UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v. -	:	S3 05 Cr. 1192 (NRB)
PHILLIP R. BENNETT,	:	
Defendant.	:	

GOVERNMENT'S SENTENCING MEMORANDUM

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GOVERNMENT'S SENTENCING MEMORANDUM

The Government respectfully submits this memorandum for the Court's consideration in connection with the sentencing of defendant Phillip R. Bennett, currently scheduled for June 19, 2008, and in response to the defendant's sentencing memorandum dated June 1, 2008 (cited herein as "Br.").

Bennett pleaded guilty to each of the 20 counts in the indictment against him, S3 05 Cr. 1192 (NRB), on February 19, 2008, only one month before his scheduled trial date and nearly two-and-one-half years after his arrest for his role in the massive fraud he conceived and executed in his capacity as the leading executive and partial owner of Refco. As set forth more fully below, and as was set forth in painstaking detail during the recent trial of Bennett's partner, Tone Grant, the defendant stood on top of a conspiracy of historic proportions, defrauding his victims of billions of dollars based on a series of lies that covered more than eight years of fraudulent activity, and which made him a billionaire prior to the discovery of the fraud.

RELEVANT FACTS

I. Background

As set forth in the PSR and as the Court learned during Grant's trial, the Refco fraud

started in the mid-1990's after Refco suffered losses when a series of customers to whom Refco had extended credit were unable to repay their loans. Starting with horrific losses born from a customer called Trade & Marine, then extending to a series of customers who lost hundreds of millions of dollars in the collapse of the Asian markets, and ultimately culminating in the market crash of October 1997, Refco suffered well over three hundred million dollars in customer losses over a period of a few years. Bennett, then partial owner and Chief Financial Officer of Refco, fully understood that the disclosure of these losses to Refco's creditors, customers and counterparties would spell the end of Refco and render his 24.5% ownership interest worthless. Rather than truthfully disclose these losses, Bennett schemed with his partner, Tone Grant, to hide them and lie about them, both to enable Refco to survive and to further their goal of selling Refco for a profit. (*See* GX 21, attached hereto as Exhibit A at 2 (memo from Bennett to Grant and Thomas Dittmer discussing their plans to sell Refco and to take the company public)).

Bennett's fraud started with concealing the losses by moving them off the books of Refco and onto the books of the holding company of which he was a partial owner (and then, later, full owner), Refco Group Holdings, Inc. ("RGHI"). As the Indictment and PSR set forth, and as was developed at trial, after Bennett had shifted the losses to RGHI, Bennett, in order to keep the fraud going, then needed to hide the resulting receivable balances from Refco's auditors in order to make sure that no one would question the sources of these receivables and thereby detect Bennett's fraud.[1] Bennett thus conceived of round trip loan transactions over each fiscal year-end (and later quarter-end) reporting period so that the auditors would not see the ballooning

[1] Bennett, as the architect of the Refco fraud, was responsible for conceiving and executing each of the fraudulent acts that formed the core of this fraud, including the shifting of the losses to RGHI, the so-called round trip loan transactions, and the various methods by which Bennett padded Refco's revenues and shifted expenses off of Refco's books.

RGHI receivable at each year and quarter-end. As a result, banks, creditors, investors, customers, counterparties and potential investors were deceived about the extent of the related party debt that RGHI owed to Refco, as well as the losses that were the origins of that debt.

Bennett's goals were not limited, however, to merely hiding the losses. Indeed – and contrary to the repeated assertions in his sentencing memorandum that Bennett was merely trying to "save" Refco by concealing losses – Bennett's goal was also to increase, fraudulently, the value of Refco so that he could sell his interest and become fantastically rich. To achieve that goal, Refco's business either had to be improved on its own merits, or through rampant fraud. As demonstrated at trial, by 1998, Bennett had committed himself and his coconspirators to the latter, commencing a scheme to cook Refco's books by generating false revenues and income and shifting expenses out of Refco and into RGHI. Among other things, Bennett inflated revenue and income by booking interest on the receivable balance owed as a result of Refco's "loans" to RGHI, and then manipulating that interest rate depending on how much fraudulent income he needed to generate in order to achieve certain revenue numbers. None of the interest charged on the receivable was appropriately charged as interest income, particularly given the lack of present intent and ability to repay the loans, their fraudulent nature, and of course that Bennett was hiding the majority of the balances of the loans through fraud.

As demonstrated in GX 219 (attached hereto as Exhibit B) and in the testimony of former Refco Controller Steven Rossi, this program was so successful that by February 1999, through Bennett's fraudulent accounting, Refco's books and records showed a profit for the preceding year of approximately $42 million, when in fact, but for Bennett's crooked accounting, Refco

would have shown a loss of approximately $25 million.[2]

As the testimony of Santo Maggio, Robert Trosten and the forensic accountant, Lisa Collura, demonstrated, Bennett's practice of shifting losses and inflating revenues grew bolder and bolder as the years went by. The reason for this was simple. As Santo Maggio explained at trial, the primary way that Wall Street values a company is based on multiples of that company's earnings. (Trial transcript of Tone Grant ("Tr.") at 1824). So, to increase the value of Bennett's stake in Refco, and to meet the ever rising budget targets that Bennett set, he had to ever expand his revenue padding program. Going beyond manipulation of the interest that was being charged on the RGHI receivable, Bennett turned to other methods to boost income, including making up billions of dollars of fictitious trades between RGHI and Refco in various financial instruments (such as foreign currencies and treasury bills) in which Refco always profited at RGHI's expense. These totally sham transactions added tens of millions of dollars to Refco's bottom line, and by increasing the RGHI receivable, also increased the sham interest income that Refco was declaring as legitimate profits. As demonstrated at trial, these and similar fraudulent transactions continued until the detection of the fraud in October 2005.

In order to manipulate Refco's earnings even further, Bennett also directed the shifting of expenses and trading losses out of Refco and into RGHI, thereby increasing the valuation a buyer (or the investing public) would place on Refco. By way of limited example, Bennett fraudulently shifted computer expenses, litigation settlements, professional expenses, trading losses, and even the compensation expenses for the entire Refco management (via Refco's so-called Profits Participation Plan) off of Refco's books to buoy Refco's earnings.

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[2] This does not even include the losses that Refco should have recognized as a result of the losses that were hidden in RGHI.

Bennett's efforts were, of course, ultimately successful. In late 2003, Thomas H. Lee ("Lee") expressed interest in purchasing a controlling interest in Refco through a leveraged buyout (the "LBO"). Leading up to the sale, Bennett increased his fraudulent efforts, increasing the frequency of the round trip loans and participating in numerous presentations and meetings with Lee and other potential participants in the LBO (including the potential bond holders and banks who were to provide $1.4 billion in financing for the LBO). At each of these meetings, Bennett easily and skillfully lied, making presentation after presentation, each of which was riddled with omissions, exaggerations and outright lies, from lies about Refco's historical losses, to representations that Refco was not engaged in proprietary trading, to promoting Refco's supposed profitability which, as Bennett well knew, was all based on his fraudulent manipulation of Refco's numbers. As was demonstrated at trial, those who listened to Bennett's lies were convinced that Bennett was not only truthful, but one of the most extraordinary businessmen they had ever met. For example, Scott Schoen testified that he believed Bennett was the most impressive businessman he had ever dealt with and that Bennett possessed great honesty and integrity. (Tr. at 1507-08). William Pappas, who represented Prudential in connection with an investment by that company in Refco, echoed that he, too, "was impressed" with Bennett. (Tr. at 660-661). Indeed, perhaps Daniel Rouse, the JPMorgan Chase executive who met Bennett in connection with the revolving credit facility the company arranged for Refco from 1998 through 2003, best captured Bennett's special talent for luring people into his confidence and into trusting his representations: "Phil [Bennett] had a very, very gifted way of presenting things and so he – he would answer the question that he chose to answer, not necessarily the question being posed. But at the end of a process, he always made you feel very good about how he had

ultimately answered the question that you posed." (Tr. at 767). Bennett was a charlatan nonpareil, and he deployed his considerable charm in the perpetuation of a massive, eight-year-long fraud.

Based on the detailed fraudulent presentations Bennett gave, and by evading the diligence efforts of Lee and the underwriters for the LBO, in August 2004 Bennett was able to raise more than $1.9 billion based on his lies: $510 million from Lee; $600 million through the sale of notes; and $800 million in long term bank financing.[3] As was demonstrated by testimony at trial, participants in these transactions would not have invested in the LBO had Bennett told them the true state of Refco's financial condition.

Through the LBO, Bennett was able to use a portion of the proceeds to pay down approximately $300 million of the RGHI debt in money stolen from the LBO participants in the fraud, and through some additional fraudulent smoke and mirrors, he was able to reduce another $390 million from the balance through a book entry.[4] The rest of the cash was used for a variety

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[3] Bennett's skill at deception and manipulation was probably best demonstrated after Lee received a tip that Bennett had been sloughing off losses through related party transactions with an overseas subsidiary. After receiving the tip, Scott Schoen and Thomas H. Lee himself, extremely sophisticated businessmen who were putting up more than half a billion dollars in the proposed transaction, met with Bennett and were convinced that Bennett was telling the truth and that the tip was not credible. (Tr. at 1376, 1380-1382).

[4] As the Court is aware, part of Bennett's fraud was deceiving Lee, other investors and Refco's auditors into believing that Refco had $500 million in retained profits on its books. Although we will attempt to describe these extremely complicated transactions below, in substance, Bennett created a series of accounting entries that had the effect of reducing the hole by $390 million without any actual money going to Refco. As noted, Bennett lied to Lee and claimed that Refco had $500 million in excess cash profits (e.g., retained earnings) sitting on the books at Refco. Of course, this was a lie, as the "profits" at Refco were fictional. Accordingly, when Lee required Bennett to demonstrate that these profits (and the resulting cash) were real and not necessary to run the business and required Bennett to put the $500 million in a segregated account, Bennett could not legitimately due so. So, he took $110 million in customer money and commingled it with $390 million in cash which Bennett borrowed from BAWAG,

of purposes, including payouts to Bennett's coconspirators and a $25 million payment to himself. A large amount of the fraud proceeds were also used to pay off the earlier victims of the fraud, the banks and investors who had lent or invested money in Refco based on the lies told to them by Bennett and his coconspirators. (These included the earlier note purchasers, such as Prudential, and the banks who had advanced money to Refco through a revolving line of credit sponsored by JPMorgan Chase). Of course, contrary to the suggestion of Bennett in his submission, there was nothing admirable about Bennett making these payments (all of which were made with fraud proceeds obtained by new victims). In essence, to keep the fraud afloat, Bennett used later victims' money (the LBO victims) to pay off earlier victims (the earlier banks and note purchasers). And of course, had he not made these payments, the entire scheme would have come crashing down.

Bennett's next step was to move quickly to an Initial Public Offering ("IPO"), where he could raise additional money both through the IPO itself and through subsequent sales of his own shares of stock, and he could move toward retiring the RGHI debt, which became a priority once Lee acquired its majority interest and was an essential component in the ultimate success of

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deposited it into a BAWAG account, and lied to Lee by stating that it was the retained earnings of Refco. When the Lee deal was closed, all of the money was paid to BAWAG. This transaction then became a screen, behind which Bennett was able to write off $390 million of the RGHI debt by reducing shareholder's equity by the same amount. Bennett was able to do this because an accountant looking in from the outside would expect to see a reduction in shareholder's equity if Refco really had distributed the cash to RGHI as Bennett pretended to do. In fact, since the $390 million in cash did not leave Refco (because it did not exist), Bennett was able to use the accounting entry to reduce the amount RGHI owed to Refco without actually contributing a penny, but by using the sham "profits" that Refco had supposedly earned and supposedly retained.

the fraud.[5] As was demonstrated at trial, Bennett continued the fraud at full tilt, engaging in large-scale revenue padding transactions involving the interest rate charged on the RGHI receivable and sham trading transactions, as well as continued expense shifting. These efforts were also successful: Bennett was able to evade the diligence efforts of the underwriters and others and was ultimately able to convince investors to pay $583 million for shares of stock in Refco, again all based on a series of lies. Bennett was able to pay off another $100 million of the RGHI receivable through the victim money he received through the IPO, but, more importantly for Bennett's own selfish interests, once Refco's stock was public, he could put an easy valuation on the shares of stock that he retained, and he could sell the shares once the "lock-up" restrictions were lifted. As noted above, shortly before the disclosure of the fraud at Refco, Bennett's shares of stock alone were worth close to $1.3 billion, making him one of the richest people in the world. *See Forbes.com* at http://www.forbes.com/2005/03/09/bill05land.html. (estimating that as of February 2005, there were 691 billionaires in the world).[6]

As would be expected in a fraud of this scope, Bennett achieved this unparalleled wealth by victimizing individuals from all backgrounds and walks of life. As the Court knows from Grant's trial, the list of victims included the sophisticated private equity fund Lee, charitable

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[5] As discussed below, Bennett's using money from the LBO and IPO to retire a portion of the receivable was a necessary component of the fraud. For Bennett to avoid detection and ultimately realize his billion dollar profit, Refco had to take on Lee and eventually become public. Bennett understood that it would become increasingly difficult to hide the receivable once Refco had to contend with type of oversight and regulation that Lee and going public would bring, fears that were ultimately well-founded.

[6] To place this in context, Bernard Ebbers's stake in WorldCom was reported as approximately $1 billion, while Kenneth Lay ($400 million) and Jeffrey Skilling ($100 million) were similarly reported as not coming close to reaping the fraudulent rewards that Bennett received in connection with the fraud at Refco. (Copies of the news reports are attached as Exhibit C).

organizations like the Gates Foundation, individual investors like Russell Schaub, who lost all of his investment in the IPO, large pension funds like TIAA Cref, which lost millions of dollars of its pension investments, banks such as HSBC, employees like Bennett's secretary, who lost her job at Refco as well as the $5000 she invested in Refco, and the countless Refco customers who saw their accounts plundered by Bennett in his efforts to keep the company afloat.

As the fraud became exposed, Bennett continued to scheme and plot to avoid facing the consequences of his actions. First, he continued his lies. Far from coming forward and acknowledging the fraud, Bennett tried to convince the board to not disclose the fraud because it was "simply a matter of disclosure and was not otherwise a financial problem with the integrity of the company." (Tr. at 1456). Bennett also neglected to inform the board that he had transferred millions of dollars of earlier Refco losses to RGHI rather than allow those losses to appear on Refco's financials. (Tr. at 1462-63). In order to try to avoid a public announcement of Lee's disclosure of the fraud, and then later, to hopefully minimize the drop in the stock price from the disclosure of the fraud and thereby preserve his fortune, and as part of his ongoing goal to avoid criminal responsibility for his actions, Bennett pledged his still locked up and soon-to-be-worthless stock in Refco to his coconspirator BAWAG in return for a loan to pay off the remaining balance of the receivable. (Tr. at 1460-61; 1920-21). While in his submission Bennett seems to take credit for this act as some indicia of good faith, it was merely a desperate act to try to avoid the consequences of a disclosure that there was a gaping hole in Refco, paid for almost exclusively with BAWAG's money. After all, Bennett fully understood that the only hope for him (and Refco) to weather the storm was to either avoid disclosure or to try to limit its impact by permitting the board to be able to say that the loan was repaid – it was the only way for

Bennett to try to preserve his fortune and stay out of jail. Ultimately, of course, the ploy did not work and Refco was plunged into bankruptcy once it was disclosed that its long time CEO had been running a massive fraud.

The losses suffered by Bennett's victims remains impressive. More than $2.4 billion was stolen from victims in 2004-2005 ($512 million from Lee + $600 million from bond holders + $800 million in bank debt + $583 million from the IPO). This sum of course does not even include the more than $1 billion that Bennett raised in the revolving lines of credit sponsored by JPMorgan Chase and the long-term notes described at trial and in the indictment, all of which were raised based on lies told by Bennett. And it does not include the money that was plundered from customer accounts and used to meet Refco's day-to-day expenses and to fund Bennett's insatiable acquisitions of other companies. Even more staggering are the *actual* loss numbers. Even after all of Refco's assets were liquidated, and after hundreds of millions of dollars were forfeited by BAWAG and returned to victims, the losses still total more than $1.5 billion, with Refco's creditors still short approximately $890 million, Lee $191 million and the IPO victims approximately $500 million.[7]

II. The Indictment and Bennett's Plea

As a result of his conduct, Bennett was charged in a twenty-count indictment with conspiracy, securities fraud, filing of false statements, wire fraud, bank fraud, money laundering and lying to Refco's auditors. The statutory maximum for his crimes is 315 years' imprisonment.

On February 15, 2008, approximately one month before his trial was scheduled to

[7]These numbers were provided to us by counsel for the victims.

commence, Bennett pleaded guilty, without the benefit of a plea agreement, to each of the 20 counts in the indictment. Bennett's change of plea came two-and-a-half years after his arrest and after years of vigorously litigating his case.

In connection with Bennett's sentencing, the Probation Office has prepared a Presentence Investigation Report (the "PSR") which calculates Bennett's Sentencing Guidelines offense level as 52, calling for a Sentencing Guidelines at the statutory maximum, 315 years' imprisonment, calculated as follows:

- A base offense level of 7 pursuant to § 2B1.1(a). (PSR ¶ 93).
- An increase by 30 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(P) because the loss amount directly attributable to the defendant's criminal conduct was more than $400,000,000. (PSR ¶ 94).
- An increase by 6 levels pursuant to U.S.S.G. § 2B1.1(b)(2)(C) because the offense involved more than 250 victims. (PSR ¶ 95).
- An increase of 2 levels pursuant to U.S.S.G. § 2B1.1(b)(9)(C) because the offense involved sophisticated means. (PSR ¶ 96).
- An increase of 2 levels pursuant to U.S.S.G. § 2B1.1(b)(13)(C) because the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense (i) substantially jeopardized the safety and soundness of a financial institution; and (ii) substantially endangered the solvency or financial security of an organization that was, during the time of the offense, (a) a publicly traded company; and (b) had 1,000 or more employees. (PSR ¶ 97).

- An increase by 4 levels pursuant to U.S.S.G. § 2B1.1(b)(15)(A) because the offense involved a violation of the securities laws and, at the time of the offense, the defendant was an officer or a director of a publicly traded company. (PSR ¶ 98).
- An increase of 4 levels pursuant to U.S.S.G. § 3B1.1(a) because the defendant was an organizer or leader of criminal activity involving five or more participants. (PSR ¶ 100).
- A decrease by 3 levels pursuant to U.S.S.G. § 3E1.1 for acceptance of responsibility.

Bennett has no criminal history points. As the top offense level under the Sentencing Guidelines is 43, Bennett's advisory Guidelines sentencing range is life imprisonment. However, because the statutory maximum is a term of years rather than life imprisonment, Bennett's Guidelines range is the statutory maximum of 315 years' imprisonment.

DISCUSSION

I. Applicable Law

While the Sentencing Guidelines are no longer mandatory, they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *United States* v. *Booker*, 543 U.S. 220, 252 (2005); *see United States* v. *Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) ("[I]t is important to bear in mind that *Booker/Fanfan* and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."). Indeed, the applicable

Sentencing Guidelines range "will be a benchmark or a point of reference or departure" when considering a particular sentence to impose. *United States* v. *Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005).

In furtherance of that goal, a sentencing court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims" *United States* v. *Booker*, 543 U.S. at 260 (citations omitted); *see also id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

Apart from the Sentencing Guidelines, as the Court is well aware, the other factors set forth in Section 3553(a) must be considered. Section 3553(a) directs the Court to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in paragraph two. That sub-paragraph sets forth the purposes as:

> (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;

Section 3553(a) further directs the Court – in determining the particular sentence to impose – to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the statutory purposes noted above; (3) the kinds of sentences available; (4)

the kinds of sentence and the sentencing range as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a).

In light of *Booker*, the Second Circuit has instructed that district courts should engage in a three-step sentencing procedure. *See United States* v. *Crosby*, 397 F.3d at 103. First, the Court must determine the applicable Sentencing Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the Court must consider whether a departure from that Guidelines range is appropriate. *Id*. Third, the Court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 113.

II. Analysis

For the reasons discussed below, Bennett's conduct, weighed in view of the factors set forth in Section 3553(a), warrants a sentence of imprisonment consistent with sentences imposed in similar cases discussed below.

A. The Nature and Circumstances of the Offense

The crimes Bennett committed were, simply put, historic. Through outright lies, Bennett tricked investors and lenders out of billions of dollars and, even today, the uncompensated losses, without considering the thousands of Refco employees who lost their jobs, exceed $1.5 billion. Unlike some of the largest frauds of recent times, the fraud here was not simply one

where loss was calculated by the drop in the stock price as a result of disclosure of the criminal conduct (i.e., market capitalization reduction) and where there can be an argument that factors unrelated to Bennett's conduct resulted in the losses. Here, the $2.4 billion loss figure (which, as discussed above, is only a portion of the total amount of money that Bennett tricked others into advancing to Refco) directly and demonstrably resulted from lies told personally by Bennett to the victims of this fraud. The offense conduct was serious, multi-faceted, costly to individual and institutional investors across the country, and damaging to investor confidence in general. As demonstrated at trial, for close to a decade, Bennett systematically lied in order to inflate the value of his ownership interest in Refco so that he could eventually convert that interest into staggering personal wealth. He lied to, among others, the press, customers (such as the Soros Funds which sought to withdraw its money after hearing rumors of Refco losses), a variety of banks from 1998-2004, purchasers of bonds from 1998 through 2004, underwriters, institutional investors, individual investors, the SEC, armies of lawyers and accountants who were conducting due diligence on behalf of Refco's investors, the public and, of course, Refco's outside auditors. And Bennett was staggeringly creative in his lies, arranging any number of sham transactions to serve his fraud, including the Round Trip loans and the fictitious currency and treasury transactions.

Bennett was also a corrupting influence. For example, Refco's internal accountants, Stephen Rossi and Robert Trosten (and later, Frank Mutterer) had no history of fraudulent conduct before they came to Refco, but under Bennett's influence, they quickly became his accomplices in the massive fraud that was Refco. Similarly, as demonstrated at trial, other individuals who seemed to have uncheckered pasts, like former Refco executives Dennis Klejna,

Joseph Murphy and William Sexton, were enmeshed in the lies told by Bennett, particularly lies about proprietary trading and expense shifting through the executive "profit participation plan." And, of course, Joseph Collins, Refco's long-time outside counsel, also became a part of this sprawling conspiracy.

By any measure – the seriousness and pervasiveness of the illegal conduct, the amount of losses, the impact on the victims of the offense – the defendant's conduct stands among, if not above, the most egregious of recent "white-collar" offenses. The Government respectfully submits that the nature and circumstances of Bennett's offenses warrant a sentence that adequately reflects his towering Sentencing Guidelines offense level and comports with the small number of sentences imposed in similar cases discussed below.

B. History and Characteristics of the Defendant

Notwithstanding the numerous letters submitted to the Court by counsel opining on Bennett's honesty and high ethics, as the trial evidence demonstrated, Bennett was a fundamentally and thoroughly dishonest human being. His lies were varied, detailed, compartmentalized, at times audacious, and for nearly ten years, totally convincing. Bennett blatantly violated the trust placed in him by Refco's shareholders, employees, banks and investors, demonstrating an utter lack of respect for the law and for the property of others, not to mention a deep ethical depravity. And to be clear, Bennett's motives were simple: greed and avoidance of detection. He originally started lying to preserve his 24.5% stake in Refco and to fulfill his long-term plan to sell the company for a handsome profit. Of course, after initiating the fraud, Bennett was compelled to see it through to the end to avoid detection.

1. Bennett's Motive for the Fraud

Bennett argues in his submission that his motive was not greed but some altruistic concern for Refco's employees and that his efforts were the product of a "misguided effort." (Br. 3). There is simply no factual support for this argument. Indeed, the record amply demonstrates that greed drove Bennett. First, Bennett's conduct while carrying out of this fraud is not consistent with the claim that he was trying to "save" Refco's employees "from losing their livelihood." (Br. 23, 60). If that had been his goal, Bennett could have simply concealed the pre-1998 losses, and through the supposed hard work and sacrifice described in his sentencing submission, sacrificed his own personal compensation and worked to pay back the debt over time with legitimate profits earned by Refco. Bennett did no such thing. Instead, he plotted to pump up the company's revenues to effect a fraudulent sale of the company. Tellingly, and we respectfully submit, controlling on this issue, the method that Bennett used to fraudulently inflate Refco's earnings was by *increasing* the debt owed by RGHI to Refco. As noted previously, nearly every single one of Bennett's fraudulent devices used to artificially augment the financial performance of Refco involved Bennett *increasing*, exponentially, the debt RGHI owed to Refco (e.g., interest rate adjustments, expense shifting, sham currency transactions, sham treasury transactions, etc.). Indeed, that the receivable had *increased* to $1.1 billion by the time of the LBO, notwithstanding the receipt, by that time, of $652 million from BAWAG in the preceding five years, demonstrates that Bennett's goal was *not* to effect a quick good faith pay down of the RGHI receivable, but to prop up Refco by any fraudulent means necessary to increase the value of his increasing stake in the company for eventual resale. Indeed, it is impossible to reconcile the receivable that spiraled out of control at his hands with

the claim that he was trying to act "without harming Refco's lenders and investors." (Br. 3). The whole fraud was *designed* to harm Refco's lenders and investors, by tricking them into lending and investing billions of dollars in Refco based on fraudulent revenue numbers.

Moreover, Bennett's conduct was fully consistent with his drive for money. Although Bennett's sentencing submission attempts to portray him as a man of modest tastes who enjoyed nothing more extravagant than an afternoon in his garden chasing geese, in reality Bennett was acquiring the trappings of the billionaire he aspired to be. Among other things, Bennett used the money he "earned" at Refco for luxury items far beyond simple gardening tools, including a sprawling mansion in New Jersey, a penthouse apartment on Park Avenue, a $20 million plane, a car collection of 15 different high end sports and racing cars worth more than $11 million, including six Ferraris, three Porsches, three Jaguars, one Audi, one Bentley and one McLaren (Bennett was about to purchase another race car for an additional $975,000 which was seized by the Government). (*See* Exhibit D, a schedule prepared by the Government setting forth the different cars about which the Government has been able to obtain information, including the date of purchase, the amount of the sale price, and the disposition of proceeds. Where indicated, "VB" means that a portion of the proceeds was directed to Bennett's wife, Valerie Bennett). Bennett was also an avid art collector, amassing a collection in excess of $29 million and featuring works by, among others, William DeKooning. Mark Rothko, Cy Twombly, Robert Ryman, Agnes Martin and Andy Warhol. (*See* Exhibit E, which similarly indicates various works purchased by Bennett and details regarding their sales and the portions which were directed to Valerie Bennett).

In support of the argument that Bennett's motive was not personal greed, he cites to the

fact that over the course of the fraud Bennett did make payments against the RGHI receivable, and argues that if Bennett's motive were greed he would have kept the money himself and walked away from Refco instead of paying down the debt. This argument is preposterous. If Bennett walked away from Refco (and his coconspirators) before having paid down the full amount of the RGHI debt, the receivable balance would have been detected almost immediately, either by Refco's auditors or by its newly hired accounting staff. Bennett knew full well that if the true amount of the receivable were ever discovered, his fraud would be over. The only way for the fraud to ultimately succeed (and the only way he could ever leave Refco) was to eliminate the RGHI receivable. This became paramount as Refco was preparing to become a public company, with the increased scrutiny that entailed. As Maggio explained at trial, he and Bennett discussed the fact that Lee would bring greater scrutiny, making avoiding detection and the carrying out of the fraud far more difficult, particularly with the departure of Trosten and Mutterer from the accounting department. (Tr. at 1880-81). Accordingly, Bennett *had to reduce and eventually eliminate the amount of the receivable* in order for him to avoid detection and realize his $1.3 billion profit, since detection would not only mean the end of the fraud, but criminal liability. Indeed, such payments are hardly unusual in large-scale frauds (such as Ponzi schemes), where it is often necessary to reinvest fraud proceeds back into the fraud to keep the fraud from being detected and to magnify the ultimate payoff. Accordingly, that Bennett used some of the fraud proceeds that he acquired from victims of the LBO and IPO to pay down a portion of the receivable is far from evidence that he was acting in good faith – it was a necessary component of the fraud that was to turn Bennett into a billionaire.[8] After all, the

[8] The only pre-LBO paydown of the receivable cited by Bennett was $172 million of the approximately $457 million in payments that Refco received from BAWAG in 2003. Of course,

purpose of this fraud was not to walk away in a manner that would cause instant detection with only a couple of hundred million dollars; it was to cover up the fraud entirely and walk away a billionaire.

2. Bennett's Criminal History

In his brief, Bennett notes that he is a first-time offender. Although Bennett does not have a prior conviction, the Government respectfully submits that given the duration and intensity of the fraud, Bennett should receive no leniency, and certainly should not receive, as he suggests, a departure for "atypical" behavior. (Br. 44 n. 24). As discussed in greater detail below, Judge McMahon recently sentenced two former executives of Bayou, a hedge fund that was based on fraud and caused hundreds of millions in actual losses, to sentences of 20 years' imprisonment, even though both defendants received 5K1.1 letters from the Government. As Judge McMahon explained to Thomas Marino, the Chief Financial Officer of Bayou, after noting that he was in Criminal History Category I:

> For at least seven years your professional life was permeated with crime. It is hard to think of anything you did at Bayou from 1998 on that was not a crime. So while your criminal history level accurately reflects or [sic] a lack of any record you are as much a career criminal as any mobster or drug kingpin. Your entire career at Bayou was a crime.

(Transcript of sentencing of Thomas Marino ("Marino Tr."), a copy of which is attached as Exhibit F, at 16). In sentencing Marino's co-defendant, Samuel Israel, she reiterated: "Your criminal history category is ridiculously low because you didn't just commit one crime, you were, in every meaningful sense, a career criminal . . ." (Transcript of sentencing of Samuel

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even though Bennett was contractually obligated by his coconspirator BAWAG to apply the first $350 million of this investment to paying down the receivable, ever dishonest, Bennett only applied approximately $172 million for that purpose.

Israel ("Israel Tr."), a copy of which is attached as Exhibit G, at 59-60). Judge McMahon's words are equally applicable here. Although the fraud committed by Bennett dwarfs the conduct of the defendants in Bayou, Bennett, like the Bayou defendants, spent nearly a decade of his professional life at committing crime after crime, balancing and coordinating multiple acts of fraud on literally a daily basis.[9] The duration of Bennett's criminal conduct thus shows a longstanding pattern of contempt for the law and a long-term, repeated pattern of deceitful criminal conduct, all designed to increase the size of Bennett's eventual payout from the fraud.

3. Family Circumstances

Bennett's chief argument regarding his family circumstances is that his wife and children will suffer from his incarceration. Every defendant who is married and who has children is in the exact same situation as Bennett. A sad part of any criminal sentencing is the impact on a defendant's family, but the defendant himself is, of course, responsible for that harm. The circumstances confronting Bennett's family are no different from the circumstances confronting the families of other criminal defendants, and, accordingly, do not warrant leniency for Bennett.

Similarly, while Bennett argues that his deportation should also be considered, this too is a common result and does not warrant leniency. It was Bennett's decision to come to the United States to commit his crimes, and he presumably could have applied for citizenship while he was here. As he is in no different position than the many noncitizens who appear before this Court (other than having far greater resources and having a family that also has ample resources to

[9] As Maggio testified, on top of all of the loss concealment and revenue padding frauds that consumed his and Bennett's time, they were also engaged in a series of schemes and frauds to deal with the daily liquidity crises that was generated from the fraud. For example, for years on end, on a daily basis, Bennett and Maggio would intentionally fail to meet Refco's obligations to customers and counterparties, handpicking their victims and lying to them about the reasons for such "fails." (Tr. at 1771) (indicating that fails occurred "almost every day").

relocate or spend substantial time visiting him if he is deported), we respectfully submit that he is entitled to no leniency on this basis.

4. Charitable Works

Similarly, Bennett's good works merit no leniency. Given Bennett's considerable wealth, there is simply nothing that extraordinary about Bennett's charitable efforts, the bulk of which appears to involve fund raising or donating to schools attended by his children. While it appears he may have also made some modest contributions of time and effort to other charitable endeavors, for a man of Bennett's means and spending habits, the efforts seem far from extraordinary. And while no dollar amount was assigned to Bennett's contributions, it seems clear that he spent far more money on just one or two cars in his racing car collection than on good works. Indeed, it is not uncommon for people of considerable wealth to engage in philanthropy; the ability to do so is an opportunity most criminal defendants, generally of more modest means, do not have. Bennett did not engage in charitable works to an extent greater than – and perhaps to a far lesser extent than – similarly wealthy people. Bennett therefore cites to nothing that would warrant a significant variance in his sentence.

C. Application of Sentencing Guidelines

Although no longer binding upon the Court, the United States Sentencing Guidelines represent the considered judgment of the United States Sentencing Commission, a body of experts drawn from all areas of the legal profession, specifically created to determine the appropriate sentence in particular types of cases. As Judge Lynch has recognized, it is important for "rational judges [to] seek guidance . . . in the collective judgment of their peers and of institutions that have sought to develop a logical structure for guiding their discretion, such as

the Sentencing Commission." *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 426 (S.D.N.Y. 2004); *see also id*. (acknowledging the significance of the Guidelines "as an advisory system of principles that both (1) sets a general level of severity of sentences deemed appropriate by a judicious body of politically-responsible experts, and (2) creates a methodology and enumerates factors to be applied to assess the seriousness of criminal conduct and the severity of an offender's criminal record"). Both the *Booker* and *Crosby* courts stressed the continuing significance of the Guidelines under the new sentencing framework. In this case, the sentence called for by the Sentencing Guidelines is obviously a significant marker of the seriousness of the offenses committed by Bennett.

As noted above, even with acceptance of responsibility, Bennett has an offense level of 52, nine levels above the highest offense level in the Guidelines. The Guidelines therefore call for a sentence of life imprisonment. *See* U.S.S.G. § Ch. 5, Pt. A. Because Bennett is not charged with any offense that carries a maximum term of life imprisonment, his Guideline Range is computed by adding the applicable statutory maximums on all counts of conviction, which results in a Guideline Sentence of 315 years' imprisonment. *See* U.S.S.G. § 5G1.2(d).

While the Guidelines themselves are certainly not controlling, the fact that Bennett's advisory range is literally off the charts (and significantly so) obviously reflects the seriousness of the offenses of conviction and the particular aggravating factors relating to his conduct. Indeed, as set forth below, on nearly every applicable enhancement, Bennett not only fits within each enhancement, but he far exceeds the minimum standards. In other words, Bennett has earned each and every one of his 52 offense levels, in a manner that has rarely been seen.

1. Loss

The highest loss level in the Guidelines is $400 million. By even the most conservative estimate, the intended loss in this case is at least more than six times that amount, and the actual loss more than triple it.[10] By any measure, the loss suffered by the victims of the defendant's crimes is staggering. Moreover, although Bennett repeats the argument in his brief that Bennett's Guidelines calculation should be dismissed entirely by the Court because of "its exclusive reliance on the loss," as Bennett once acknowledges, the $400 million loss number in this case is of modest significance. Even if the loss number was only the amount of money that Bennett personally took from the LBO, $25 million, his Guidelines offense level would be reduced by 8 levels, *not even affecting the advisory Guidelines range of life*. Bennett's Guideline range, far from being driven exclusively by amount of the loss, is equally driven by the individual enhancements set forth below.

Bennett nonetheless makes an extended claim that the loss numbers here overstate the seriousness of the offense, primarily by blaming others for the actual losses that were suffered and claiming that there were *some* legitimate aspects of Refco's business. These arguments, perhaps persuasive in other types of cases, simply do not resonate here, where the intended loss numbers are the actual amounts of money that Bennett received based on his lies. In other words, the loss numbers here are born from straight-out theft, as opposed to a more theoretical

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[10] Bennett claims that the *intended* loss in this case is zero, because he hoped that everyone would be made whole eventually. Of course, putting aside the speciousness of this claim, as is part of every jury charge regarding a fraud offense, a victim is harmed every time he or she is deprived of the right to make his or her own economic determinations because the truth is hidden from them by a defendant's lies and omissions. Here, Bennett would not have been able to raise any money, let alone the $2.4 billion that he stole in the LBO and IPO, had he told the truth. Moreover, as Judge McMahon observed in the Bayou sentencings, there is nothing new about a fraud defendant claiming that he did not intend for the victims to suffer any losses. (Israel Tr. at 28 ("Classic Ponzi scheme, always, always. They always intend. The next bet is going to be the right bet."))

calculation that is required in cases where the loss amount is measured by a reduction in market capitalization.

In making his argument, Bennett first claims that the actual losses that were suffered were caused not by him, but by the Government and the CME. (Br. 67-69). Of course, this argument misses the point. As an initial matter, the actions of the Government and the CME have no affect on the Guidelines range applicable in this case. As noted above, Bennett's Guidelines offense level is the same whether the loss number is $25 million, accounting just for what Bennett took out of the LBO, or $2.4 billion, the amount of money he tried to steal from investors and others, or the $1.5 billion in actual losses.

More significantly, the actual loss figures in this case were plainly caused by Bennett's conduct. The CME, faced with discovery of a breathtaking and largely unprecedented fraud by one of its largest members, took the steps necessary to protect its constituency and minimize the potential losses that customers on their exchanges would suffer. That Bennett disagrees with their actions is no surprise, but it hardly absolves him of blame given that the entire fraud was conceived and executed by him. Even more incredible is Bennett's baseless criticism of the Government for placing him under arrest after developing proof of his guilt. As the Court is aware from Maggio's testimony and the record in this case, prior to Bennett's arrest the Government had obtained overwhelming proof of Bennett's guilt *and* that he had plans to leave the jurisdiction to fly to Austria, where his BAWAG coconspirators were located. Of course the Government took the necessary steps to make sure that Bennett, one of the largest corporate criminals in history, was placed under arrest. And indeed the arrest, while devastating to Refco's stock price, at least ensured that those considering the purchase of Refco stock in the open

market had more accurate information about the true nature of Bennett's fraud before investing in Refco. Moreover, that Refco's customers and investors reacted swiftly to the news that Refco's President and Chief Executive Officer had been involved in a massive fraud and wanted to withdraw their money was not the fault of anyone other than Bennett himself. It was, after all, based on *his* lies that these people and institutions had invested in or did business with Refco in the first place. Indeed, that Bennett blames the CME and the Government over himself for the losses that were suffered in this case is a strong indication of the shallowness of Bennett's acceptance of responsibility for his actions.

Finally, Bennett claims that there were aspects of Refco's business that were legitimate. This argument also misses the point. From FY 1998 through FY 2004 Refco reported net income totaling approximately $785 million. (*See* financial statements, GX 6001-6008). Putting aside all of the other expense shifting and income manipulation, Bennett took as income to Refco $486 million in interest on the RGHI receivable, more than 60% of total net income. (*See* Exhibit H, a calculation of interest income recognized by Refco from the RGHI receivable). When one adds in the Asian losses (at least $170 million), the income from the currency hedge on that transaction ($38 million) and the RGHI portion of the Niederhoffer losses ($71 million), Refco would have been left with a total of $20 million in net income over that entire time period. Obviously, if one also included the other revenue padding activities described in the Indictment, along with the shifting of tens of millions of dollars of management expenses, litigation settlements (e.g., the $43 million settlement referred to in Bennett's brief at 22, n. 6), and other fraudulent actions, Refco, in reality, had lost significant amounts of money during that time

period.[11] Furthermore, it goes without saying that if Refco's business had turned into a success, Bennett would not have needed to continue the revenue padding and expense shifting frauds in the manner that he did, right up to the date of discovery of the fraud. Bennett's claim to the Court that Refco was a success is no more truthful today than it was when he made the same claim to investors on the eve of the IPO. Furthermore, even if true, such an observation is irrelevant, as it does nothing to mitigate the nature of Bennett's fraud and the extraordinary losses that followed.

2. More than 250 Victims

Pursuant to Section 2B1.1(b)(2)(C), the defendant's offense level should be enhanced six levels because the offense involved more than 250 victims. Here, the securities frauds involving the notes and the IPO involved victims that far exceeds this number. As with loss, Bennett's crime not only exceeds the Guidelines uppermost level of the enhancement, it obliterates it.

3. Sophisticated Means

Section 2B1.1(b)(9)(C) provides for a two-level sentencing enhancement if "the offense otherwise involved sophisticated means." Application Note 8(B) to the Guideline explains that "sophisticated means" covers conduct that is "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense" and provides examples such

[11] Bennett also cites the supposed great success that MF had from purchasing Refco. (Br. 30-31). What Bennett fails to cite is the recent scandal involving a former Refco employee who caused a $141 million loss in unauthorized trading earlier this year, disclosure of which caused the stock price to tumble by 50-percent. (*See* news report, attached as Exhibit I). Furthermore, although Bennett claims credit for "growing" Refco, as Maggio explained, Bennett was not doing this for any legitimate business purpose (indeed it infuriated Maggio that Bennett was continuing to misuse customer funds to make acquisitions when Refco was suffering from such serious cash flow issues), but because in order to dress up Refco for a sale, Bennett felt that he needed to "buy revenues" since Refco's business, even through extensive fraud, could not meet Bennett's grossly inflated budgetary targets. (Tr. at 1824-25).

as the hiding of assets or transactions through the use of fictitious entities, corporate shells, or offshore bank accounts. U.S.S.G. § 2B1.1, comment. (n.8(B)). It is difficult to imagine a financial crime that could be more sophisticated. As demonstrated in the Forensic Accountant's testimony at trial and GX 1700 (and supporting materials), Bennett's fraud involved countless fictitious and fraudulent transactions, and it involved all of the examples cited in the Application Note cited above. Bennett's conduct, once again, far exceeds the Guidelines' requirements.

4. Endangering Solvency and Financial Security Enhancement

Section 2B1.1(b)(13) involves a series of enhancements relating to harm to financial institutions and public companies, which, if taken separately, would enhance the defendant's offense level by a total of six levels. However, since the provision provides that the cumulative adjustment of (b)(13) and (b)(2)(C) (relating to the total number of victims) is eight levels, and because Bennett is subject to a six level enhancement under (b)(2)(c), Bennett's sentence may only be increased by an additional two levels under this provision, even though he meets each and every criteria. For example, (b)(13)(A) provides for a two level increase if Bennett derived more than $1,000,000 in gross receipts from a financial institution. The bank fraud count alone involved $800,000,000 in proceeds. Similarly, (b)(13)(B) provides for a four-level increase if an offense either (i) substantially endangered the safety and soundness of a financial institution (which Refco was); or (ii) "substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees." This enhancement "reflects the Commission's determination that such an offense undermines the public's confidence in the securities and investment market much in the same manner as an offense that jeopardizes the safety and soundness of a financial

institution undermines the public's confidence in the banking system. This prong also reflects the likelihood that an offense that endangers the solvency or financial security of an employer of this size will similarly affect a substantial number of individual victims, without requiring the court to determine whether the solvency or financial security of each individual victim was substantially endangered." U.S.S.G., App. C, amend. 647. Once again, Bennett's conduct easily meets (if not exceeds) the requirements of each and every subpart of this enhancement. Refco was publicly traded, had over 1,000 employees, was put out of business as a result of the disclosure of Bennett's fraud, and was itself a financial institution. *See* U.S.S.G. § 2B1.1, comment. n.12(B)(ii) (including as factors to consider whether company's solvency or financial security was substantially endangered, whether the company became "insolvent or suffered a substantial reduction in the value of its assets," filed for bankruptcy protection, "suffered a substantial reduction in the value of its equity securities," "substantially reduced its workforce," "substantially reduced its employee pension benefits," and substantially endangered the liquidity of the company's equity securities by, for example, the company being "delisted from its primary listing exchange, or trading of the company's securities [being] halted for more than one full day").

5. Officer and Director Enhancement for Securities Fraud

Section 2B1.1(b)(15)(A)(I) provides that if an offense involved a violation of the securities laws and the defendant was an officer of a publicly-traded company, the offense level should be enhanced four levels.

This enhancement is plainly applicable because Bennett, the President and Chief Executive Officer of Refco, was obviously an officer of a publicly-traded company, and the

offenses of conviction involved violations of the securities laws. Such an enhancement, of course, makes sense where, as here, as an officer of a publicly-traded company commits securities fraud and thereby violates "certain heightened fiduciary duties imposed by securities laws," U.S.S.G. App. C, amend. 647.

6. Leadership Role

Bennett originated the fraud, was its organizer and leader, and the fraud itself was "otherwise extensive." He recruited many other participants and directed their actions. At all relevant times, moreover, the fraud involved at least five people (including, among many others, the defendant, Tone Grant, Santo Maggio, Robert Trosten, Steven Rossi, and Joseph Collins). A four-level enhancement under Section 3B1.1(a) is therefore warranted. Indeed, it is worth noting that, once again, Bennett meets every single guidepost given in the Guidelines for such an enhancement. *See* U.S.S.G. § 3B1.1 App. n. 4 (citing as relevant factors: decision making authority, nature of participation in the commission of the offense, the recruitment of accomplices, the right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others).

7. **Acceptance of Responsibility**

Bennett is entitled to a three-level reduction for his acceptance of responsibility for his guilty plea in advance of trial, having pleaded guilty on the deadline set by the Government on which it would rescind its willingness to move for the assignment of the third point for acceptance of responsibility. While the Government agrees that Bennett should receive that third point, we respectfully submit that Bennett's argument that his conduct in this case is a basis for

receiving credit under 3553(a) beyond the three level reduction should be rejected by the Court.

First, Bennett puzzlingly asserts that his guilty plea somehow led to Trosten's cooperation and the conviction of Tone Grant. To state this argument is to demonstrate its absurdity. The Government's offer to cooperate was made to Trosten long before Bennett's plea, and it was the reality of certain conviction that led Trosten to plead guilty; there is no reason whatsoever to credit Bennett with Trosten's decision. Similarly, Bennett took no action to assist in Grant's conviction at trial. While the trial would certainly have been longer had Bennett not pleaded guilty, that is the case in any multi-defendant case, and that, of course, is why the Guidelines assign a three-level offense reduction for acceptance of responsibility. Bennett is certainly not entitled to any *additional* credit for having pleaded guilty.

Second, Bennett's claim that he had accepted responsibility from the very beginning is belied by his conduct in this case. As an initial matter, Bennett's so-called attempt to cooperate with the Government certainly merits him no leniency. After Bennett's arrest, his counsel did ask the AUSA then handling the case if the Government would be interested in Bennett's cooperation. The AUSA informed counsel that the Government was not interested in having cooperation downward (e.g., against Refco employees subordinate to Bennett) or against BAWAG, against whom the Government already had sufficient evidence. The conversations did not go much further than that until after Bennett's plea, when the Government heard an attorney's proffer from Bennett's counsel. Having heard that proffer, the Government found the information proffered by Bennett to be, on some topics, merely cumulative of evidence already in its possession, and, on other topics, not particularly credible. And while Bennett's citations to plea discussions is frankly improper under Rule 11, the Court should not be left with the

impression that Bennett and his counsel had somehow communicated to the Government the inevitability of a plea. For more than two years, up until the days before Bennett's guilty plea, counsel for Bennett repeatedly claimed that Bennett would take his case to trial if the Government did not accede to a plea offer the Government found to be unreasonable, a threat the Government took very seriously and which required the Government to engage in a great deal of trial preparation.

Bennett's other actions prior to his last-minute guilty plea were decidedly non-cooperative. To put Bennett's plea into context, Bennett was arrested on October 11, 2005. From that moment forward, Bennett had to have known that he would have little chance of success at trial. Among other things, Bennett knew that he had been caught on tape by Maggio shortly before his arrest, and his involvement in the charged fraud was evident by the various round trip loan agreements and the contradictory written representations to the auditors, all of which bore his signature. Rather than plead guilty, however, Bennett took full advantage of all the procedural protections afforded him, putting off as long as possible his acceptance of his responsibility for his crime. He filed pre-trial motions, engaged in protracted discovery litigation, and asked for and received repeated adjournments of his trial date.[12] And rather than limit the impact of his fraud, he knowingly accepted millions of dollars from Refco's director's and officer's insurance (the premiums for which, of course, were paid with fraud proceeds) to

[12] The Government, of course, is not suggesting that there was anything wrong with Bennett having availed himself of the various procedural protections afforded to him; that is his absolute right and no defendant should be viewed less favorably for exercising his rights. However, that Bennett chose to delay his plea is obviously relevant to evaluating his claims that his "cooperative" posture entitles him to a downward sentencing variance.

pay his legal bills, money that Bennett knew he had no right to claim.[13] It was only after these various attempts to forestall the inevitable failed that he entered his guilty plea. And although Bennett's plea certainly saved some Governmental resources, his decision to wait until just one month before trial nonetheless caused a great expenditure of Government resources. Obviously, for a trial covering more than eight years of conduct and extensive documentary evidence, intensive trial preparation by the Government occurred far before Bennett entered his plea. Moreover, as a result of the timing of his plea, the Government was forced to substantially recalibrate its entire pretrial efforts only one month before trial to contend with a trial against Tone Grant alone.

Next, Bennett claims that he should receive substantial credit for his post-plea cooperation with *some* of the civil litigants.[14] This too may be dismissed. As an initial matter, while the Circuit has made clear that the Court is free to consider a defendant's attempt to cooperate (at least with the Government), along with nearly any other factor as part of the defendant's "history and characteristics," that does not mean that the Court necessarily should give a defendant credit for such cooperation. *United States* v. *Fernandez*, 443 F.3d 19, 33-34 (2d Cir. 2006) (finding that District Court properly declined to reduce sentence based on

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[13] According to the insurance companies, Bennett received more than $10 million to pay his legal bills pursuant to Refco's Directors & Officers policy, even though he knew that under those policies he was not entitled to any payments if he was in fact guilty, and that upon his guilty plea he would be responsible for repaying those amounts to the insurance companies. Bennett also was aware that given the Government's asset forfeiture case against him, there would be no money left to repay the insurance companies upon his conviction. In substance, at the same time that Bennett was supposedly accepting full responsibility for his actions, he was, in fact, taking millions of dollars from the insurance companies under false pretenses. Notably, Bennett has not offered to cooperate with these civil litigants.

[14] Bennett did not make a general offer of cooperation to all of the victims of the fraud, but apparently only approached the Litigation Trustee and the Class.

defendant's attempt at cooperation, even where Government conceded that the information she provided was "important," emphasizing that "we underscore that the requirement that the sentencing judge consider a § 3353(a) factor that may cut in a defendant's favor does not bestow on the defendant an entitlement to receive any particular 'credit' under that factor.").

It remains that the near-exclusive basis for a downward departure or variance in sentencing for cooperation comes from a Government motion under Section 5K1.1 of the Guidelines, the vehicle that has been encouraged by the Courts, Congress and the Sentencing Commission. This is with good reason. The 5K1.1 procedure contains certain safeguards to assure that recipients of such consideration are truly deserving. Typically, in a written motion, the Government must explain, and the Court must find, that the defendant provided substantial assistance in the prosecution of others, which necessarily includes not only a detailed description of *what* the assistance is, but usually is reviewed by both the Government and the Court as to the *significance* and *veracity* of the cooperation being provided by the defendant. In making this evaluation the Court and the Government have the benefit of various indicia of truthfulness so as to avoid granting a defendant credit for falsely inculpating others in the hope of getting a sentencing benefit, such as an opportunity to evaluate the witness' testimony at a hearing or at trial, or through other corroborative information, such as the guilty pleas of others or other evidence (e.g., consensual recordings). Furthermore, because cooperating witnesses are typically not sentenced until their cooperation is complete, the Court has the benefit of a full record of the cooperation, including the details of guilty pleas, trial convictions, indictments, or forfeiture that flow from the defendant's substantial assistance. And, as a result, cooperating defendants face significant dangers if they provide false information to inculpate others, or

refuse to testify, including receiving no 5K1.1 letter at sentencing, further prosecution, loss of acceptance of responsibility, and penalties for perjury or obstruction.

In Bennett's request for credit, none of these safeguards are present, and there is nothing to indicate that Bennett is acting out of true "remorse or rehabilitation." *Fernandez*, 443 F.3d at 33. Bennett has not been subject to any judicial evaluation of his credibility, and his "cooperation" has not yet produced any real tangible benefits.[15] Nor can there be any real assurance that Bennett's cooperation with the civil litigants will continue after he is sentenced, given that he will have absolutely no incentive to do so. And with this brand of cooperation, Bennett faces limited repercussions, if any, if he lied to the civil litigants and falsely inculpated others. The Government submits that giving Bennett a significant benefit at sentencing in the *hope* that his information may one day turn out to be truthful, helpful to victims, and continuing, is simply not warranted.

For example, there is no way to assess what benefit Bennett is actually providing in his purported cooperation with the civil litigants. While the Government is not minimizing the impact the wide publicity surrounding the Class's announcement of Bennett's cooperation with the civil litigants may have, without Bennett's actual testimony (or some other tangible results), it is simply not possible for the Court to evaluate Bennett's so-called cooperation to determine if it is, in fact, worthy of a sentence reduction. Indeed, even if Bennett's cooperation continued past his sentencing date (for which he would have no compulsion whatsoever), it is questionable what weight a civil party or ultimate fact-finder would give to the testimony of Phillip Bennett.

[15] To the extent that Bennett has provided useful corroborated information to the civil litigants, it is likely cumulative of other evidence that is in (and will be in) the public record, as was developed in the trial of Tone Grant and will be developed in the trial of Mayer Brown partner Joseph Collins.

As demonstrated at trial, Bennett is an accomplished liar, and throughout the history of the Refco fraud he knew exactly how to tell just the right lie in order to manipulate others in ways beneficial to himself. And, of course, the timing of his cooperation will also call into question his credibility.[16] To give Bennett credit in these circumstances, at this stage of those proceedings, is simply not warranted. Moreover, giving Bennett significant credit for such cooperation could potentially create dangerous precedent. Other corporate executives would be able to take heart that if they committed a massive corporate fraud, they could simply plead guilty at the last minute, have a few meetings with the civil litigants, blame the other civil defendants, get sentenced before any of that information is tested, and still receive a significant benefit.

Finally, to the extent that Bennett has conferred some benefit to the litigants, the Government respectfully submits that it pales in comparison to the devastating harm caused by Bennett in carrying out this fraud and worthy of no more than minimal credit, if any.

Next, Bennett also makes much of his "voluntary" forfeiture of his assets. While it is true that Bennett has agreed to give up his right, title and interest in all of *his* forfeitable assets, a substantial percentage of the proceeds of the fraud are "owned" by the defendant's wife, Valerie Bennett, as Bennett, like many purveyors of fraud, placed a substantial amount of assets into his spouse's name and into difficult to pierce trusts. Moreover, when Bennett liquidated his automobile and art collection, he directed a great portion of those proceeds into his wife's name. The Government is currently negotiating with Ms. Bennett to resolve her claims to the

[16] Bennett, of course, offered no such cooperation to the civil litigants until such time when it cost him absolutely nothing. Given Bennett's guilty plea and the pending asset forfeiture judgment that will follow at sentencing, Bennett no longer has anything to fear from civil litigants. He will be judgment proof once the asset forfeiture judgment against him is executed.

forfeitable assets, but absent an agreement, Ms. Bennett is expected to pursue a claim in ancillary proceedings to at least $10 million in cash holdings and extremely valuable real estate. Accordingly, while it is technically correct that Bennett has agreed to voluntarily forfeit his assets, Bennett's decision to place those assets in his wife's name -- including a Park Avenue apartment, a multi-million dollar home in New Jersey, and cash holdings -- could limit the Government's ability to restore stolen monies to the Refco victims. Similarly, Bennett's waiver of claims to RGHI assets and his "willingness" to forfeit assets that were acquired before the beginning date of the conspiracy are meaningless. As substitute assets, the Government is fully entitled to seize all of Bennett's assets, including those acquired before the mid-1990's, and the Government also has the right to seize the moneys from RGHI, irrespective of whether Bennett wants to put up a wholly frivolous (and indeed impossible) fight over them. The fact that Bennett is not launching frivolous and baseless objections to asset forfeiture is certainly no basis for leniency.

D. The Need To Afford Adequate Deterrence

One of the factors the Court must consider in imposing sentence under Section 3553(a) is the need for the sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). The Government submits that a substantial term of imprisonment is necessary, and indeed vital, to achieve the goals of general deterrence in this case.

General deterrence serves an important function and works to prevent financial crimes of the sort committed by Bennett. Corporate executives will, in the future, consider the sentence imposed on Bennett when they are tempted, as Bennett was, to mislead shareholders or investors or to manipulate the financial statements of their companies for whatever reason. Given the

breadth of the Refco fraud, including the unprecedented gain that Bennett personally reaped from the fraud, other corporate executives will almost certainly look to the sentence imposed on Bennett as a cap, the highest sentence that a corporate executive who *pleads guilty* could ever face. There is a significant danger that corporate executives may view a shorter sentence as essentially a license to commit fraud, secure in the knowledge that if they are caught, they would surely be able to *plead guilty* and argue at sentencing that whatever their conduct was, it had to have been less extensive, harmful and self-enriching than the crime committed by Bennett, and therefore worthy of a shorter sentence than him. Thus, to effect the goal of general deterrence, the Court should impose a sentence commensurate with the nature and seriousness of Bennett's crime sufficient to cause others who may be tempted to engage in similar conduct to refrain from criminal activity for fear of the potential sanctions that might follow. The Court should also consider the fact that, unlike the conduct of other recent corporate defendants mentioned herein, Bennett's criminal conduct continued – and was most pernicious – *after* the well-publicized corporate scandals and corporate reform efforts of a few years ago. A significant term of imprisonment is warranted to deter others from ignoring those same warnings today.

Finally, Bennett argues, in substance, that it is unfair for a white collar criminal to receive a sentence as long as other, more violent criminals. Of course, while Bennett may disagree with the Guidelines treatment of white collar crime, it remains the judgment of Congress, the Sentencing Commission, and as discussed below, the Courts, that white collar criminals who commit crimes as extreme as the ones committed by Bennett should be punished stiffly. As Judge McMahon explained when discussing deterrence in sentencing Bayou founder Samuel Israel to 20 years' imprisonment: "Courts cannot say too often or too strongly or too loudly that

financial frauds, white collar crimes are every bit as heinous, if not more so, as every other type of crime and that they will be punished severely and proportionally to the harm that they cause, proportionally to the amount of criminal conduct that was engaged in and that people who come from privileged backgrounds and who commit crimes while wearing ties do not get a break because of that." (Israel Tr. at 60-61).

E. The Need To Avoid Unwarranted Sentence Disparities

The Sentencing Guidelines were promulgated, in part, to minimize disparities in federal sentences. Although those Guidelines are no longer mandatory, the importance of eliminating sentencing disparities remains an important factor which the Court must separately consider pursuant to 18 U.S.C. § 3553(a)(7).

Although securities fraud prosecutions are by no means rare in this District, there have been very few recent sentences in cases which involved similar criminal conduct. What is of course apparent from any attempt to compare Bennett's conduct with others are the unique characteristics of this fraud. As discussed below, the cases cited by Bennett in his brief are particularly easy to distinguish from the current case, involving mostly defendants who were late-comers to the fraud, who received Guidelines sentences, who did not profit in the manner that Bennett did, or who were not even corporate executives. Similarly, while we have attempted to cite several other cases for Your Honor's consideration that we believe raise issues that are closer to the facts of this case, these too may also be distinguished – in certain aspects Bennett's conduct was far worse, and in many of these cases, the defendants went to trial or obstructed justice, which of course distinguishes Bennett in a direction more favorable to him. They all demonstrate, however, the seriousness with which courts have treated white collar

defendants in cases that are at least analogous to Bennett's crimes.

As noted, although the Government submits that the nature of the crime committed by Bennett was, in several aspects, even worse than the cases cited below, measured in terms of the extent of the harm caused (both in terms of the financial losses and number of victims), the scope and complexity of the schemes, and duration of the schemes, the conduct of Bennett was in many respects similar to that of Daniel Marino and Samuel Israel, Bernard Ebbers, John and Timothy Rigas, Patrick Bennett, and Steven Hoffenberg.[17]

As discussed above, Samuel Israel and Daniel Marino were the CEO and CFO of Bayou, a hedge fund that collapsed after eight years of covering up losses through fraud, with an intended loss of approximately $400 million and an actual loss in the hundreds of millions of dollars. Unlike Bennett, Israel and Marino pleaded guilty early in the case, and both fully cooperated with the Government and were the beneficiaries of a Section 5K1.1 letter. Also unlike Bennett, it appears that neither defendant reaped any great personal wealth from the fraud. Nonetheless, Judge McMahon, recognizing the length, scope and duration of their crimes, imposed 20 year

sentences on both of them. In considering the 3553(a) factors with respect to Marino, Judge McMahon cited to "the enormity of this crime, the amount of money involved, the length of time over which it was perpetrated, the sophistication of the deception and the breach of trust cannot be understated. The amount of money speaks for itself." (Marino Tr. at 11-12). While Judge

[17] We have not cited out-of-district sentences in this submission, because, among other things, we submit that these Southern District sentences sufficiently illustrate previous reasonable sentences for white collar defendants. Obviously other districts have meted out similar sentences, such as the 24-year sentence imposed on Enron's Jeffrey Skilling. Similarly, we have not cited (but, of course can, if the Court desires) other long white collar sentences for lower level executives, both within and outside the district.

McMahon considered the defendant's mitigating circumstances, she deemed them non-material when compared to the scope and duration of the fraud: "Nothing– not your illness, not the death of your mother, not the fact that Bayou became the most important thing in your lonely life, not the fact that you sank into depression and despair because you knew you were committing crimes – none of that excuses it or for that matter mitigates it in the slightest. Nothing in your history and none of your characteristics makes this anything other than what it was: Theft and deception perpetrated out of a sense of arrogance and entitlement and a belief that the rules did not apply to Bayou." (Marino Tr. at 15). In discussing deterrence, Judge McMahon stated: "This Court firmly believes that only a lengthy period of incarceration will adequately and justly punish you for your years and years of criminal behavior while sending a message to the securities industry, a message that those entrusted with other people's money have an obligation to be truthful and forthright and honest at whatever costs to themselves personally. These sorts of scams bubble to the surface all of the time, though never in my experience at this level of loss. The very fact that they occur again and again that one can never send that message too frequently too forcefully." (Marino Tr. at 15-16).

Similarly, when sentencing Israel, Bayou's CEO, Judge McMahon considered Israel's serious medical considerations (including heart disease, a condition that caused mini-strokes, and a degenerative back condition that caused extreme pain and had already required nine back surgeries) and cooperation, but found that the conduct of the fraud was simply too significant for her to sentence him to less than 20 years. Specifically, she found that Israel was "the public face of Bayou and the key contact person with investors and potential investors" (Israel Tr. at 50), was "the mastermind" of the scheme (Israel Tr. at 51), and that he "lived a life of unremitting

crime for eight years." (Israel Tr. at 59). Judge McMahon stressed that she initially had "the thought that you would do all 30 of those years [the statutory maximum] or close to it", but for his receipt of a 5K1.1 letter from the Government. (*Id*. at 63). Obviously, Judge McMahon's words and justifications for the sentence she imposed on Marino and Israel are equally, if not significantly more applicable to Bennett.

Bernard Ebbers, who was President and CEO of WorldCom, and his coconspirators engaged in an illegal scheme to deceive members of the investing public, WorldCom shareholders, securities analysts, the SEC, and others, concerning WorldCom's true operating performance and financial results. Ebbers and his coconspirators knew, by no later than in or about September 2000, that WorldCom's true operating performance and financial results were in decline and had fallen materially below securities analysts' expectations. Ebbers nevertheless insisted that WorldCom publicly report financial results that met these expectations. As a result, rather than disclosing WorldCom's true condition and suffer the ensuing decline in the price of WorldCom's common stock, WorldCom's CFO, with Ebbers's knowledge and approval, directed various coconspirators to make false and fraudulent adjustments to WorldCom's books and records. Thereafter, from September 2000 through June 2002, for the purpose of disguising WorldCom's true operating performance and financial results, Ebbers and his coconspirators caused WorldCom's reported financial results to be falsely and fraudulently manipulated. As Ebbers and his coconspirators knew, the aggregate effect of these adjustments was to present to the public a materially false and misleading picture of WorldCom's true operating performance and financial results.

On July 13, 2005, the Honorable Barbara S. Jones sentenced Ebbers to 25 years'

imprisonment, after finding the amount of loss resulting from the fraud was over $200 million based on the estimated loss in market capitalization of WorldCom's stock and rejecting an argument that the loss overstated the seriousness of the offense, and that Ebbers committed perjury at trial. The Second Circuit has affirmed this decision. *United States* v. *Ebbers*, 458 F.2d 110 (2d Cir. 2006). Notably, the loss in this case is far greater than what Judge Jones found in WorldCom, and the personal benefit to Bennett is greater as well. Also, the nature of the loss in WorldCom, loss in market capitalization, is distinguishable from this case, where the loss numbers are based on pure and simple theft, tricking investors and banks into giving up billions of dollars based on a near decade-long campaign of lies and deceptions.

John J. Rigas was the founder, Chairman of the Board of Directors and Chief Executive Officer of Adelphia, which in 2002 was the sixth largest cable television service provider in the United States. His son, Timothy Rigas, was Adelphia's CFO. John and Timothy Rigas and their coconspirators looted Adelphia for their personal benefit and the benefit of their family. Further, John and Timothy Rigas lied to public investors about Adelphia's financial and operational performance by fraudulently: (a) understating Adelphia's debts to banks and concealing the size of Adelphia's liability for borrowings by the Rigas family under various co-borrowing agreements; (b) overstating Adelphia's earnings in nearly every quarterly and year-end financial report; (c) overstating the number of Adelphia's subscribers and the pace at which Adelphia was rebuilding its physical plant; and (d) representing that the Rigas family had invested cash of more than $1.6 billion to purchase newly-issued Adelphia securities, when in fact those securities had effectively been stolen from Adelphia. The Rigases's fraudulent schemes between August 1998 and January 2002 financially damaged both Adelphia and the many thousands of

investors who entrusted billions of dollars to them and their coconspirators as officers and fiduciaries of Adelphia.

On June 20, 2005, the Honorable Leonard B. Sand sentenced John Rigas to 15 years' imprisonment. This sentence was a non-Guidelines sentence, as Judge Sand calculated Rigas's Sentencing Guidelines range to be life imprisonment, with a statutory maximum of 215 years' imprisonment. In imposing a non-Guidelines sentence, Judge Sand made clear that he was considering Rigas's age (80 years' old) and poor health. Were these factors not present, Judge Sand indicated that he would have imposed a greater sentence. And Judge Sand sentenced Timothy Rigas, who personally did not profit as much as his father, to 20 years' imprisonment.

Patrick Bennett was the CFO of the Bennett Funding Group ("BFG"), a company which specialized in providing equipment leasing and financing for office equipment and started as a small family-owned business. Although unlike Refco, BFG never went public, it raised capital by selling debt securities and interests in the equipment leases that BFG originated. Following two jury trials Bennett was convicted of numerous counts of money laundering, securities fraud, and bank fraud. The evidence at trial demonstrated that, among other schemes, Patrick Bennett (1) engaged in accounting fraud by inflating BFG's revenue as reported to debt-holders in audited financial statements in two separate years; and (2) securitized and sold to investors leases that did not exist and/or leases that had been previously sold to other investors. *See United States* v. *Bennett*, 252 F.2d 559, 560-61 (2d Cir. 2001). As a result of selling leases that did not exist, BFG quickly turned into both a massive accounting fraud and one of the largest Ponzi schemes ever prosecuted. The losses from Bennett's conduct, as found by the Probation Office exceeded $600 million. *Id.* at 565. And the number of victims reached well into the

thousands.

Bennett was sentenced under an earlier version of the Sentencing Guidelines which prescribed a sentencing range of 188 to 235 months. *Id.* at 561. At sentencing, the Honorable John S. Martin upwardly departed from that range and imposed a term of imprisonment of 30 years based, in part, on efforts by Patrick Bennett and his wife to shield some of the proceeds of the fraud from recovery by the victims. Bennett appealed his sentence and the Second Circuit, finding that the wife's refusal to voluntarily return assets was not a proper basis for an upward departure, remanded for reconsideration of the upward departure. *Id.* at 565. Bennett also challenged the 30 year sentence on Eighth Amendment grounds. Even though the Circuit's remand mooted the Eighth Amendment issue, the Court took pains to resolve the question. In language that would be equally applicable on the facts here, the Court stated: "[w]hether the final sentence is thirty years or twenty years (or something in between), we think there is no disproportion between sentence and conduct. Bennett's conduct wiped out the savings of thousands of people, and is not longer than the sentences meted out in other large fraud cases." *Id.* at 567. On remand, Judge Martin again upwardly departed and imposed a sentence of twenty-two years on the basis of the extraordinary amount of the loss, the number of victims, and Bennett's efforts to shield his assets by placing them in his wife's name while the scheme was ongoing. *See United States* v. *Bennett*, No. 02-1379 (2d Cir. Sep. 18, 2003) (unpublished).

Similarly, the Honorable Robert Sweet imposed a sentence of twenty years' imprisonment on Steven Hoffenberg. *See United States* v. *Hoffenberg*, No. 94 Cr. 213 (RWS), 1997 WL 96563 (S.D.N.Y. Mar. 5, 1997). Hoffenberg was the CEO and Chairman of Towers Financial Corporation ("Towers"). Through various subsidiaries, Towers was engaged in the

insurance business as well as in the providing of receivables financing. *Id.* at *3-4. Although Hoffenberg's relevant conduct included schemes to defraud various insurance regulators, the principal offense for which he was sentenced involved the fraudulent sales of notes to investors. As a result of Hoffenberg's fraudulent note sales, more than 3,000 victims suffered losses of approximately $475 million. *Id.* at *6.

By any objective measure of the harm caused, the conduct of Bennett was at least similar to, if not worse than. that of Ebbers, the Rigases, Bennett, Hoffenberg, Marino and Israel. The Government respectfully submits that the sentence imposed on Bennett should be proportionate to the sentences imposed in those cases.

Naturally, Bennett urges the Court to look for guidance to cases where white-collar defendants have received sentences substantially less than the sentences meted out in the Ebbers, Rigas, Bennett (Patrick), Hoffenberg, Marino, and Israel cases. Indeed, in the cases upon which Bennett principally relies, the defendants were sentenced to between 3.5 and 12 years' imprisonment – a range of sentences significantly less than the range of sentences imposed in the cases cited by the Government above, primarily 20 to 25 years. For reasons already discussed and discussed in more detail below, Bennett plainly resembles the defendants in the constellation of cases recommended to the attention of the Court by the Government, and the analogies Bennett draws between himself and defendants who received much less severe sentences in other cases are entirely without foundation.

In arguing for leniency, Bennett points to sentences imposed in a handful of cases here in the Southern District of New York, with *United States* v. *Adelson* being chief among them. In *Adelson*, the president of Impath, Inc., Richard P. Adelson, was convicted of various securities

laws violations in connection with a scheme to overstate the company's financial results and sentenced by Judge Rakoff to a term of 3.5 years' imprisonment, a non-Guidelines sentence. Superficially, *Adelson* offers Bennett some argument for a reduced sentence: like Bennett, Adelson was the officer of a publicly traded company and, worse than Bennett, took the Government to trial.

Even a cursory review of Judge Rakoff's sentencing opinion, however, reveals that Bennett and Adelson are nothing alike in ways that matter most to Bennett's sentencing. The most immediately apparent distinction between the two cases is the magnitude of the losses involved. In *Adelson*, Judge Rakoff attributed intended loss of between $50 million and $100 million to Adelson's conduct. As articulated elsewhere in this memorandum, the loss suffered as a result of Bennett's conduct amounted to $2.4 billion. That amount is between 24 and 48 times the loss Judge Rakoff found to have been suffered as a result of Adelson's conduct. The scope of Adelson's conduct, as measured by loss, is not even in the same universe as the loss suffered at Bennett's hands.

More significantly, Adelson's role in the fraud at Impath is wholly dissimilar to the role Bennett played in the fraud at Refco. Indeed, it is plain from Judge Rakoff's opinion that he was moved to impose such a lenient sentence principally because, in his words, "Adelson was not an originator of the fraud" but rather "a belated entrant" to a conspiracy "initially concocted by others." *Adelson*, 411 F.Supp.2d at 507, 512, 513. In page after page of his opinion, Judge Rakoff returns to the central theme that Adelson ought not to receive a lengthy sentence of imprisonment because he was not an architect of the scheme in which he participated. Indeed, Judge Rakoff goes so far as to write that "Adelson was sucked into the fraud not because he

sought to inflate the company's earnings, but because . . . he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others," and even likens Adelson to "an accessory after the fact, a position that has historically been viewed as deserving lesser punishment than that accorded the instigators of the wrongdoing." *Id.* at 513. Obviously, these words can hardly be used to describe Bennett, who was not only the CEO of Refco but also the instigator-in-chief of the fraud at the company. As explained in detail elsewhere in this memorandum – and as the testimony at the trial of Tone Grant plainly demonstrated – Phillip Bennett was the principal architect of the Refco fraud. He initiated it, he managed it, and, ultimately, he benefitted handsomely from it. If Phillip Bennett is an accessory after the fact of the fraud at Refco, then the fraud at Refco was a crime without a principal.

Indeed, Judge Rakoff's opinion makes plain how Bennett belongs in the category of criminal at the center of cases like WorldCom, Adelphia and Bayou and not remotely in the same class of criminal as Adelson. At one point in his opinion, Judge Rakoff distinguishes the conduct of Ebbers in WorldCom from that of Adelson, stating: "this Court . . . is specifically aware of how hugely different that case, involving the largest fraud in history (with losses anywhere from $2 billion to $11 billion) is from [the Adelson] case, let alone how totally removed the situation of Adelson (a belated entrant to the Impath conspiracy) is from that of Ebbers (an active leader of the WorldCom conspiracy through many of its critical phases)." *Id.* at 512. One need simply insert "Bennett" for "Ebbers" and "Refco" for "WorldCom" and it is plain that Judge Rakoff would have seen the same difference to exist between Bennett and Adelson as he found to exist between Ebbers and Adelson. Of course, conversely, such an

exercise demonstrates just how similarly situated Bennett and Ebbers, in fact, are.[18]

While the reasons for Bennett's reliance on *Adelson* are obvious, his references to the sentences meted out in several other fraud cases in the Southern District are curious and, indeed, inapposite. In several of the cases, the defendants received sentences within the applicable Guidelines range. *See United States* v. *Humphreys*, 02 Cr. 1559 (LTS) (Nov. 8, 2007) (sentence at bottom of Guidelines range); *United States* v. *Smirlock*, 2005 WL 975875 (GEL) (Apr. 22, 2005 S.D.N.Y.) (sentence two months above bottom of the Guidelines range); *United States* v. *Walder*, 02 Cr. 469 (RMB) (Jan. 10, 2003 S.D.N.Y.) (top of the range sentence). While it is true that the defendant in *United States* v. *Armstrong*, 99 Cr. 997 (JFK) (Apr. 10, 2007 S.D.N.Y.) did not receive a sentence within the applicable Guidelines range of 108 to 135 months' imprisonment, the statutory maximum in that case was 60 months, meaning that the defendant could not be given a sentence within the applicable Guidelines range, and, indeed, was given the maximum sentence he could be given – 60 months. Bennett's entire 79-page sentencing submission is devoted to securing a sentence far below the Guidelines range (life imprisonment) and statutory maximum (315 years' imprisonment) applicable to his offenses of conviction. Obviously, cases that *support* the application of the relevant Guidelines and statutory maximum are inapposite to his argument that he should receive a non-Guidelines sentence substantially below the statutory maximum in this case.

In fact, Bennett relies upon only one other Southern District case in which a fraud defendant received a non-Guidelines sentence, *United States* v. *Strafaci*, 03 Cr. 1182 (LTS) (May 20, 2005 S.D.N.Y.). Of course, the defendant in *Strafaci*, like the defendants in several of

[18] In any event, the Government's view is that Judge Rakoff's sentence in *Adelson* was substantively unreasonable and has appealed the sentence.

the other cases cited by Bennett, is wholly distinguishable from Bennett. Like the defendants in *Armstrong* and *Smirlock*, the defendant in *Strafaci* was a hedge fund manager who lied to investors about the performance of his fund to induce them to invest money. While defendants in cases like *Strafaci* clearly commit very serious crimes, they do not compare in scope and depth to the crimes committed by defendant Bennett. Bennett initiated and managed an eight-year scheme that involved lying to auditors, investors, banks, counterparties, and the public. His lies ranged from the simple to the complicated, concerned all matters of Refco's business, and were told with startling frequency. Moreover, he was the architect of innumerable transactions – round trip loan transactions and sham foreign exchange and treasury bill transactions, among others – designed to conceal the financial shambles the company had become and the fraud with respect to which he was the primary mover. Bennett's conduct and the conduct of the fund managers cited above are even less comparable than apples and oranges. The loss in *Strafaci* – $89 million – is likewise hardly comparable to the loss involved in the fraud at Refco, which totaled approximately $2.4 billion.

In addition to the cases referenced above, Bennett also relies heavily on an out-of-district case, *United States* v. *Kumar*, 04 Cr. 846 (ILG). To be sure, as Bennett points out, the defendant in *Kumar*, the former CEO of Computer Associates, Sanjay Kumar, engaged in a serious accounting fraud that resulted in a market capitalization loss to shareholders of greater than $400 million. Moreover, Kumar obstructed the investigation of his conduct. Despite having engaged in serious accounting fraud and having obstructed justice, Judge Glasser of the Eastern District of New York sentenced Kumar to a non-Guidelines sentence of just 12 years' imprisonment (the applicable Guidelines, as here, called for life imprisonment). As with *Adelson*, Bennett's

reasons for relying on *Kumar* are obvious.

Bennett ignores, however, critical differences between Bennett's conduct and Kumar's – differences that speak in favor of a sentence greater than 12 years. First, like the defendant in *Adelson*, Kumar did not originate the fraud with which he was charged. Bennett, of course, was the mastermind of the Refco fraud in all of its many facets. Second, the accounting fraud with which Kumar was charged was of a far shorter duration than the accounting fraud committed by Bennett. The indictment against Kumar implicated him in accounting conduct for the period 1998 through 2000. Of course, Bennett's manipulations of Refco's finances spanned at least eight years – from 1997 through 2005.

The nature of the accounting fraud was also qualitatively different. The Computer Associates fraud involved, at its core, the movement of revenue between quarters in order to meet Wall Street expectations for those quarters. This amounted to tricking investors and Wall Street analysts into thinking that the company's earnings were growing at rates substantially in excess of reality. On the other hand, by and large, the revenue that was shifted was *real* revenue, even if recorded in the wrong quarter, in sharp contrast to much of the revenue recorded by Refco during the eight years of Bennett's fraud. Hundreds of millions of dollars of Refco's revenue for this period was, quite simply, phony, or, put differently, the product of accounting hocus pocus. Bennett created hundreds of millions of dollars of revenue simply by booking interest on a related-party receivable from RGHI that he knew was uncollectible. He ginned up tens of millions of dollars of income by simply shifting expenses off of Refco's books and onto RGHI's. And when the company's financial problems were really bad, Bennett simply had Refco engage in sham foreign exchange and treasury bill transactions in order to manufacture

additional revenue. In corporate history, there are few, if any, comparable examples of a company so rife with fraud. While the fraud at Computer Associates was obviously serious, the movement of real revenues from one quarter to another by a defendant who did not even conceive of the scheme just does not compare in either breadth or depth to the fraud committed by Bennett at Refco.

Finally, while for reasons cited elsewhere in this memorandum the Government submits that Bennett's charitable efforts ought to be accorded little weight at sentencing, it is notable that Bennett's charitable giving pales by comparison to Kumar's, who by age 44 had (and the following list is non-exhaustive): founded and personally financed a mobile pediatric health unit that serves 4,000 underprivileged children a year on Long Island; personally financed an educational enrichment program that has served dozens of underprivileged children, also on Long Island; founded and personally financed a program that has enabled 25 young women from tribes in Kenya to relocate to the Kenyan capital of Nairobi and to receive educations they would not otherwise receive; provided money in the aftermath of the 1998 bombing of the U.S. Embassy in Nairobi that helped 12 hospitals in the area restock with medical supplies; sent materials to Sri Lanka that enabled that country to purify 49 million liters of otherwise unusable water in the aftermath of a tsunami that ravaged that country; made the final wishes of 280 terminally ill children come true in partnership with the Make-A-Wish Foundation; and created an onsite Montessori school to serve children of working parents at Computer Associates. *See* Kumar Sentencing Transcript, attached hereto as Exhibit J, at 23-43.

By any objective measure of the harm caused, the conduct of Bennett was at least similar to, if not worse than, that of Ebbers, the Rigases, Bennett, Hoffenberg, Marino and Israel. The

Government respectfully submits that the sentence imposed on Bennett should be proportionate to the sentences imposed in those cases.

F. The Need To Provide Restitution

The Government is working to determine the feasibility of restitution in this case. We respectfully request the Court for leave for a further post-sentencing submission. 18 U.S.C. § 3664(d)(5) (granting up to 90 days to finalize restitution order).

G. The Appropriate Sentence

The Sentencing Guidelines relating to white-collar crime have been the subject of much debate and consideration by the Sentencing Commission and others. Since the 1990s, these Guidelines have been amended on numerous occasions to reflect the belief that, in some cases, white collar crime was not being sufficiently punished and adequate general and specific deterrence was not being provided, especially in light of the corporate scandals of the early 2000s that rocked the markets. The applicable Sentencing Guidelines in this case reflect these concerns and thus reflect a step in the progression toward greater deterrence of white-collar crime, and decisions by Congress and the Sentencing Commission that such increased deterrence was fair and necessary.

Bennett's willful frauds on Refco's investors, purchasers, customers, counterparties, banks, the public and others resulted in countless victims being defrauded of billions of dollars, causing uncompensated losses, even after the dissolution of Refco's assets and large legal settlements of well over $1.5 billion, and of course drove Refco into bankruptcy. The defendant's criminal conduct, motivated by greed that drove him to lie and scheme in ways previously unimaginable, brought him wealth that has scarcely been seen before in a criminal

fraud case, launching Bennett into the rarefied air of a billionaire. In terms of scope, length, sophistication, harm, and criminal benefit, Bennett stands on a plateau of criminality that frankly makes comparisons difficult. Accordingly, the Government respectfully submits that an appropriately stiff term of imprisonment, consistent with the sentences imposed in the similar cases discussed above, should be imposed in order to reflect the seriousness of the offense, promote respect for the law, provide just and fair punishment, and deter potential corporate criminals.

CONCLUSION

The Government respectfully submits that, for the reasons explained above, Bennett should be sentenced to a term of imprisonment consistent with the sentences imposed in the similar cases discussed above.

Dated: New York, New York
June 6, 2008

Respectfully submitted,

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