

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES	)	
	)	
	)	
V.	)	NO. 13-30042-1-2 -MAP
	)	
AARON PEABODY	)	

**SENTENCING MEMORANDUM OF AARON PEABODY**

The defendant, Aaron Peabody submits this Memorandum with respect to the application of 18 U.S.C. § 3553(a) and to the facts and circumstances of his offense. For the reasons reflected in the Memorandum and to be discussed at the sentencing hearing, Mr. Peabody respectfully submits that a term of probation, including a period of home confinement, and with an appropriate order of restitution would be sufficient but not greater than necessary to achieve the purposes of sentencing. This is particularly true in light of Mr. Peabody’s history and characteristics, and the fact that he derived no personal benefit from the offense. The Memorandum also discusses the reasons that the advisory sentencing guidelines significantly overstate the seriousness of the offense, wholly fail to capture the mitigating aspects of both his personal history and characteristics as well as the nature and circumstances of his crime, and yield a sentencing range that greatly exceeds what is needed to satisfy the purposes of sentencing.

## **THE APPLICATION OF 18 U.S.C. §3553(a)**

With the sentencing guidelines as advisory, the Court must now also look to 18 U.S.C. § 3553(a) to inform its sentencing decision. The sentence imposed must (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) afford adequate deterrence to criminal conduct; and (C) 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.

In determining the minimally sufficient sentence, section 3553(a) further directs sentencing courts to consider the following factors:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the kinds of sentences available
- (3) the advisory guidelines
- (4) any pertinent policy statement in the Guidelines Manual, which includes departures
- (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct

Other statutory sections also give the District Court direction in sentencing.

Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to “recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation.” (emphasis added)

Under 18 U.S.C. § 3661, “no limitation shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

(emphasis added). Sentencing under §3553(a) therefore requires the Court to start with the minimum sentence permissible and add only so much additional punishment, if any, as is necessary to comply with the §3553(a)'s purposes. As discussed below, application of the §3553(a) factors to Mr. Peabody's case establishes that a sentence of probation is sufficient but not greater than necessary.

**A. Factor One: The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant**

Aaron Peabody's story is that of a typical middle-class family, providing the basic essentials of food, clothing, housing, education and employment. Ultimately it is one that provided him with the ability to start his own business with his co-defendant, Gary Como. It was this venture that led to flawed choices, poor judgment, many sleepless nights, and eventually the basis for his crime. As set forth below, Mr. Peabody's crime is significantly mitigated by the circumstances of his offense, which reveals a man desperate to save his company for the benefit of not simply himself, but others who he tried to keep employed.

Mr. Peabody is 42 years old and was born in Houlton, ME. He is the oldest of three children. His father owned and operated a John Deere shop, selling logging and lawn equipment. He died in 2006 at age 59, from lung cancer. His mother was the bookkeeper of her husband's business. She died at age 54 in 2004 from a heart attack. His two brothers both continue to live in Houlton, have married and work in the Town.

At age 18 Aaron began a relationship with a woman a bit older than he. They remained together for 5 years and had a child, Chelsea, now 23 who lives in Bangor, ME and is a college graduate.

After graduating high school Mr. Peabody attended the University of Maine and also the University of Southern Maine. He began working for a power equipment company, New England Equipment. In 1996 his employment took him to Palmer, MA and Ware, MA where he continued to live until 2010 when he moved back to Houlton.

In 1999 he married Lisa Bailey and he and wife lived in Ware, MA. They had one child, Alyssa, now age 13. Aaron and Lisa separated in 2010 when he closed his business. Lisa moved back to Houlton at that time. They were divorced in 2011. Aaron continues to have significant and continuous contact with Alyssa.

In 2011 Aaron began a relationship with Ellen Bartlett. They have since moved into her home together, and are raising her three children. Ellen is a Registered Nurse at Houlton Regional Hospital. Ellen and her children have been a great support to Aaron during the pendency of these proceedings. Aaron's brothers, have similarly provided emotional and financial support. (See attached character letters).

Practically his whole adult life, Aaron has been able to be employed. When his business in Massachusetts closed he was unemployed for a period of time, but for the most part, he has found work. Aaron currently works as a bartender at a local establishment in Houlton.

Gary Como and Aaron Peabody have known each other for a long time. They both thought they could run a successful business and began that journey in 2004 as New England Equipment Company (NEECO). However, as described in the presentence report (PSR), NEECO was a struggling business that went deeper and deeper into debt. In 2006 Gary and Aaron, realizing that they were in deep financial trouble, but in an effort to try to keep the business afloat, engaged in a series of

conduct that unfortunately ultimately led to the business having to close in 2010. The details of their folly are described more completely in the PSR.

Throughout the time period of their criminal conduct the company paid taxes and so did Gary and Aaron personally. They both wanted to try to keep the company going long enough to make things “right”, but they ran out of time. Neither of them made a profit or personally benefitted from this conduct and any money they took as “salary” was used only to pay their basic expenses.

Aaron’s history and characteristics do not reflect a need for a harsher punishment or incarceration. Aaron has been miserable the whole time this was going on. He’s a good man with a good moral core. This “ate” at him day and night. He didn’t like what he was doing and he didn’t like himself for doing it. He has been a productive and respected member of his community and has garnered the support of his family and friends. That’s the man he is. Not the person who “robbed Peter to pay Paul”.

## **B. Factor two: The Purposes of Sentencing**

Section 3553(a) lists four purposes of sentencing, which can be summed up as: (1) just punishment; (2) deterrence; (3) protection of the public; and (4) rehabilitation. Under the parsimony principle the sentence should be the minimum necessary to accomplish these purposes.

### **1. Just Punishment and Deterrence**

A sentence of probation, even including a period of home confinement would adequately deter Mr. Peabody and others in the future. Aaron Peabody derived no net benefit from his crime. He has essentially been financially ruined as a result of it. All his assets went at the beginning. He had an inheritance of approximately \$200,000 which went into the business when it started. He had a 25% interest in Peabody

Equipment that owned property in Northern Maine and was rented out. That interest was lost in all this. He had a 33% interest in a camp in Maine that was also lost. Aaron gave all his interest in all the properties to his brothers so that they could go to the bank and refinance their loans. These properties were attached by Katahdin Trust Company that had loaned money to NEECO, and were causing his brothers financial difficulties because of Aaron's misdeed. As a show of support and in an effort to help their brother cooperate with the authorities in "righting" this matter, his brothers are paying back his obligation and paying approximately \$400,000 in mortgage payments. Aaron has no assets and can't borrow against anything.

## **2. Protection of the Public and the Need for Rehabilitation**

As to protecting the public and the need for rehabilitation, the facts of this offense as well as Mr. Peabody's personal characteristics place him at a low risk to re-offend. This was a crime of opportunity. There was never a plan to drive this company into the ground or to deceive customers or lenders. His offense was completely out of character and an aberration when compared with the rest of his life. Moreover, the offense was a product of conditions that will not recur in the future. The circumstances of his offense strongly suggest that Mr. Peabody does not require incarceration to prevent him from committing another offense.

He is essentially a first offender convicted of a non-violent offense. He has a strong and stable employment history, is educated, and is in a very supportive relationship. Mr. Peabody's life history strongly suggests that he will never be involved in criminal behavior again. In fact, Congress explicitly incorporated the concept of a first offender not repeating criminal conduct when drafting the Sentencing Reform Act itself when it directed the Sentencing Commission to "insure that the guidelines reflect

the general appropriateness of imposing a sentence other than incarceration in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense". See 28 U.S.C. §994(j). Incarceration of Aaron Peabody is not necessary for the protection of the public.

**C. Factor Three: The kinds of Sentences Available**

This Court has at its disposal every sentencing option in framing a just sentence for Mr. Peabody. A sentence of probation with a period in home confinement is certainly a feasible sentence available to the Court.

**1. The Advisory Guidelines Range Overstates the Seriousness of the Offense because of its Undue Reliance on Loss and Cumulative Specific Offense Characteristics.**

The principal reason the advisory guidelines range overstates the seriousness of Mr. Peabody's offense is the guidelines' undue reliance on loss as a sentencing factor. The guidelines have significantly increased the weight afforded to loss over the years, in each instance without empirical basis. In the initial 1987 guidelines, the amount of the loss could result in no more than a five-fold increase in the range of imprisonment. Under the current guidelines the loss can increase the range nearly forty-fold.

To be sure, loss has a place in measuring the culpability of an offense as it reflects the harm inflicted on the victim. But the present guideline exaggerates that factor. Numerous courts have recognized that loss in a fraud case, like the quantity in a drug case, is not always an appropriate proxy for culpability. Loss, alone and in combination with various cumulative specific offense characteristics, can yield guideline ranges that significantly overstate a defendant's culpability. Aaron Peabody's crime was NOT a crime of greed. It was a crime of desperation and at bottom with good intention. Like others who have committed similar crimes, Aaron Peabody did not set out in his

business to commit a fraud, he contributed a great deal more of his own money to the company than he took out of it, and he did not commit the fraud for his own personal gain.

**2. The Guidelines' Emphasis on Loss is Especially Misplaced Where There is No Gain to the Defendant.**

The Commission initially settled on the use of loss as a principle measure of culpability on the assumption that in most cases loss would roughly equate to the defendant's gain. Hence the commentary to the guidelines stated that the amount of loss "plays an important role in determining sentences.....because it is an indicator of both the harm to the victim and the gain to the defendant." See U.S.S.G. §2B1.1 But in the atypical case in which the offender received little or no personal gain as a result of the fraud, the expected correlation between the personal gain to the offender and the amount of the loss falls apart. In fact, the Sentencing Commission has previously recognized lack of personal gain as a mitigating circumstance not taken into account in the guidelines.

There is a significant and palpable difference in culpability between, on the one hand, defendants who purposely and intentionally derive gain in an amount similar to the loss caused by their conduct and, on the other hand defendants whose gain is zero. In the case at bar, Aaron Peabody was driven to commit fraud by circumstances beyond his control, did not derive any personal gain from it, and liquidated substantially all of his assets in an effort to mitigate and try to put an end to it. Because the circumstances of Mr. Peabody's offense are so vastly different in terms of culpability than it would be if he had made a straight million dollar heist, a sentence significantly below the advisory guideline range is appropriate here.

### **3. Post Offense Conduct**

After the close of his business and the disclosure of the fraud, both Gary Como and Aaron Peabody immediately began to cooperate with those agencies attempting to figure out what happened and where the money went. There were countless meetings with representatives of the local police and the FBI. Both defendants did their best to recreate the trail of money. There was never an intention to not be forthcoming.

In addition both defendants have worked cooperatively to try to mitigate the loss. Fortunately for Gary Como he was able to secure employment almost immediately from one of the “victims”. As a result he has been making periodic payments to “bring down the loss”. On the other hand, Aaron Peabody was unemployed for a period of time until he secured a fairly good job at a car dealership in Houlton, ME. However, when he pled guilty, there was a press release and his employer felt he had to terminate Aaron from employment. Again, Aaron went in search of any job he could find. He was lucky enough to land a part-time job, through a friend, as a bartender. Since being hired he has been able to increase his hours and eventually expects this to be a full time position. He hopes eventually to land a better job, and he’s been told that once this matter is resolved, other employment opportunities may surface. Hopefully that would put him in a better position to continue to make restitution.

It also must be noted that as mentioned earlier, Aaron’s brothers were impacted by his fraud, and the Katahdin Trust Company which contributed financing to NEECO, was liable to suffer a significant loss. Because Aaron

forfeited much of his “estate” to his brothers, they were able to secure refinancing and are paying off a loan of \$400,000 so the bank would not lose more.

(Included with this sentencing memorandum is a copy of the promissory note for this loan).

A review of the character letters submitted with this memorandum, clearly show a man deeply remorseful for his conduct. A good man who has lived with the constant reminders of what he has done. A moral man who has had many sleepless nights wondering how things went so wrong and what he can do to fix it. Aaron Peabody has taken full responsibility for his actions and will continue to live with the consequences for a long time.

### **CONCLUSION**

Accordingly, the defendant requests that in light of the section 3553(a) factors that the Court impose a sentence of five years’ probation with any conditions the Court sees fit.

Aaron Peabody  
By his attorney,

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**CERTIFICATE OF SERVICE**

**I 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.**

**/s/ Peter L. Ettenberg\_\_\_\_\_**  
**Peter L. Ettenberg**

**Dated: November 10, 2014**