UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No. 13-cr-30042-MAP
	)	
v.	)	
	)	
AARON PEABODY,	)	
GARY COMO	)	
	)	
Defendants.	)	

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by and through its undersigned attorneys, submits this memorandum in aid of sentencing the defendants, Aaron Peabody and Gary Como. The government submits this memorandum two days prior to the sentencing because the government was awaiting further information from the victims of charged offenses which would impact the restitution awards and amount of loss for sentencing guidelines purposes.

Background and Introduction

Both defendants pled guilty to one count of Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 371, and three counts of Wire Fraud, in violation of 18 U.S.C. § 1343, pursuant to identical pre-indictment plea agreements in which the government agreed not to charge the defendants with Aggravated Identity Theft, 18 U.S.C. § 1028A, which would have carried a mandatory minimum term of two years' imprisonment.

Sentencing Guidelines Calculation

In the plea agreements, the parties agreed that the base offense level is seven under USSG § 2B1.1(a)(1), and the base offense level is increased by 16 due to a loss amount of $1 million to $2.5 million under USSG § 2B1.1(b)(1). The government's loss calculation from its

statement of facts was $1,007,524.35. This calculation yielded an adjusted offense level of 23, prior to the three point reduction for acceptance of responsibility. The total offense level under the plea agreement, therefore, was 20. With the defendants' Criminal History categories of I, the plea agreements contemplated a guidelines range of 33 to 41 months.

Despite the parties' agreement as to the loss amount, the defendants initially submitted objections to the Probation Department that claimed that the loss amount was less than $1 million, which would have reduced the total offense level by two levels. The defendants have since withdrawn their objections to the loss amount. The Probation Department applied the enhancement for more than 10 victims, USSG § 2B1.1(b)(2)(A), which would increase the offense level by two levels. The defendants initially submitted objections to the Probation Department which disputed this enhancement. Those objections were also later withdrawn.

Notwithstanding the parties' agreement on the amount of loss, and the fact that the defendants withdrew their objections to the loss amount, the government took a closer look at the various items of loss. This review, which involved obtaining further information from the corporate victims of this fraud, did show that some of the items were inflated, to a small degree, by interest charges and provisions of lease contracts that increased the true out-of-pocket costs. While some of these amounts could be recoverable in civil actions against the defendant, the definitions of loss for purposes of the sentencing guidelines are more restricted. *See* USSG § 2B1.1, App. Note 3(D).

The government has made a revised calculation of loss, and it has shared that calculation with defense counsel. Defense counsel have indicated that they assent to this calculation, which vindicates their initial objections to the loss amount, and also includes a few other small

reductions identified by the government. The total loss amount should be $869,349.37, rather than $1,007,524.35. This lowers the total offense level by two levels.

The government also takes the position that the number of victims enhancement should not apply because the parties' agreement did not include that enhancement. While the government respects the Probation Department's position, it remains bound by the plea agreement, and it supports a guideline calculation that excludes this enhancement.

Giving the Defendants the Benefit of any Doubt

As noted above, the most conservative calculation, which gives the defendants the benefit of any doubt and the full benefit of the plea agreement struck with the government, renders a total offense level of 18 and a guideline range of 27 to 33 months. This is derived from the base offense level of 7, an enhancement of 14 levels for loss between $400,000 and $1 million, and a three level reduction for acceptance of responsibility.

Restitution

The government's further review of the loss also impacts the total restitution award, which should be $869,349.37, less the $38,280.36 insurance settlement obtained by Country Bank for Savings for its loss in connection with the defendants' check kiting scheme. This renders a total restitution award of $831,069.01. Because CAT Financial and Morbark assumed certain losses that were initially borne by the small business customers of the defendants, the individual payees should be as follows:

Victim	Amount
CAT Financial	$139,975.06
Morbark, Inc.	$485,982.24
Country Bank for Savings	$99,805.98
Nortrax	$47,969.94
Direct Capital	$15,324.37

Financial Pacific	$14,807.52
Pawnee Leasing Corp.	$27,203.90
TOTAL:	$831,069.01

Determining a Just Sentence

The plea agreement, which removed the possibility of mandatory imprisonment, and the current sentencing guidelines regime, affords the Court broad discretion in fashioning a sentence that meets the goals of 18 U.S.C. § 3553(a). There is no meaningful distinction between the conduct of the two defendants. They worked as partners in this fraud scheme, they were the two owners of the NEECO business, and they were equally knowledgeable about the various elements of the fraud they committed together.

While Mr. Peabody's 1994 violation of a protective order offense should not escape notice, neither defendant has a serious criminal history, and neither criminal history appears to be connected to the current offense. Both defendants have consistent work histories, both appear to make positive contributions to their families and communities, and neither has a drug or alcohol problem.

Each defendant admitted his guilt to the government at an early stage of the government's investigation, and each entered into a pre-indictment plea agreement, which saved the government significant resources.

Of course, the government saved significant resources through these plea agreements precisely because the defendants' fraud scheme was so lengthy and complex. Even with the assistance of the defendants through their proffers, tracing the path of fake loans, stolen wood chippers, and a multitude of checks passed back and forth between two banks required determined investigators and a substantial amount of time. Some machines on loan or lease to NEECO were then sold to unsuspecting customers, who believed they had clear title to the

wood chippers they needed for their landscaping or forestry businesses. The defendants took out loans in the names of some of their best and most loyal customers. All of the government's effort in untangling this scheme was a testament to the level of deception practiced by the defendants. The practices of falsifying documents and deceiving customers became so pervasive and regular that it would be fair to say that NEECO was a business premised on fraud.

While the defendants have acknowledged all of these pervasive practices, it is worth asking how they could have engaged in such dishonest behavior over a long period of time. The defendants' crimes did not stem from momentary stresses, or brief lapses in judgment. Rather, their offenses were committed with the full opportunity for reflection and deliberation and without the distorting effects of drugs, alcohol, or mental illness. This factor should give this Court pause as it considers the defendants' proclivity for future crimes. The defendants' criminal behavior cannot be dismissed as merely aberrational.

This Court should also consider the importance of general deterrence. Men and women across this country, on every day of the week, contend with struggling businesses, changing industry conditions, and downturns generally in the economy. The temptation to cheat to keep a business afloat is ubiquitous, and yet, the criminal justice system must fashion disincentives to act on this temptation. The United States remains a remarkable place for small businesspeople to gain a fresh start after a business failure. Our bankruptcy laws can erase debts, and our culture, unlike many others, does not stigmatize those who aim high and fall short. Some of our finest entrepreneurs found success after a litany of failures. There must remain a bright line between business failure and fraud.

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Dated: November 18, 2014

CERTIFICATE OF SERVICE

I 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) on this 18th day of November, 2014.

/s/ Alex J. Grant
ALEX J. GRANT
Assistant United States Attorney