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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05 CR 727-5**
	)	
CONRAD M. BLACK, et al.	)	**Hon. Amy J. St. Eve**
	)	
Defendants.	)	

Mark Kipnis's Sentencing Memorandum

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On November 14, 2007, the Probation Office dispatched its presentence report ("PSR") for defendant Mark Kipnis. The next day, the Court directed that the defendants file their sentencing memoranda on or before November 27, 2007. (Doc. No. 946.)

For the reasons discussed below, we respectfully suggest that the PSR's Sentencing Guideline range for Mark is too high and that the Court would best serve the purposes set forth in 18 U.S.C. § 3553(a)(2) by imposing a non-incarceratory sentence.

I. The Court Should Not Send Mark to Prison.

Under Section 3553(a), Congress directed the federal courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in paragraph (2). Those purposes are

> the need for the sentence imposed —
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

In determining the particular sentence to impose, the Court should "consider" both these purposes and six other factors (enumerated in paragraphs 1, 3, 4, 5, 6, and 7). For example, paragraph 1 directs the Court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Neither the nature and circumstances of the offense, nor Mark's history and characteristics, nor any of the purposes set forth in paragraph 2 militate toward an incarceratory sentence for Mark. Indeed, the overriding directive that the

Court's sentence be "not greater than necessary" to serve the statute's deterrent and retributive purposes compels the conclusion that Mark should not be sent to prison.

A. The Offense's Nature and Circumstances and Mark's History and Characteristics.

Paragraph 1's requirement that the Court consider the nature and circumstances of the offense alongside the defendant's history and characteristics presents a paradox in many fraud cases: How does the Court reconcile a defendant's clean record with patent criminal conduct replete with lies and deception and characterized by greed? The Court must struggle to answer why a seemingly "good" person engaged in obviously criminal, "evil" conduct.

But Mark's case is different. He did not suddenly decide to steal money or to help others do so. His story is not one of a good person who committed inexplicable deceptive acts for personal gain. Rather than black and white, Mark's picture is best seen as gray: To be sure, he made mistakes. But he was not a person who took money that did not belong to him. He worked long and hard to bring value to Hollinger International's shareholders. In their testimony, government witnesses Paul Healy, David Radler and Angela Way drew the outlines of the picture of Mark's value to Hollinger. The letters provided to the Court by his co-workers confirm and fill in the picture's details.

Mark worked in the eye of a hurricane. He wore many hats to accommodate the cost-saving imperatives at the Sun-Times. He worked tirelessly to help his co-workers, even though he was a newspaper industry novice. As the letters describe, Mark did so with kindness, grace, and a giving nature. Ironically, corporate governance was the job for which he was least qualified, and it was his failure there that led to his conviction.

The lines between Hollinger and the people who ran it — the people who built it — were not clearly drawn. To many, including Mark, Hollinger was in large part Conrad

Black and David Radler. Mark watched the Audit Committee approve more than $200 million in management fees during his time at Hollinger, fees approved with nothing but Mr. Radler's request as justification. The Audit Committee, comprised of independent directors of enormous stature and experience, never said "no" to Mr. Black or Mr. Radler.

Given this environment and Mark's background, it was not obvious to him that the APC payments were unlawful.[1] Rather, from Mark's perspective, the APC payments were a logical extension of the conduct that the Audit Committee had approved and which the company had reported to the world in public filings. Indeed, that perspective (informed by Mr. Radler) was that Hollinger would lose nothing from the APC payments, for the funds were Ravelston's, not Hollinger's.

Mr. Radler did not ask Mark to draft the APC non-competition agreements because he thought that Mark could be trusted to aid criminal conduct and then keep quiet about it. On the contrary, Mr. Radler "consciously avoided" taking Mark into his confidence about any scheme. He instead asked Mark to draft the APC agreements because Mark was Hollinger International's in-house counsel, he had previously drafted non-compete agreements in connection with various newspaper sales transactions and drafting the APC agreements was a logical extension of Mark's position. This differentiates Mark's offense from almost every other fraud and certainly from the heartland of frauds. *See United States v. Redemann*, 295 F. Supp. 2d 887, 899 (E.D. Wis. 2003) (departing in part because the defendant's conduct logically extended from other legitimate work); *United States v. Forchette*, 220 F. Supp. 2d 914, 927 (E.D. Wis. 2002) (departing in part because the defendant was unaware of the full scope of the scheme and therefore operated with "diminished intent").

[1] We are not saying that Mark agreed that the APC payments, or the bulk of the management fees, were a good idea. Indeed, he believed that the tax avoidance motivating the characterization of the APC payments as non-compete payments was "silly."

Mark never consciously decided to join any scheme to defraud the company. The conduct in which he was asked to engage, and in which he did engage, came with none of the typical warning signs that accompany criminal conduct. While he should have done better, his conduct was far from willful. And this distinguishes Mark's conduct from that found in almost all other frauds. The nature and circumstances of Mark's offense argue against prison.

So do Mark's history and characteristics. His conduct before this case, both professional and personal, was extraordinary. Once again, the government's own witnesses began to sketch the picture of his character. They described him as an open, honest, trustworthy person. The letters the Court has received from those who know him well fill in the details, describing a strong family man, an honest and trustworthy employee and colleague, a person imbued with integrity.

His character is epitomized by giving not by taking, by honesty and integrity not by deceit, by caring not by callousness, by adherence to and respect for the law not by criminal conduct. He is the rock upon which the Kipnis family has been built and against which the family has rested for support during tough times. He has helped neighbor, friend, colleague, and stranger, not once, but repeatedly, never asking what he might receive in return. And he has done all of this with a self-deprecating sense of humor, deflecting credit to others, while accepting responsibility for his own mistakes. He is truly an extraordinary person.

Although Mark's performance at Hollinger could have and should have been better, it was not contrary to his character. It was not deceitful. It was not selfish. It was not greedy. Indeed, he cooperated with every entity that investigated these matters. In particular, he met with the Special Committee, repeatedly, with and without counsel. He was, as Mr.

Rosenberg testified, the Committee's tour guide through the morass of documents and transactions. He did not provide a single intentionally false or misleading statement.

Mark also spoke with the United States Attorney's Office. Once again, he was honest and forthcoming. His open posture has been the same from the beginning of his career through today.

When sentencing a defendant, the Court not only imposes punishment for an offense, it also judges the defendant. Given Mark's history and character, it is impossible to imagine what interest could be served by punishing Mark further.

B. **The Offense's Seriousness and Just Punishment.**

As a result of the APC payments, four executives received $5.5 million that would have otherwise stayed with Hollinger International. That is a serious offense. But the question before the Court is not an abstract one of how to measure the seriousness of a hypothetical offense, but rather how to measure the seriousness of Mark's offense.

Mark drafted the APC non-competition agreements and mailed the agreements and payments to the executives. That is the crime for which he must be sentenced.

1. **Mark Did Not Profit.**

People commit fraud for money. Mark received nothing from the APC payments or for any other conduct in this case. This is a critical distinction from a typical fraud. Mark's actions were not motivated by greed or personal gain. Certainly, this lack of avarice is critical in determining the "just punishment for the offense." *See Forchette*, 220 F. Supp. 2d at 926-27 (departure warranted in part because the defendant's limited gain compared with loss amount made the case unusual).[2] Mark's lack of personal gain certainly takes his case outside the

[2] As the court in *Forchette* recognized, neither *United States v. Seacott*, 15 F.3d 1380, 1387 (7th Cir. 1994) nor *United States v. Corry*, 206 F.3d 748 (7th Cir. 2000), precludes a sentence reduction based

heartland of fraud cases. His motive, or more aptly, his lack of motive, is an important factor in sentencing. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (defendant's motive for committing the offense is one important factor in determining culpability).

2. **Mark Did Not Initiate the Plan.**

Mark acted pursuant to Mr. Radler's instructions. Mark did not devise the plan for the APC payments. He was not involved in discussions that hatched this plan. His only role was to provide valid and binding non-competition agreements that provided APC with some benefit. This differentiates Mark's offense from that of others involved in the fraud and diminishes the seriousness of his offense. *United States v. Costello,* 16 F. Supp. 2d 36, 38 (D. Mass. 1998) (downward departure appropriate in part because defendants "did not come up with the scheme at the outset").

3. **Mark Did Not Determine the Payment Amounts.**

Nor did Mark have any role in determining the amount of the payments to the executives. Mr. Radler selected the amount in consultation with accounting personnel, discussions Mark was neither involved in nor privy to. There can be little question that the amount involved in this offense is an important factor in its seriousness. But that amount had nothing to do with Mark. Once again, the seriousness of Mark's offense is overstated by looking

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upon a lack of personal gain. *Forchette*, 220 F. Supp. 2d at 927. *Seacott* held that lack of personal profit motive in a fraud case was a legally insufficient reason to depart downward because the Sentencing Commission took that factor into account in setting the guidelines. *Seacott*, 15 F.3d at 1387. But *Seacott* preceded the Supreme Court's decision in *Koon*, in which the Court held that "for courts to conclude a factor must not be considered under any circumstances would be to transgress the policy making authority vested in the Commission." *Forchette*, 220 F. Supp. 2d at 926-27 (quoting *United States v. Koon*, 518 U.S. 81, 106-107 (1996)). Given that failure to profit is not a ground that the Commission has expressly *forbidden* (*see* U.S.S.G. Ch. 1, Pt. A 4(b)), courts may consider it. *See Corry*, 206 F.3d at 752 (Flaum, J., concurring). While the *Corry* majority opinion discussed both *Seacott* and *Koon*, the court ultimately concluded that the defendant did, in fact, personally gain. 206 F.3d at 751.

solely at the amount involved. *Forchette*, 220 F. Supp. 2d at 925-926 (downward departure appropriate in part where scheme's mastermind, not the defendant, decided the loss amount).[3]

C. **Further Punishment is Unnecessary for General Deterrence.**

Mark spent virtually his entire adult life working as an attorney. This was how he earned his living and provided for his family. Mark's indictment and conviction have ended his legal career. He, his wife Kay, and one of his sons operate a small sign shop in Elgin, Illinois. Mark would never say, nor does he believe, that this work is "beneath" him. He has lived his life respecting hard work and those who do it in any capacity. But for lawyers looking in from the outside at Mark's inability to continue his legal career in any capacity, the risk to their future and to their family's livelihood should they engage in conduct similar to Mark's is a powerful deterrent.

Nor does this Court need to send Mark to prison to catch people's attention. This case, and Mark's role in it, received intense local, national, and international media attention. Indeed, Business Week cited Mark's role as a warning to lawyers everywhere.

D. **Further Punishment is Unnecessary for Specific Deterrence.**

Mark has already been punished greatly for his conduct. He has lost his livelihood and his reputation. He has depleted his savings, has no ability to replenish them, and they will soon be entirely gone. (Kay is 63 and faces the prospect of having to work indefinitely.) A man who has lived his life in quiet service to others is now associated in the minds of millions with a story of corporate greed. He is, in the eyes of the law and the public, a criminal, something virtually unthinkable.

[3] We are not saying that the loss amount is irrelevant. Mark knew the amount when he mailed the checks. But he did not choose the amount and his conduct would have been the same regardless of the amount.

There is no need for this Court to impose an incarceratory sentence to deter Mark from engaging in unlawful conduct in the future. The indictment and conviction have punished him severely. Prison will serve no purpose other than to be unduly punitive. It would be greater than necessary and would diminish rather than enhance respect for the law and the criminal justice system. Mercy, in Mark's case, will serve the purposes that Congress has set forth.

II. The PSR Guideline Calculation Overstates Mark's Offense.

The Court is required to consider the applicable guideline range for Mark's offense. But the range is only one of a number of factors that the Court must consider. *United States v. Ranum*, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005). For the reasons discussed below, the PSR's range is too high.

A. From Mark's Perspective, the Loss Amount Was Zero.

When he drafted the APC non-competition agreements, Mark never intended that Hollinger International would lose a single cent. Rather, as fully set forth in Mark's Fed. R. Crim. P. 29 briefing, the plan devised and directed by David Radler involved the transfer of $5.5 million in already-approved management fees held by International but owed to Ravelston. It was Ravelston's funds, not International's, that were to serve as the source of the APC non-competition payments. From Mark's perspective (which was informed by Mr. Radler), International stood to lose nothing from the APC payments.

In its ruling on the post-verdict motions, this Court held that Mr. Radler's statements to Mark that the $5.5 million constituted previously-approved management fees were in error. But there is no evidence that Mark knew that. He did not have access to Ravelston's records. He did not know that the $5.5 million was paid twice. In light of this unambiguous record, a loss amount of zero, not $5.5 million, accurately reflects Mark's understanding of payments and, in turn, more accurately reflects his offense.

B. **Mark's Role in the Offense Was Minimal.**

The sentencing guidelines provide for a four-level minimal participant reduction, a reduction intended for those defendants within a group who are plainly among the least culpable. *See* U.S.S.G. § 3B1.2 cmt. N. 4. Mark is such a defendant. His lack of knowledge about and understanding of the fraud's scope and structure is indicative of his role as a minimal participant.[4] *See id.*; *see also United States v. Moeller*, 80 F.3d 1053, 1063 (5th Cir. 1996) (minimal participant reduction warranted when defendant was selected to participate in the scheme because of his lack of overall knowledge about the scheme); *United States v. Olson*, 1995 WL 743845, Nos. 95-8006 and 95-8019, at *4-5 (10th Cir. 1995) (minimal participant reduction warranted when defendant lacked knowledge, in part because co-defendants kept details of the scheme from him). Indeed, Mr. Radler testified that he consciously avoided discussing aspects of his plan with Mark. The only evidence of Mark's knowledge about the APC payments is that he drafted the non-competition agreements, circulated them for the individuals' signatures, and mailed the checks. There was no evidence that Mark had any real understanding of the fraud.

Even were one to assume that Mark knew that the APC payments came from Hollinger funds, he should nonetheless receive a minimal participant reduction. *See United States v. Dempsey*, 768 F. Supp. 1277, 1284 (N.D. Ill. 1991) (overruled on other grounds) (establishing that defendant's lack of knowledge about or understanding of the scope and structure of the conspiracy and of the activities of his codefendants is *a factor*, but not the *only* factor, a court should consider in determining the propriety of granting the § 3B1.2 reduction). Indeed, courts have found that a defendant's lack of economic gain from a conspiracy is a critical

[4] We discussed extensively Mark's lack of knowledge of the APC payments' scope and structure in our 8/27/07 Motion for an Acquittal (Doc. No. 881) and 10/5/07 Reply in Support of Motion for Acquittal (Doc. No. 918).

factor that will overcome knowledge of the scheme. *See, e.g., United States v. Giraldi,* 86 F.3d 1368, 1378-79 (5th Cir. 1996) (defendant, who understood scope and structure of the enterprise, was granted minimal role reduction in money laundering and bank fraud conspiracy because, unlike the other defendants, he received no personal economic gain); *United States v. Petti,* 973 F.2d 1441, 1447 (9th Cir. 1992), *cert. denied,* 507 U.S. 1035, 1447 (1993) (although defendant was fully aware of scheme, a minimal participant reduction was warranted because he was not involved in the actual "smurfing" of the money into the banks, was not privy to all the mechanics of the laundering operation, and had a subordinate role to his co-conspirator). It is undisputed that Mark received no money in connection with the APC payments or other payments in this case. Accordingly, given Mark's role, a four-level minimal participant reduction is appropriate.

C. **The Abuse of Trust Enhancement Does Not Apply to Mark.**

An abuse of trust enhancement is inappropriate when the elements of the offense, by necessity, include an abuse of trust. *See* U.S.S.G § 3B1.3; *United States v. Dion,* 32 F.3d 1147, 1149-50 (7th Cir. 1994). The elements of Mark's offense, honest services fraud, necessarily includes an abuse of a position of trust: a breach of fiduciary duty. *See United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). The enhancement simply should not apply to Mark's case.

D. **Mark's Conduct is Outside the Heartland the Guidelines Address.**

We respectfully suggest that the PSR guideline range grossly overstates the seriousness of Mark's offenses.[5] Many factors discussed above would have justified downward departures pre-*Booker*. Post-*Booker,* the Seventh Circuit has stated "departures" are an obsolete concept. *United States v. Miranda,* --- F.3d ---, 2007 WL 3120098, at *6 (7th Cir. Oct 26, 2007).

[5] The PSR itself notes that one potential ground for imposing a sentence less than the guidelines range is that the loss may overstate the severity of Mark's offense. PSR at 24, lns. 726-27.

Rather than "departing," district courts may now apply departure guidelines by analogy when analyzing the Section 3553(a) factors. *Id.*

Plainly the primary driver of Mark's guidelines is the $5.5 million loss amount. For the reasons discussed above, there can be little question that, in Mark's case, this loss amount overstates the seriousness of his offense.[6] That Mark received not a cent of the money and that he played no role in initiating the scheme or selecting the payment amounts are facts that individually show that the loss amount overstates the offense's seriousness. In combination, these facts show that the loss amount has little-to-no utility in fashioning a sentence for Mark.

The court's logic in *United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005), is both compelling and directly applicable:

> One of the primary limitations of the guidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level. For example, the guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child. It is true that, as the government argued in the present case, from the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference. *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) ("Were less emphasis placed on the overly-rigid loss table, the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society would perhaps assume greater significance in assessing the seriousness of different frauds."). In the present case, defendant did not act for personal gain. He made loans outside his authority and was reckless with his employer's money. But that is not the same as stealing it. Thus, due to the nature of the case, I found the guideline range, which depended so heavily on the loss amount, greater than necessary.

[6] Pre-*Booker*, courts could (and did) depart from the guidelines range when the loss amount under § 2F1.1(b)(1) significantly overstated the seriousness of the defendant's offense. *See* U.S.S.G. § 2F1.1 cmt. N. 8(b) and 11 (2000). Indeed, this was an "encouraged" basis for departure under *Koon. United States v. Corry*, 206 F.3d 748, 751 (7th Cir. 2000).

As discussed above, the statutory sentencing factors have been satisfied by the punishment Mark has already endured. In circumstances similar to Mark's, courts have in the past departed downward from the guideline range.

> [T]he destruction of defendant's business has already achieved to a significant extent some although not all of the objectives otherwise required to be sought through the sentencing process. Elimination of the defendant's ability to engage in similar or related activities — or indeed any major business activity — for some time, and the substantial loss of assets and income resulting from this have decreased for the foreseeable future his ability to commit further crimes of the type he was tempted to undertake, and constitutes a source of both individual and general deterrence.

United States v. Gaind, 829 F. Supp. 669, 671 (S.D.N.Y. 1993), *aff'd* 31 F.3d 73 (2d Cir. 1994) (departing downward); *see also Redemann*, 295 F. Supp. 2d at 897 (departing in part "because the defendant suffered punishment, loss and hardship beyond that usually seen or which can usually be expected in similar cases," including business consequences, civil prosecution, and substantial amounts of adverse publicity); *United States v. Whitmore*, 2002 WL 460391, at *11 (9th Cir. 2002) (downward departure appropriate not only because of the potential employment consequences the defendant faced, but also because of the employment consequences that resulted when the defendant was deprived of his livelihood during his prosecution).

Dated: November 27, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Erika L. Csicsila, an attorney, hereby certify that on this, the 27th day of November, 2007, I filed the foregoing document using the Court's ECF system. Notice of Electronic Case Filing has been sent to the following registered parties, which constitutes service of same:

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