancement. Indeed, the enhancement is particularly appropriate in this case given the tremendous resources spent by the government through diplomatic processes (*e.g.*, MLATS and Rule 15 depositions) to secure testimony and evidence beyond the jurisdiction of the United States.

D. There Should Be a Two-Level Increase Because the Offense Involved Sophisticated Means

Guideline § 2B1.1(b)(9)(c) and § 2F1.1(b)(6)(c) provide for a sentencing enhancement of two levels if the offense involved "sophisticated means." The sophisticated-means enhancement is later defined in Application Note 8(B) and 18, respectively, of the two sections:

> Sophisticated Means Enhancement. - "sophisticated means" means especially complex or intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

This case involves especially complex and intricate offense conduct, and the sophisticated-means enhancement should be applied for all defendants.

In a simple corporate-fraud scheme, a defendant might forge a signature on a document or a check. Obviously, a simple fraud like that is much easier to detect and unravel than the scheme perpetrated by the these defendants. The four-month trial here revealed the defendants' scheme to be unique, brazen, calculating, manipulative – and *complex*. They successfully completed this multi-million dollar crime and hid the truth for years by creating fraudulent transaction documents,

[1]This Court should also consider the applicability of the enhancement to defendant Black's obstruction-of-justice conduct, which is clearly related to the fraud in this case.

drafting and signing false and misleading corporate documents, manipulating the corporate approval process, back-dating checks, falsifying SEC filings, and weaving elaborate lies to anyone who asked questions.

In the instant case, the fact that the defendants were able successfully to hoodwink International, a very large and successful newspaper corporation, should be considered by this Court in determining whether to apply the sophisticated-means enhancement. The defendants' efforts to secure money for Inc. and the officers while keeping a former United States Attorney and Governor, United States Ambassador, noted economist, a Board of Directors which consisted of world business and political leaders, hedge-fund managers, informed shareholders, lawyers, accountants, professional staff, reporters, and all of Wall Street in the dark for years is beyond comparison to any other "normal" corporate fraud embezzlement. To call this a routine fraud belies the facts and common sense.

Although they deemed it a "close call" and noted that the mischaracterizations of the funds in the 10-K report may be considered "somewhat complex" or "intricate in nature," the probation office did not apply the two-level enhancement for sophisticated means for any of the defendants. Black PSR at 19; Boultbee PSR at 15; Atkinson PSR at 15; Kipnis PSR at 13. Probation contends that the offenses may be viewed as "money grabs" and their concealment as simple omission of facts to the shareholders. Black PSR at 19. Respectfully, the probation office has misunderstood the context of the government's description of the APC and supplemental payments as "money grabs," and has not considered or analyzed the many aspects of the offense that show its sophistication.

First, while the government used and defendants repeated in their filings to probation the phrase "money grab," it was used at trial in the context of describing the defendants' greed. As

such, it has no relevance to the applicability of the enhancement at sentencing. *See, e.g., United States v. Newell*, 239 F.3d 917, 921 (7th Cir. 2001) (Government's argument that criminal scheme was "not particularly sophisticated" does not affect applicability of "sophisticated means" sentencing enhancement.). The government was clear that "[t]hese are some of the most sophisticated businessmen you will ever see. They are the most sophisticated businessmen you will ever lay your eyes upon." Tr. 835. The government argued that the defendants could not just walk into International, write themselves a check, take it up to Harris Bank, and cash it. In explaining the extensive coverup, the government stated, " [t]his company has bookkeepers, they've got lawyers, they've got accountants. There's a Board of Directors. How do you do it? How do you get away with it?" Tr. 942. The government did not argue that these defendants actually grabbed money or simply wrote themselves checks and then prayed it wouldn't be discovered. These defendants were much more calculating in the execution and concealment of their crime than the average fraud defendant.

Second, the facts of this case amply demonstrate the sophisticated nature of the defendants' U.S. community non-compete scheme and subsequent concealment. This is true for all the U.S. community transactions (which should all be considered in evaluating the sophisticated-means issue). To give just a few examples, though, as to the supplemental payments, Black, Radler, Boultbee, and Atkinson managed to pay themselves $600,000 of the corporation's money as purported non-compete payments from the Forum and Paxton transactions, despite the fact that neither Forum nor Paxton requested or required non-compete agreements with the executives, and no non-compete agreements were ever signed. Defendants took numerous complex steps to execute this fraud, including Black's and Radler's actions in having Executive Committee consents prepared,

signed, and slipped past the Board of Directors. Gov. Ex. Executive-1D and 1E, Board-1D. The Executive Committee consents on Forum and Paxton permitted the deals themselves to go through, while avoiding the Audit Committee's review. The consents that Black and Radler signed referred to executive non-compete agreements – even though the buyers never even hinted at requiring non-competes from the executives – thereby giving the executives the seeds of an argument down the road that their payments had been "approved," even though of course they had not been. The defendants' intricate knowledge of International's corporate structure and approval process enabled them to falsify corporate records and maneuver around true disclosure while securing the necessary approvals for the transaction to proceed. *See United States v. Wu*, 81 F.3d 72, 73-74 (7th Cir. 1996) (affirming sophisticated-means enhancement where defendants falsified their company's business records, provided fraudulent documents to banks, and provided incomplete and misleading information on their tax returns); *United States v. Utecht*, 238 F.3d 882, 889 (7th Cir. 2001) (fabricating documents can be sophisticated method of hiding tax fraud).

As to APC, another example, the defendants did not simply write checks and deposit them into a bank account. These intelligent and successful businessmen knew what type of document to draft, how to use the International corporate structure to ensure the money would be paid, and how to make it appear that the money was being paid as part of a proper arms-length transaction.

Probation states that Black concealed the offenses as simple omissions of facts to the shareholders. Black PSR at 19. Respectfully, this cursory statement fails to acknowledge what took place before and during the shareholder meetings. Specifically, Black did not simply get up at the meetings and omit certain facts. Rather, in order to conceal the truth, Black affirmatively stated at the meetings that the buyers in CanWest and the U.S. community deals required that the officers sign

non-compete agreements in order to consummate the deals, thereby justifying the payment of millions of dollars to the top executives. Upon hearing Black's comments, Atkinson leaned over to Paul Healy and acknowledged that Black was lying. This was not a simple omission. This was a knowing lie to a room full of angry hedge-fund managers and owners. Black's lies – perpetuated further at the 2003 shareholder meeting – were calculated, articulate, and meant to be persuasive. Other coverups to shareholders came in the form of the false and misleading transaction information in the 10-K and 10-Q reports. These false filings misled not only International's shareholders, but also the investing public and find managers.

In *United States v. Rettenberger*, 344 F.3d 702 (7th Cir. 2003), the Seventh Circuit considered the applicability of the sophisticated means enhancement to an insurance fraud scheme involving the submission of false medical claims. *Id.* at 705-06. Defendants depicted their scheme as a "simple lie" and argued that the sophisticated means enhancement should not apply. The court rejected this claim, finding that the scheme was more detailed. The court explained:

> Fooling a skilled neurologist and 14 insurers requires intricate maneuvers. The [defendants] had to present a picture consistent with the injury [the patient] supposedly suffered . . .. Careful execution and coordination over an extended period enabled [the defendants] to bilk more insurers and reduce the risk of detection.

Id. at 709. Similarly here, defendants' false characterization of the unauthorized bonus payments as legitimate "non-compete" payments to board members, outside lawyers (from two law firms), accountants, shareholders, and numerous International employees enabled them to bilk International out of millions of dollars in sales proceeds. Moreover, these defendants went to great lengths to cover up their scheme through false SEC disclosures, affirmative lies at shareholder meetings, and attempts to thwart the Special Committee's formation and investigation.

As noted above, probation did acknowledge that the false filings to International

shareholders "may be considered somewhat complex" or "intricate in nature." Black PSR at 19; Boultbee PSR at 15; Atkinson PSR at 15; Kipnis PSR at 13. While probation acknowledges the false 10-K reports, it does not appear that they analyzed the false 10-Q Reports; blatant lies to the shareholders at the 2002 and 2003 shareholder meetings; defendants' concealment of payments from the Audit Committee, International's auditors, and various of International's outside counsel (including Bud Rogers and Paul Saunders of Cravath, who testified at trial in detail about discussions with Atkinson (Rogers and Saunders), Boultbee (Rogers), and Kipnis (Rogers); or attempts by certain of the defendants to prevent the Special Committee from in-depth review of the non-compete payments (for example, Gov. Exs. Shareholder-42, 52, and 55) – all of which go beyond the normal means an individual might use to commit a fraud. *See United States v. Charroux*, 3 F.3d 827, 836-37 (5th Cir. 1993) (sophisticated means appropriate where defendant sought advice of tax professionals to lend appearance of legitimacy to their dealings, while withholding key information from those professionals). The sophisticated-means enhancement should therefore be applied in calculating each defendant's sentence.

E. Defendants Should Receive a Four-Level Increase under Guideline § 2B1.1(b)(15), Because They Were Officers of a Publicly Traded Company and Committed Multiple Violations of the Securities Laws

The government objects to the PSR's recommendation that a four-level increase for committing a violation of the securities laws while an officer of a public company does not apply in this case. The PSR essentially assumes for purposes of its analysis that the only way this enhancement could apply is if defendants interfered with an independent audit of International's financial statements, and then concludes that the evidence at trial did not establish such a violation. *See e.g.*, Black PSR at 20, lines 635-650. The PSR is wrong both as a matter of law in interpreting

the Guidelines and on the facts as established at trial. Defendants' criminal conduct violated multiple securities-law provisions, each of which provides an independent basis for applying the enhancement. Moreover, the evidence at trial established that among those violations was fraudulently interfering with the company's independent audit.

The enhancement in Guideline § 2B1.1(b)(15) applies to any violation of the securities laws by an officer, regardless of whether the securities violation was charged or the subject of a guilty verdict. The Application Notes provide one example – interfering with an independent audit – but it is not an exhaustive list of the securities violations that trigger the enhancement. *United States v. Longo*, 184 Fed. Appx. 910, 914-15 (11th Cir. 2006) (upholding application of enhancement, even though securities-law violation not charged, where defendant's wire-fraud scheme also constituted a violation of 15 U.S.C. § 77q(a) because it involved the offer or sale of securities and defendant was an investment advisor). Indeed, the Application Notes define "securities law" to mean "18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and . . . includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section."

These provisions bar officers of publicly traded companies not only from fraudulently interfering with an independent audit, they also prohibit (1) a scheme or artifice to defraud any person in connection with any registered security, 18 U.S.C. § 1348; (2) falsely certifying that information in a public filing fairly presents, in all material respects, the financial condition and results of operations of the company, 18 U.S.C. § 1350; and (3) engaging in acts or practices that violate sections 10(b), 13(b)(5), and 14(a) of the 1934 Act and Rules 10b-5, 13b2-1, 14a-3 and 14a-9

promulgated thereunder. The PSR does not even consider whether defendants' conduct violated any of these securities-law provisions. If it had, the enhancement would have been applied to each defendant.

The government proved at trial that, as part of their scheme and in an ongoing effort to conceal their scheme, defendants made repeated misrepresentations and omissions of material facts about the non-competition payments in proxy statements and SEC filings. 11/5/07 Mem. Op. at 10 (noting that defendants misrepresented the true nature of the APC payments to shareholders in public SEC filings). In addition, defendants hid these related-party payments from the Audit Committee and the full Board of International, and delayed making proper disclosure in public filings despite receiving information from lawyers at Cravath that this was material information that could expose the company to significant shareholder liability. Defendants failed to maintain accurate books and records that properly recorded the payments as bonuses disguised as non-compete payments in order to receive favorable tax treatment. And defendant Black made material misstatements and omissions about the non-compete payments at annual shareholder meetings, despite clear indications from shareholders that they were concerned about the payments and the justification for them. In light of the shareholder complaints voiced to defendants in e-mails, the press and shareholder meetings, as demonstrated through numerous trial exhibits, it is apparent that this information about why assets were being drained from International would have been material to a decision to purchase or sell International's stock.

Based on the evidence at trial, defendants violated several provisions of the securities laws. For example, defendants' fraud scheme violated Section 10(b) of the Exchange Act and Rule 10b-5 of the implementing regulations. The elements of a Rule 10b-5 violation are: (1) a

misrepresentation (or omission); (2) made with scienter; (3) that was material; and (4) that was made in connection with the purchase or sale of securities. *McConville v. SEC*, 465 F.3d 780, 786 (7th Cir. 2006); United States v. Peterson, 101 F.3d 375, 379 (5th Cir. 1996).[2] The jury has already found three out of four of these elements. The only open question is whether the defendants' fraudulent misrepresentations were made "in connection with the purchase or sale of securities." The Supreme Court has adopted a broad reading of the "in connection with" test, explaining that "the statute should be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 195 (1963)). As the court recognized in *SEC v. Santos*, 355 F. Supp. 2d 917 (N.D. Ill. 2003), "[a] fraudulent scheme that coincides with the sale of securities can satisfy the "in connection with" test. *Id.* at 920 (citing *Zandford*, 535 U.S. at 825).

Defendants made misrepresentations and material omissions during board meetings, in proxy statements, in quarterly and annual reports, and at annual shareholder meetings to conceal their self-dealing. These misrepresentations concerned millions of dollars that senior executives were taking from International and paying to themselves without any legitimate justification. Such fraudulent conduct violates Section 10(b) and Rule 10b-5, because it is the type of information that is material to an investor's decision whether to purchase or sell securities. *SEC v. Pace*, 173 F. Supp. 2d 30, 32-33 (D.D.C. 2001) (granting summary judgment for Section 10b violation where CEO failed to

[2]In a public enforcement action or criminal prosecution for a 10b-5 violation, as in a mail or wire fraud prosecution, there is no requirement that the government prove the victim's justifiable reliance or actual loss. *Schellenbach v. SEC*, 989 F.2d 907, 913 (7th Cir. 1993); *Graham v. SEC*, 222 F.3d 994, 1001 & n.15 (D.C. Cir. 2000).

disclose in proxy statements or annual reports that he transferred funds from corporation to CEO's personal bank account, and stating "[i]nvestors have a right to know-and would reasonably consider it important-when the head of a publicly-owned company is stealing any quantity of money from their company"); *In re Tyco Int'l Multidistrict Litig.*, No. 02-226-B, 2004 U.S. Dist. LEXIS 20733, *10-11 (D.N.H. 2004) (senior management's failure to disclose information about compensation and related party transactions that must be disclosed under SEC regulations); *SEC v. Saltzman*, 127 F. Supp. 2d 660, 667 (E.D. Pa. 2000) (managing partner's failure to disclose personal loans taken in violation of partnership agreement). The evidence at trial demonstrated that existing and potential shareholders were concerned about the non-compete payments and specifically about the reason why the senior executives were receiving these payments as opposed to International. Defendant Black in particular made misleading representations to shareholders at the annual International shareholder meetings about the non-compete payments that were designed to assuage these concerns and encourage shareholders to invest in International.[3]

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[3]In fact, defendants have already successfully argued in one of the pending civil cases, *Hollinger International, Inc. v. Hollinger, Inc.*, No. 04 C 0698, 2004 WL 2278545 (N.D. Ill. Oct. 8, 2004), that the claims against them for false and misleading disclosures concerning non-compete payments are claims for securities fraud. In moving to dismiss RICO claims against them, defendants argued that the alleged predicate acts were actionable as "fraud in the purchase of securities" and therefore barred under 18 U.S.C. § 1964(c): "[The Special Committee's] Complaint alleges not just looting but concealed looting of a public company. This is the essence of a securities fraud violation. . . . [The Special Committee's] allegations – of false SEC filings, false statements at shareholder meetings, and breach of the duty of disclosure – are plainly subject to a civil action by the SEC, and that alone dooms plaintiff's RICO claim." Judge Manning agreed with Defendants' arguments and dismissed the civil RICO claims with prejudice, stating that the predicate offenses were actionable as securities fraud under section 10(b) and 20(a). 2004 WL 2278545 at *7. The court explained: "[The] predicate acts would be part of an overreaching scheme to defraud International (and thus also its majority non-controlling shareholders) by misappropriating and usurping the Company's assets for their personal enrichment at the expense of International and the other shareholders. To facilitate and disguise this scheme, Defendants . . . caused International to make material

(continued...)

In addition, defendants' fraudulent conduct caused International (i) to file inaccurate and misleading annual and periodic reports, and (ii) to fail to make and keep books and records that accurately and fairly reflected the transactions and dispositions of International's assets, in violation of Sections 13(a) and 13(b)(2)(A) of the Exchange Act, 15 U.S.C. §§ 78t(a) and 78m(b)(2)(A). Defendants. Specifically, defendants hid the true nature of the U.S. community non-compete payments, including the APC and supplemental payments, so that they were inaccurately reflected in the company's public filings and books and records as payments for non-compete agreements, in connection with the sale of community newspaper assets, that were required by the purchasers.

Finally, with regard to the one possible violation of the securities laws that the PSR did consider – interfering with the company's audit – defendants should receive the enhancement on that basis as well. Defendants' fraud scheme not only deprived the shareholders of important information about the company, it caused International to fail to maintain a system of internal accounting controls such that transactions were recorded properly to permit preparation of financial statements in conformity with generally accepted accounting principles, in violation of Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A). The APC non-compete payments and the supplemental payments were never presented to the Audit Committee for review as related-party transactions, nor were they properly recorded in International's financial statements as bonus compensation that was merely characterized as non-compete payments for tax purposes. The PSR for Black states that the probation officer is "unaware of any evidence that Conrad Black attempted

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[3](...continued)
misstatements and omissions in its financial records and public filings with the SEC. Accordingly, the predicate acts would be part of a scheme which is actionable under securities law . . . ." *Id.* at *10.

to unduly influence the independent audit," Black PSR at 20, lines 643-644, however, the evidence at trial demonstrated that Black signed several Executive Committee consents that had the effect of circumventing the company's established internal controls for reviewing and approving related-party transactions. As a result, these related-party payments were kept from the Audit Committee – or to the extent the transactions themselves appeared in the records of the Audit Committee's work, such records did not reflect any related-party payments.[4] For all of these reasons, a four-level enhancement of each defendant's guidelines level is warranted.

F. If the Court Applies the 2000 *Guidelines Manual*, the Offense Levels Should Be Increased for More than Minimal Planning

In the PSRs for Atkinson, Boultbee, and Kipnis, where probation was using the 2000 *Guidelines Manual*, probation made recommendations concerning whether defendants should receive a two-level enhancement under Guideline § 2F1.1(b)(2)(A), which applies if the offense involved more than minimal planning. Atkinson PSR at 14; Boultbee PSR at 14; Kipnis PSR at 12. The government's position is that the Court need not consider this enhancement at all, because the Court should apply the 2007 *Guidelines Manual*, and this enhancement is no longer part of the manual. If, however, the Court decides to use the 2000 *Guidelines Manual* in sentencing Atkinson, Boultbee, and Kipnis, then each defendant should receive a two-level enhancement for more than minimal planning.

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[4] With regard to International's Form 10-Qs and Form-10K filed in 2003, Black certified, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002 and Rule 13a-14 promulgated thereunder, that International's reports did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made non misleading. Because Black knew or was reckless in not knowing at the time he made these certifications, that International's filings were misleading and inaccurate in material respects in characterizing the non-compete payments, he also violated Rule 13a-14, 17 C.F.R. § 240.13b2-1, of the securities laws.

The more-than-minimal-planning adjustment is warranted where: (1) there is more planning than is typical for commission of the offense in simple form; (2) steps are taken to conceal the offense; or (3) criminal acts, each of which are not purely opportune, are repeated over a period of time. *United States v. Sonsalla*, 241 F.3d 904, 907 (7th Cir. 2001). Enhancement is proper if any one of these three factors is present. *United States v. DeAngelo*, 167 F.3d 1167, 1169 (7th Cir. 1999). In this case, all three factors are present.

First, the U.S. community non-compete scheme, including but not limited to the APC and supplemental payment transactions, involved more planning than is typical for commission of a simple mail fraud. *United States v. Green*, 114 F.3d 613, 618 (7th Cir. 1997) (a "simple fraud" would be, for example, "mere inflation of a[n insurance] claim after an actual accident"). As to APC, for instance, the offense required creation of four phony contracts, signing of the contracts by five different parties, a series of acts to get the money into the hands of the top executives, and concealment from the Audit Committee that over $5 million had been paid to the top executives of the corporation.

Second, steps were taken to conceal all the U.S. community non-compete payments. The defendants hid the fact of the payments from the Audit Committee, Board of Directors, and shareholders for over a year. Even when defendants finally revealed the payments to individuals (continuing to conceal the payments to Inc.), they lied about the nature of the payments and why the payments were made. Specifically, defendants explained the payments as required non-compete payments to buyers in newspaper transactions. Neither the APC payments nor the supplemental payments were made for those reasons; instead, the top executives were taking the money for no reason, and providing false justification to the shareholders on why the shareholders had received

over $6 million less than they were supposed to.

Third, both the APC and the supplemental payments scheme involved multiple criminal acts, none of which was "purely opportune," over a period of time. Taking APC alone, that transaction involved multiple criminal acts. *Green*, 114 F.3d at 619 (enhancement applies to multiple, individual acts and affirmative steps that make up a single fraudulent scheme); *United States v. Viemont*, 91 F.3d 946, 952 (7th Cir. 1996) ("repeated acts" prong of enhancement applies where defendant committed multiple acts in furtherance of a single scheme to defraud). Kipnis, for example, drafted a phony non-compete for Conrad Black; one for David Radler; one for Jack Boultbee; and one for Peter Atkinson. Kipnis signed each of the four contracts on behalf of APC. Kipnis mailed the checks to the executives. Kipnis signed a false proxy statement to shareholders, misrepresenting the nature of and reasons for the payments. That's ten acts just by Kipnis, all involving deliberation, occurring over a period of approximately one year. *United States v. Channapragada*, 59 F.3d 62, 65 (7th Cir. 1995) (defendant properly received enhancement where he engaged in multiple steps as part of a single transaction). In addition, the offense involved acts by Black, Radler, Atkinson, and Boultbee, including signing the APC contracts, cashing the checks, and making additional false statements to shareholders concerning the payments. All these acts, taken together, establish that the APC offense involved more than minimal planning. *Green*, 114 F.3d at 618 (whether defendant was personally involved in planning for the offense is irrelevant, "because the Guideline focuses 'on the planning involved in the offense rather than on the planning done by the particular offender'") (citing *United States v. Levinson*, 56 F.3d 780, 781 (7th Cir. 1995); *United States v. Moore*, 991 F.2d 409, 413 (7th Cir. 1993) (the more-than-minimal-planning enhancement is applied based on the nature of the offense itself, not the particular defendant's role

in the offense). The same is true with respect to the other U.S. community non-compete payments, which involved multiple criminal acts by the schemers resulting in over $32 million being stolen from the company.

G. Black Should Receive a Leader/Organizer Enhancement

The Seventh Circuit has repeatedly held that, "[t]o be classified as an organizer or a leader, a defendant 'may simply have organized or in some way directed' another member of the conspiracy." *United States v. Hanhardt*, 361 F.3d 382, 393-94 (7th Cir. 2004), *rev'd on other grounds by Altobello v. United States*, 543 U.S. 1097 (2005); *United States v. Mustread*, 42 F.3d 1097, 1104 (7th Cir. 1994); *United States v. Carson*, 9 F.3d 576, 585 (7th Cir. 1993). The terms "leader/organizer" and "manager/supervisor" are meant to denote gradations of authority, and the enhancement is meant to punish relative responsibility. *Mustread*, 42 F.3d at 1103 ("Section 3B1.1's core focus is on relative responsibility[.]"). Moreover, the Guidelines recognize that "persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate." Guideline § 3B1.1, cmt. background. Defendant Black presents precisely the types of dangers that this enhancement was designed to address.

In determining whether a leadership enhancement is appropriate under Guideline § 3B1.1, the court is directed to consider seven factors. Guideline § 3B1.1, cmt. n. 4. "And the defendant's leadership role can be demonstrated by *any* of [the] seven factors." *United States v. Blaylock*, 413 F.3d 616, 621 (7th Cir. 2005) (emphasis added). These factors include, but are not limited to: (1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the

crime; (5) the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others. Guideline § 3B1.1, cmt. 4. No factor listed in Application Note 4 is essential to finding the enhancement, nor must equal weight be given to each factor. *United States v. Wasz*, 450 F.3d 720, 729 (7th Cir. 2006). In fact, "[a]lthough the nature and purposes of the enhancement certainly require the defendant to have played a leading role in the offense, he need not literally have been the boss of his cohorts in order to qualify for the enhancement, for a leader can influence others through indirect as well as direct means." *Id.* at 729-30. Any fair comparison of the evidence in this case to these factors, however, reveals that defendant Black played a substantial leadership role in this criminal activity.

Exercise of Decision-Making Authority and Control Over Others

There was little dispute during the trial that Black, above all defendants, exercised ultimate decision-making authority at Ravelston, Inc., and International. Black was the Chairman of the Board and the CEO for Inc. and International. Black was also the controlling shareholder for both companies. Black had the final say over all significant financial and strategic decisions involving the purchase and sale of International's asserts. Black also exercised considerable control over the information provided to International's board members and shareholders. For example, Paul Healy testified that when he attempted to provide information to the chairman of the Audit Committee without Black's knowledge, Black angrily confronted him and warned, "This is my company, I am the controlling shareholder and I'll decide what the governor needs to know and when." Tr. 9948-49.

Another example of Black's decision-making authority could be seen in January 2003 when Atkinson cautioned Black in an e-mail that if multiple related-party issues were raised with the

Chairman of the Audit Committee at the same time, the Chairman might give more scrutiny to the management fee. Atkinson wrote: "I think that if in their conversation [*i.e.*, between Radler and the Chairman,] David raises a possible share buy-back from Inc., a potential asset sale and Southam benefit packages proposals, the [Chairman] will feel that a number of related party packages are in the offing and the prudent course may be to retain outside counsel and a financial adviser now. He may decide to do that anyway but I think we have a better chance of obtaining approval for the management fee on a fairly expeditious basis if we treat it as a one-off matter." Black responded that he had spoken with Boultbee, and they agreed not to present the other matters to the Chairman for approval, and to present the Ravelston management fee for approval in the ordinary course ("[W]hy bother the [Chairman] at all at this point?"). Similarly, in its November 5, 2007 Memorandum Opinion and Order, this Court noted another series of e-mails in May 2003 between Black and Atkinson where the two discuss that it is "crucial" that they maintain "control" of the International's Board of Directors. 11/5/07 Mem. Op. at 19.

Participation in the Planning and Commission of the Offense

This Court aptly described the non-competition payments as "bonus payments fraudulently disguised as non-competition payments." 11/5/07 Mem. Op. at 8. The testimony at trial was that Conrad Black (along with Boultbee) set Ravelston salaries and bonuses for all of the participants in this scheme. Tr. 7558-59. When it came to the "non-competition" payments, the testimony from several different sources was that these bonuses were set by Black as well. For example, Atkinson advised Paul Healy that Black was the individual who awarded him his "non-compete" payment for the CanWest transaction. Tr. 10487. Similarly, Radler testified that Black decided on the payment amounts for all of the Inc. and individual non-competes. Tr. 7712-14, 7785-87, 7822-24, 7837,

7932-33. Even apart from the actual allocation of the payments, there was evidence of Black's involvement and direction in each and every aspect of the charged offense.[5]

***American Trucker*/CNHI I Transaction**

- Radler testified that in January 1999, he received a telephone call from Black. During that phone call, Black told Radler to have Inc. inserted as a covenantor to the CNHI non-compete agreement, and to allocate $12 million of the $50 million non-compete fee from International to Inc. Black told Radler that the parent company (*i.e.*, Inc.) deserved a piece of this fee. Tr. 7710-14, 7724.

- Black presented CNHI and *American Trucker* deals to the International Board of Directors at a February 26, 1999 meeting. Black told the board that the *American Trucker* and CNHI deals concluded successfully. There was no mention of non-compete payments for either transaction being sent to Inc., and the International board of directors and Audit Committee did not know about or approve non-compete payments to Inc. Nor was the International board or Audit Committee informed that the non-compete payments to Inc. would be used to repay Inc.'s debt to International. Tr. 6043-44, 6048.

- In early 1999, around the time that the decision was made to include Inc. in the CNHI non-compete agreement, Kipnis told Radler that, at a meeting Kipnis attended in Toronto, it had been decided by "Toronto" (which Radler understood to include Black and Boultbee) that Inc. would be inserted as a non-compete covenantor in all future deals involving the sale of International's U.S. community newspapers, and that Inc. would receive 25% of any non-compete payments. Either at that time or soon thereafter, Kipnis told Radler that Black and Boultbee made this decision. In other conversations with Radler, Black and Boultbee confirmed that this 75% International/25% Inc. split would be the template for future deals. Tr. 7716-17.

CNHI(2) and Paxton/Forum Non-competes

- Shortly after the CanWest transaction, in the summer of 2000, Radler testified that Black told him that he should insert the other executives as non-compete parties into

[5]For sentencing purposes, even if defendant were involved in "multiple conspiracies," Guideline § 3B1.1's Introductory Commentary directs that "the determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1) - (4), and not solely on the basis of elements and acts cited in the count of conviction." Thus, the district court is required to consider what role defendant had in relation to the other participants with whom the trial evidence showed him to have worked, regardless of the offense of conviction.

the upcoming newspaper transactions – CNHI (2), Paxton, and Forum. Tr. 7785-87.

- In a telephone conversation before the CNHI (II) closing, in November 2000, Radler testified that Black told Radler to allocate $9.5 million of the purchase price as non-competition payments to himself, Radler, Boultbee, and Atkinson. Also during that conversation, Black and Radler discussed how the $9.5 million would be allocated among the four executives. Radler conveyed this information to Kipnis. Tr. 7823-25.

- Radler received a call from Black in Spring 2001 about what happened to the non-compete payments from the Paxton and Forum transactions that was supposed to have been set aside – consistent with their earlier discussions. Tr. 7734-37. Radler told Black there was only $600,000 left in the reserves that could be allocated and Black agreed that the money should be allocated to the executives. Black told Radler how the money should be allocated among the executives. Tr. 7931-33.

APC

- Black authorized the payment of the $5.5 million for APC as a "tax-generated non-compete." Tr. 7944.

Executive Committee Consents

- Black signed and presented Executive Committee consents authorizing CNHI(2), Paxton, and Forum transactions, which allowed executives to bypass the Audit Committee and the Board of Directors when presenting these transactions. Executive-1C, 1D, 1E, Board-1D, Tr. 5546-47, 6079-80.

Recruitment of Accomplices

With the exception of Kipnis, Black was responsible for the recruitment or hiring of each of the participants in this scheme. Even Radler was brought into Ravelston by Black after their successful Canadian newspaper operation. While Black's counsel presented maps and other arguments depicting Black and Radler as equal partners, the reality was that Ravelston and Inc. were Black's companies and Radler worked for Black. Nothing depicts this more clearly than the ownership percentages of the respective companies. Black owned 65% of Ravelston as compared to Radler's 14%. Similarly, Black owned a 46% interest in Inc. as compared to Radler's 10%

interest.

Claimed Right to a Larger Share of the Fruits of the Crime

Black's ownership interests in Ravelston and Inc. permitted him to control these companies and allowed him to claim a larger share of the fruits of these crimes. Indeed, Black's share of the non-compete proceeds was considerably higher than any of his co-defendants. Based on his ownership interests in Ravelston and Inc., Black claimed a right to over half (54%) of the "non-compete" funds allocated to Inc. and the individuals. Black's closest rival, Radler, claimed a right to only 32% of the overall "non-compete" funds. Given the fact that Black was the controlling shareholder of Inc., his share of the Inc. "non-compete" proceeds was even greater. Black enjoyed 46% of the funds diverted to Inc. as compared to the 10% share allotted to Radler.

Again, to be classified as an organizer or leader, Black "may simply have organized or in some way directed another member of the conspiracy." *Hanhardt*, 361 F.3d at 393-94. The Seventh Circuit has cautioned that the leadership enhancement was designed "to hold accountable for their role defendants who are relatively more responsible for the crime." *United States v. Kamoga*, 177 F.3d 617, 621 (7th Cir. 1999); *see also Mustread*, 42 F.3d at1104 n.3 (ultimate question is what relative role defendant played). The *Kamoga* court went on to note:

> It is designed precisely to prevent masterminds of criminal schemes from escaping responsibility for their role simply by delegating some authority to only one or two deputies. It is enough that the others be acting according to the organizer's design and in furtherance of his or her plan.

Id. at 621-22. Black was unquestionably the "mastermind" of this criminal scheme, and it would be a misapplication of the Guidelines to fail to hold Black accountable for his aggravating role.

H. Atkinson, Boultbee, and Kipnis Were Average Participants in the Scheme, and There Should Be No Mitigating-Role Adjustments

Under Guideline § 3B1.2, a defendant's offense level should be reduced by four levels if he was a "minimal participant" in criminal activity; by two levels if he was a "minor participant"; and by three levels for defendants falling in between "minimal" and "minor." This Guideline section applies only for "a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." App. Note 3(A); *United States v. McGee*, 408 F.3d 966, 987 (7th Cir. 2005) (to get mitigating-role reduction, defendant "must be substantially less culpable than the *average* participants in the conspiracy, not substantially less culpable than the *leaders* of the conspiracy") (emphasis added); *United States v. McClinton*, 135 F.3d 1178, 1190 (7th Cir. 1998) (even where a defendant is less culpable than others, he is not "substantially" less culpable where he is an "integral component" and "one of the essential participants that made [the] conspiracy work").

Determining whether to apply a mitigating-role adjustment is "heavily dependent upon the facts of the particular case." App. Note 3(C). According to this Circuit's case law, the mitigating-role adjustment should be granted "infrequently." *United States v. Corral*, 324 F.3d 866, 874 (7th Cir. 2003); *United States v. Crowley*, 285 F.3d 553, 559 (7th Cir. 2002).

As to minor and minimal participation, a minor participant is a defendant "who is less culpable than most other participants, but whose role could not be described as minimal." App. Note 5. The minimal-role adjustment, by comparison, "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." App. Note 4. The minimal-role adjustment applies in very limited situations: "Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of

others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently." *Id.*

In determining whether mitigating-role adjustments are appropriate in any given case, the "comparative roles of conspirators are an important, but not determinative, consideration...." *Crowley*, 285 F.3d at 559. "One person might be the 'driving force' behind a criminal scheme, but a defendant who plays an integral role by assisting with that scheme is not eligible for a minor role reduction." *Id.*; *see also United States v. McKee*, 389 F.3d 697, 700 (7th Cir. 2004) ("[W]here each person was an 'essential component' in the conspiracy, the fact that other members of the conspiracy were more involved does not entitle a defendant to a reduction in the offense level."). Courts determine how integral a defendant's role was by evaluating the importance of the defendant's conduct to the scheme's success. *United States v. Cea*, 963 F.2d 1027, 1032 (7th Cir. 1992) (affirming denial of minor-role reduction where defendant took various steps to help deal go forward, even though defendant was not the major player and had less to gain than others).

For example, in *United States v. Kerr*, 13 F.3d 203 (7th Cir. 1993), the Court considered a mitigating-role reduction for Donna Kerr. Kerr was convicted as part of a broader case involving 12 defendants who distributed cocaine for a five-year period. *Id.* at 204. Kerr was nowhere near the leader of the conspiracy. *Id.* In fact, her only involvement was that she twice traveled with one of the conspiracy's leaders to pick up cocaine, she twice wired money to a drug supplier, and she put the leader's home and telephone in her own name. *Id.* at 204, 206. Nevertheless, the Court rejected Kerr's argument that she should get a minor- or minimal-role reduction, because she was not "substantially less culpable" than the average participant in the conspiracy. *Id.* at 206. The Court explained that mitigating-role reductions are inappropriate even for those who are just

following the leader's orders, if they play an essential (even though lesser) role:

> If everyone has an equal role, no one's offense level can be diminished, but the fact that one plays a much lesser role than another does not mean that one is a minor participant. The boss's trusted secretary through the years is crucial to the enterprise, even where the boss decides everything and gives all the orders. If the enterprise is criminal the secretary is a lesser participant but not a minor one.

Id.

So too, here, Atkinson, Boultbee, and Kipnis may have had lesser roles than Black and Radler, but they did not have minor roles, in the sense that term is used in this Circuit's case law. Indeed, applying the above principles to defendants in this case, not one of the defendants is even close to eligible for a mitigating-role reduction.

As to the APC payments, for example, the participants in that fraud were Black, Radler, Boultbee, Atkinson, and Kipnis. Boultbee and Atkinson each received $137,500 as proceeds of the fraud. Each signed a phony document, labeled as a non-compete agreement between the executive and APC, upon receiving the money. Each knew that there was no legitimate basis for the non-compete agreement, and that the only reason for its existence was to funnel money into their pockets from International. Each concealed their receipt of the money from International directors, employees, and advisers. Boultbee and Atkinson's roles were similar with respect to the supplemental payments.

As to Kipnis, Kipnis actually drafted each one of the bogus APC non-compete agreements. He signed each agreement on behalf of APC, as an officer of the company. Kipnis mailed his co-defendants their ill-gotten gains. Kipnis concealed the fact of the payments from the Audit Committee, even though he was the person who was supposed to tell the Audit Committee members about related-party transactions.

If not Boultbee, Atkinson, and Kipnis, then who is an average participant in the APC scheme? The answer is that all three were, in fact, average participants. All three played essential roles in the success of the APC scheme, even if they were not the scheme's "driving force" or leader.

The probation office's only bases for recommending minor-role reductions for Atkinson and Boultbee are that they reported to Black and Radler; their degree of participation in the offense was less than that of Black and Radler; and their share of the fruits of the crime was smaller. Atkinson PSR at 16; Boultbee PSR at 16. As to Kipnis, the probation office suggested a three-level reduction because defendant's primary function was drafting and mailing documents at the direction of other participants. Kipnis PSR at 14. Probation further stated, with respect to Kipnis, that Kipnis implemented Radler's decisions but did not have a role in determining the course of the overall scheme or the flow of the money, and that Kipnis did not profit from his actions. *Id.*

Respectfully, the probation office's analysis entirely disregards the legal standards governing the mitigating-role reduction. The question is not whether Atkinson, Boultbee, and Kipnis were lower in the food chain than Radler and Black, who masterminded the scheme. *United States v. Tholl*, 895 F.2d 1178, 1186 (7th Cir. 1990) (rejecting argument that defendant should get minor role because he did not think up the scheme or play the most active role). It does not matter that Kipnis was implementing other people's decisions, rather than running the show. *Kerr*, 13 F.3d at 206. Nor does it matter that Atkinson and Boultbee received less money than Black and Radler, or that Kipnis received no money. *United States v. Corral*, 324 F.3d 866, 874 (7th Cir. 2003) (rejecting argument that defendant should get minor role because he did not profit from transaction, because "whether a participant stands to profit from the crime does not reflect upon that person's role within the offense"); *United States v. Navarro*, 90 F.3d 1245, 1263 (7th Cir. 1996) (affirming denial of

mitigating-role reduction because, even though defendant did not profit from scheme, he had an integral role in assisting the enterprise).

Instead, the analysis should focus on what each defendant's role was with respect to the scheme, and whether they played an essential role, integral to the scheme's success. Here, each defendant did play an essential role. Even though the government agrees that Atkinson, Boultbee, and Kipnis are less culpable than Black and Radler, the facts of this case make clear that Atkinson, Boultbee, and Kipnis are average participants in the scheme, and cannot qualify for mitigating-role reductions.

Finally, the probation office recommended three levels off for Kipnis, placing him a step between minor and minimal role. There is no analysis at all of why Kipnis could be considered close to a minimal participant. Indeed, he cannot be. A minimal participant is someone on the outskirts, who doesn't really know or understand what the criminal scheme is about, but happens to participate in some small element of it. Kipnis was the corporation's general counsel, and he had already facilitated numerous criminal transactions funneling so-called "non-compete" money to his co-defendants and Inc. He is the person who signed for all of the executives on the CNHI(2) transaction, and directed $9.5 million out of the deal to the top executives. Had Kipnis taken a different course on this transaction, as with all the other U.S. community deals, the shareholders' money would not have been stolen. As to APC, as another example, Kipnis fully knew and understood what the top executives were doing with these agreements, even admitting to the Special Committee that he viewed the agreements as "silly." A general counsel who is ordered to draft phony agreements so that the executives he works for can take money from the shareholders tax-free is supposed to stand up and say no, or tell the Audit Committee, or tell the Board of Directors, or

tell law enforcement. He is not supposed to go ahead and draft the contracts, and sign on the company's behalf, and hide the deal from the company's Audit Committee and directors. But that is what Kipnis did, over and over, and he was therefore critical to the scheme's success. He did not have anything close to a minor, let alone minimal, role.

CONCLUSION

The government requests that the Court adopt the sentencing guidelines calculations set forth in the government's version and in these objections.

Respectfully submitted,

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Dated: November 27, 2007

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

Government's Consolidated Objections to Presentence Investigation Reports

was served on November 27, 2007, in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the District Court's system as to ECF filers.

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