

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA)	
)	
vs.)	Criminal No. 13-30042 -MAP
)	
GARY COMO,)	
DEFENDANT)	

**SENTENCING MEMORANDUM SUBMITTED ON
BEHALF OF GARY COMO**

INTRODUCTION:

Gary Como entered guilty pleas to a four count information alleging (1) conspiracy to commit wire fraud in violation of 18 U.S.C. 371, and three counts (2-4) of wire fraud in violation of 18 U.S.C. 1343. The co-defendant entered pleas to an identical guilty four count information. The plea was tendered pursuant to a written plea agreement in which the defendant, *inter alia*, waived appellate rights.

Mr. Como submits that the appropriate sentence in this case, one that is sufficient but not greater than necessary to achieve the purposes of sentencing is probation with an order of restitution.¹

FACTS:

The relevant offense conduct is set forth in the PSR. The defendant cooperated in the investigation, made full disclosure to investigating authorities and provided records as requested. He fully and completely acknowledged his participation in the events that led to his plea to the above referenced information. In addition, the defendant has

¹ A sentence probation might also include a period of including home confinement, which would allow the defendant to continue to work.

consistently made payments to various victims, answered various lawsuits seeking damages for losses resulting from the conduct of the defendant, and his co-defendant, and continues to make such payments. To date, Mr. Como has paid approximately \$122,000 to persons or entities that suffered losses as a result of his conduct.

In summary form the business run by Mr. Como and Mr. Peabody, NEECO, began in 2001. Mr. Como was approached with the opportunity to purchase the dealership from Nortrax. He did not have the necessary capital. Mr. Como contacted Thornton Peabody (Aaron Peabody's father) and discussed the possibility of forming a partnership. The elder Peabody agreed to finance the purchase of the business and Aaron Peabody and Mr. Como would run the business.

The business was structured so that Gary Como would run the service and repair end of things, as well as the day-to-day operations. Aaron Peabody would run the sales department and Thornton Peabody would handle the finances of the business. Although the business was under capitalized from the beginning, this system worked fairly well until Thornton's passing in 2006.

At the time of Thornton's passing Aaron took over the bookkeeping. The business went well in the beginning. However, as the economy slowed, the business started to have trouble keeping enough cash on hand to payoff used machines as they were taken in trade. The economy kept slowing, and soon Gary and Aaron were finding it impossible to meet their financial obligations to Morbark and other vendors without using some of the monies that we were receiving from the sales of these used chippers. This in turn led them to keep making payments on the machines rather than paying them off as they were sold.

Soon, they were making so many payments every month that they were unable to raise enough cash from profits to make payments to Morbark and other vendors. At this point Mr. Peabody, with the knowledge of Mr. Como, started writing checks between their two banks. This was done to cover shortages in the checking account that was used to pay bills. Mr. Como knew that they were not paying off the chippers as originally planned and he realized that what was going on with the checking accounts was not right. Como and Peabody had a meeting and formed what they hoped was a plan to begin paying off the financed machines that had already been sold. They agreed that they would not use the system of not paying off trades any longer and started to make progress paying off the machines that they were making payments on. However, the economy really fell off in the beginning of 2010. One day in September of 2010, Mr. Peabody had written a rather larger check to cover a shortage on their regular account. That day, the teller did not automatically clear the check. It was going to be held for three days. Aaron wrote a second check in the hopes that the second check would be automatically cleared. Instead, all accounts were frozen. The next day they were audited by their bank in Maine, which financed the floor plan for used equipment. Finding that they had sold the equipment the bank demanded immediate payment. The partners had no ability to pay and closed the business that afternoon.

OBJECTIONS TO THE PSR:

Mr. Como's objections to the PSR are directed to the classification of the wire fraud counts as Class B felonies carrying a maximum penalty of thirty (30) years. The wire fraud counts are Class C felonies carrying a maximum penalty of twenty (20) years; there is no statutory prohibition against a sentence of probation.

GROUNDINGS FOR DEPARTURE FROM THE APPLICABLE GUIDELINES:

Family Ties and Responsibilities, U.S.S.G § 5H1.6:

Mr. Como is presently employed and earning a good salary. He is essentially the sole support of the family unit. It is unlikely that his wife would be able to meet the family expenses if Mr. Como is incarcerated for any length of time as that would result in the loss of his employment. Since the failure of the business in question, Mr. Como has regained the trust of a person who was defrauded and has successfully and steadily been in his employ.

ADVISORY GUIDELINE CALCULATIONS:

The guideline range offers no useful advice or guidance in this case because it (1) is the product of a guideline that is not based on empirical evidence or national experience; (2) fails to take any account of Mr. Como's low risk of recidivism, and (3) is far greater than necessary to promote the goals of sentencing in this case.

The guideline calculations in this case are driven by the fraud guideline wherein the amount of loss is the determining factor in setting the offense level. "While the fraud guideline focuses primarily on aggregate monetary loss and victimization, it fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment, in a particular case." Allan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011); *see also United States v. Ovid*, slip op., 2010 WL 3940724, *1 (E.D.N.Y. Oct. 1, 2010) ("[T]he fraud guideline, despite its excessive complexity, still does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so."). A substantial variance is needed in this case

because of the following mitigating factors, all of which are highly relevant to the purposes of sentencing and none of which is taken into account by the guideline range. Some of the below mentioned factors are also grounds that, singularly or in combination, may warrant a departure from the guideline range.

SENTENCING PURSUANT TO 18 U.S.C. 3553 (a):

The Court must “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2),” which are “the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

18 U.S.C. § 3553(a)(2). In “determining the particular sentence to be imposed,” the Court must consider these purposes, the nature and circumstances of the offense and the history and characteristics of the defendant, the need to avoid unwarranted disparities, and the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a)(1)–(7). “In the last analysis, a sentencing court should not consider itself constrained by the guidelines to the extent that there are sound, case-specific reasons for deviating from them. Nor should a sentencing court operate in the belief that substantial variances from the guidelines are always beyond the pale. Rather, the court should ‘consider every convicted person as an individual and every case as a unique study in the

human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.’” *United States v. Martin*, 520 F.3d 87, 91 (1st Cir. 2008), quoting *Gall v. United States*, 552 U.S. 38, 52 (2007) 128 S.Ct. 586, 598. Additionally, 18 U.S.C. 3582 provides in pertinent part as follows:

(a) Factors to be considered in imposing a term of imprisonment.--

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in [section 3553\(a\)](#) to the extent that they are applicable, **recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.** (Emphasis Added).

NATURE OF THE OFFENSE AND CHARACTERISTICS OF THE DEFENDANT

The PSR sets forth Mr. Como’s family background, education and upbringing. As noted he is married to the woman he began dating at age sixteen. The couple has two children. Mr. Como has always been a law-abiding citizen, a good husband and father.² As noted above, Mr. Como, since the commission of the instant offenses has worked for Northern Land Clearing and is now a project superintendent. He began work for this company the Monday after his business closed. He owed his employer \$65,000 as a result of his actions in this case. He began employment as a Safety and Training officer as well as an equipment sales person. He worked nights and weekends to sell trucks and equipment. A portion of his earnings was used to pay of the debt owed. This \$65,000 debt was fully paid in two years time.

² The single exception to this was his arrest for possession of marijuana at age 20.

After just over one year Mr. Como was transferred to the Land Clearing Division of the company where he first became a foreman and was later promoted to project superintendent. He is now responsible for five to ten job sites at any given time, oversees several employees and multiple pieces of equipment. His territory covers western Massachusetts and Connecticut from border to border with job billings in the millions of dollars.

Mr. Como did not engage in the criminal behavior to which he has admitted for personal gain. Rather it was a misguided and totally inappropriate effort to save a failing business. Clearly he did not derive any economic benefit from his fraud. Indeed he and his wife have suffered financially and have struggled to satisfy creditors in some way victimized by his conduct. The family motor vehicle was repossessed.

In addition to the \$65,000 paid to his employer, Mr. Como has paid John Deere Credit (credit card) \$8,950 as of 11/14 against an original debt of \$12,377.71, paid at the rate \$450 per month; Clark L'abbe \$23,950; Haverlock, Estey & Curran LLC (a former business accountant) \$4,650, and Chase Credit Card (used for business), \$7,500; Pawnee Leasing has been paid a total of \$5,500 at an agreed rate of \$275 per month.³ The Massachusetts Department of Revenue is owed a total approximately \$12,000 for use and sales tax and are currently being paid at the rate of \$150.00 per month. To date Mr. Como has paid \$6,450. Aaron Peabody also pays \$150 per month on this debt. The total payments are \$122,000.

³ Pawnee initiated a lawsuit and attached the Como real estate. They have obtained a judgment of \$50,095.44.

Direct Capital, a lender on a machine, was owed \$42,182.50. Direct Capital seized Mrs. Como's motor vehicle and sold it for an as yet unknown sum of money.⁴

Mr. Como is the sole support of his family. His continued employment is essential to the financial well-being of the family unit. His ability to make restitution successfully depends in large measure on his continued employment.

JUST PUNISHMENT AND DETERRENCE:

Given the facts and circumstances of this offense and the characteristics of Mr. Como, a sentence of probation adequately deters Mr. Como and others from similar conduct in the future. Mr. Como derived no personal gain from his and his co-defendant's actions. None of the criminal acts occurring in this case were motivated by a larcenous intent. Mr. Como's continuing efforts to make injured parties whole is in part reflective of his intent at the time the criminal acts occurred. It was always their intent, albeit misguided, to make all parties whole. Mr. Como is ashamed of his conduct, admitted fully to his wrongdoing and is prepared to work diligently to compensate all injured parties. Mr. Como is prepared to make a restitution payment of \$100,000 within thirty (30) days of sentencing.

PROTECTION OF THE PUBLIC AND NEED FOR REHABILITATION:

Mr. Como's crimes were non violent. This is not to say that members of the public were not victims. Mr. Como recognizes his conduct hurt people financially, and has worked, since the closure of his business, to repay the people injured. He has achieved a significant measure of trust from one of his victims. Not only has he repaid his debt; this victim now entrusts him with considerable responsibility. Indeed, the character letter

⁴ Credit needs to be assessed for the vehicle seizure.

written by Mr. Como's employer is a testament to his rehabilitation, but also a measure of his character. His actions simply do not warrant the conclusion that he is a threat to the public. Mr. Como has made a grievous mistake. He recognizes the mistake, has acknowledged his guilt and worked toward compensating his victims. The character letters attached hereto and submitted on his behalf, offer insight into his character and of how he is viewed in the community of those who know him best. A sentence of imprisonment will do little to further the goals of the statute in this case.

APPROPRIATE SENTENCE:

Probation is an appropriate sentence in this case. A sentence of incarceration, although available as a sentence and suggested by the advisory guidelines, is greater than necessary to achieve the statutory purposes of sentencing and would necessarily deprive Mr. Como to continue his employment, support his family and pay restitution to his victims. The advisory guidelines, as indicated above, are driven solely by the amount of the loss and do not adequately take into account the most relevant factors necessary to fashioning a just punishment in this case.

Respectfully submitted,
Gary Como, by his attorney

/s/ Edward P. Ryan Jr.

Dated: November 13, 2014

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CERTIFICATE OF SERVICE

I, Edward P. Ryan, Jr., Attorney for the Defendant, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Edward P. Ryan, Jr.
Edward P. Ryan, Jr.