

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- v. - : S4 05 Cr. 1192 (NRB)

TONE N. GRANT, :

Defendant. :

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GOVERNMENT'S SENTENCING MEMORANDUM

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TABLE OF CONTENTS

Relevant Facts 2

I. Background 2

II. Grant’s Trial and the PSR 9

Discussion 11

I. Applicable Law 11

II. Analysis 13

 A. The Nature and Circumstances of the Offense 13

 B. Acceptance of Responsibility 20

 C. History and Characteristics of the Defendant 21

 D. Application of Sentencing Guidelines 22

 E. The Need To Afford Adequate Deterrence 26

 F. The Need To Avoid Unwarranted Sentence Disparities 28

 G. The Need To Provide Restitution 29

 H. The Appropriate Sentence 30

Conclusion 31

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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 Tone N. Grant (“Grant”), currently scheduled for August 7, 2008, and in response to the defendant’s sentencing memorandum dated July 18, 2008 (cited herein as “Br.”).

On April 17, 2008, Grant was convicted after trial of all five counts in the indictment against him, S4 05 Cr. 1192 (NRB). As was demonstrated during the 18 days of trial that preceded his conviction, Grant, first as a leading executive and later as a partial owner of Refco, stood side-by-side with partner and coconspirator Phillip R. Bennett (“Bennett”) in perpetrating a fraud of historic proportions that ultimately bilked victims out of billions of dollars and positioned him to receive more than \$275 million in fraud proceeds.

In a sentencing memorandum that offers a version of Grant’s role in the Refco fraud that is considerably divorced from the reality of his involvement, as reflected in the testimony and evidence at trial, Grant asks the Court to impose a sentence that is “a small fraction” of the 16-year term of imprisonment that this Court has imposed on Bennett, (Br. at 1, 63), and suggests that a sentence of approximately three-and-a-half years would be “appropriate” in light of his

conduct. (Br. at 55). Because Grant's conduct is not nearly as disparate from Bennett's as he claims, because Grant, who persists in his innocence to this day (Br. at 58 n.67), is not entitled to credit for acceptance of responsibility as Bennett was, and for the reasons set forth additionally below, the Government respectfully requests that the Court impose a sentence on par with that imposed upon Bennett.

RELEVANT FACTS

I. Background

As set forth in the PSR and as the Court learned during Grant's trial, Grant's involvement in the Refco fraud started no later than 1997, after Refco suffered losses when a series of customers, like Victor Niederhoffer, to whom Refco had extended credit, were unable to repay their loans. At the time Refco suffered these losses, Grant was president of Refco and owned 24.5-percent of the company. Bennett also owned 24.5-percent of the company and was Grant's chief financial officer. Aspiring to keep Refco afloat in the hope of one day selling Refco for a profit, (*see* GX 21, attached hereto as Exhibit A, at 2), Bennett and Grant embarked on a scheme to hide the losses and to lie about Refco's financial health and the manner in which it conducted its business.

As the evidence at trial demonstrated, Grant was a founding father of the fraud that ensued. This meant that he played a significant role both in hiding the losses and lying about them. Specifically, in late October 1997, Victor Niederhoffer suffered reversals so significant that Refco had to absorb nearly \$100 million in losses. The evidence at trial showed that Grant was aware of the staggering losses as they were occurring, executed the contracts that released Niederhoffer from responsibility for the losses, effectively making them Refco's losses, and lied

repeatedly about them. Grant lied to the public through a statement he provided to Chicago Tribune reporter Greg Burns. He devised the plan to lie to Doug Reid in order to convince George Soros's fund, for which Reid worked, to keep its substantial (\$260 million worth) deposits at Refco, and effectively executed that plan in a face-to-face meeting with Reid. (Trial Transcript ("Tr.") at 1701-04). And, having decided with Bennett to raise debt in order to bring cash into the company – cash that was needed to keep the company afloat – Grant lied to the people from whom he sought such cash. Specifically, he and Bennett met with William Pappas of Prudential and told him that Refco had suffered only \$300,000 in losses in connection with then Niederhoffer debacle when the figure was really approximately \$100 million, (Tr. at 654, 667-68), and helped conceive of the "plan" to raise money from Chase based on a similar set of lies. (Tr. at 1711-14).

Of course, as the Court is aware from trial, the Refco fraud had many facets, involving many lies told in the service of the ultimate goal of keeping the company afloat and selling it, and Grant played an instrumental role in these lies as well. Entirely ignored in Grant's brief, for example, is his role in lies told about proprietary trading. As the evidence at trial demonstrated, Refco engaged heavily in proprietary trading. As an officer at Refco in the late 1990s, Grant not only knew that such trading occurred but also wanted to expand the company's involvement in it. (*See* Tr. at 1761; GX-228 (December 8, 1998 email in which Grant says "I emphasize that we must spend time . . . developing a strategic plan for . . . Proprietary Trading/Market making"), attached hereto as Exhibit B). As the evidence at trial also demonstrated, however, banks, investors, customers, and ratings agencies consider a financial institution's involvement in proprietary trading a negative and were impressed by the representation that Refco did not

engage in it because proprietary trading contributes to a volatility of earnings that jeopardizes repayment. Knowing this, and aware of Refco's acute need for cash, Grant and Bennett, as the evidence at trial showed, lied to a ratings agency, (Tr. at 1715-19), lied to customers like Paribas, (*see* GX-8015, relevant portions attached hereto as Exhibit C), and lied to William Pappas of Prudential. (Tr. at 659) (told during meeting with Grant and Bennett that proprietary trading "just didn't make sense" for Refco, that "[i]t was inconsistent with what their objectives were," and that Refco simply did not engage in such activity). These lies were all told to bring cash into Refco so that it could be kept afloat until a sale could be achieved.

And lest there be any doubt that Grant was aware of the full scope of the fraud at Refco, one need only recall from trial the presentation that was made to Grant, Bennett, and Ed Cox on February 26, 1999. (*See* GX-219 (presentation from the February 26, 1999 meeting), attached hereto as Exhibit D). As both Steven Rossi and Robert Trosten testified, the meeting had but one purpose: to make sure that the principals of Refco were fully apprized of the scope of the financial problems at Refco and the practices that the company engaged in to hide the problems from the world. Among other things, Rossi explained at the meeting that the related party debt owed to Refco by RGHI was really in the order of \$900 million, not the \$231 million that had been reported in the company's financial statements for fiscal year-end 1998; gave an accounting of the constituent parts of the receivable, including losses suffered in connection with the Asian crisis of 1997; showed how the company was manipulating revenue and income by booking vast sums of interest on the receivable owed to Refco by RGHI and shifting company expenses to RGHI; and explained that the company was lying to its auditors, among other people, and that it was able to avoid being caught in such lies by temporarily paying down the receivable balance at

fiscal year ends through round trip loan transactions. Rossi further demonstrated how Refco's books and records showed a profit for the preceding year of approximately \$42 million when, in fact, but for the crooked accounting, Refco would have shown a loss of approximately \$25 million. It was clear from that meeting that the audited financial statements for fiscal year-end February 1999, which had not yet been completed, would reflect such accounting chicanery. Grant, of course, did not express any surprise or outrage in response to what Rossi told him because he already knew of the fraud that Rossi was describing. For example, as reflected in the testimony of Santo Maggio, Grant was aware of the Asian losses by the time of the meeting. (Tr. at 1774-75). And he also knew that the fraud was necessary if he and Bennett were going to achieve their ultimate objective of selling the company, as no one – no bank, no investor and certainly not the public – was going to buy a company with a \$900 million hole and actual net losses of \$25 million.

Two months after this meeting, Grant ceased being an officer of Refco and was no longer involved in the day-to-day operations of Refco. During the years that followed, the fraud at Refco continued, and Bennett, Trosten, and Maggio were responsible for the daily dirty work that needed to be done to keep the company afloat and to increase the marketability of the company through fraud: padding revenue, shifting expenses, and executing round trip loan transactions, among other things. Accordingly, Grant's fingerprints are not as evident on the levers of the fraud – failing customers, lying to auditors, engaging in fictitious transactions – as those of Bennett, Trosten, and Maggio.

As the evidence at trial demonstrated, however, Grant, still an equal owner of the company with Bennett, was not only aware of the fraud after his departure: He promoted it. The

telephone record evidence (1,400 calls between Grant and Bennett from February 27, 1999 through October 12, 2005 and 277 calls between Grant and the Refco switchboard during the same period) and the testimony of Maggio, Trosten, and even Karen Fleming, Bennett's former secretary, all demonstrated that Bennett and Grant were in close contact during this period, just as you would expect given their equal financial interest in the company. Indeed, after Grant left Refco as officer, far from being an out-of-favor former owner who had been banished from the company, Grant's ownership in Refco's controlling company, RGHI, *increased* from 24.5-percent to 50-percent, giving him a large incentive to keep tabs on the company and the fraud that he and Bennett started together.

At trial, the testimony of Santo Maggio and Robert Trosten gave content to the conversations that the phone evidence demonstrated occurred. From his conversations with Bennett and his own, direct conversations with Grant, Maggio explained that Grant was aware of the continued revenue padding, that Refco continued to fail customers, and that the receivable owed from RGHI to Refco continued to grow. (*See, e.g.*, Tr. at 1818-1819, 1886-87). As the testimony of Robert Trosten demonstrated, Grant continued to play a role in the macro-level decisions of the company – helping it find a potential suitor in Allen & Company and consulting with Bennett with respect to the 2002 Proceeds Participation Agreement (“PPA”) with BAWAG. (Tr. at 930, 941). Significantly, it is apparent from the trial evidence that Grant, although aware of the ongoing fraud, never scolded either Maggio or Trosten for their roles in the fraud. On the contrary, he thanked both of them for their work and, with respect to Maggio, reassured him that his fraudulent conduct was appreciated and that the problems at Refco would be solved through the sale of the company. (Tr. at 913, 1695-96, 1818-19, 1838-39). As all of the principal

players in the Refco fraud knew, the only way that they could extricate themselves from the Refco mess both monied and still at liberty was to continue to cook Refco's books so as to deceive unwitting investors to pay billions of dollars for what they knew was a failing, insolvent company. Grant kept tabs on the company – and encouraged the troops responsible for the daily implementation of the fraud – in an effort to make sure that this long-standing end game would be realized.

Of course, Grant's most significant contribution to the fraud came many years after he left the company. In 2004, Bennett finally found a potential suitor in Thomas H. Lee Partners ("Lee"). A deal was on the table that would involve an investment by Lee of approximately \$510 million and financing of \$800 million by a syndicate of banks and \$600 million by purchasers of notes. Lee would not do the deal without Grant being bought out and without Bennett and Grant standing behind certain representations in the central deal document, the Equity Purchase and Merger Agreement ("EPMA"). As the evidence at trial showed, Grant took the buyout and signed the EPMA even though he had full knowledge that Lee had been deceived about, among other things, the \$1.1 billion in debt that RGHI owed Refco; Refco had been continuing to pad its revenue; and several of the representations he stood behind were false. And he signed the deal documents knowing that the offering circular for the notes and the financial statements for 2004 upon which all of the participants in the deal (including the note purchasers and the banks) relied continued the flat out lie that the RGHI debt to Refco had been paid off when, in fact, the total debt was \$1.1 billion and the company's financials were riddled with misstatements about its revenues.

Like his coconspirators, Grant received a payout in connection with the LBO. Under the

terms of his buyout, he received \$4 million. Shortly thereafter, he received an additional \$12 million for a total of \$16 million at around the time of the LBO. Concededly, this amounted to a smaller payout than some of Grant's coconspirators received at the time of the LBO, such as Trosten. But much like Bennett, Grant's compensation for his years as an owner of Refco and purveyor of that company's fraud was deferred. Upon a future sale of the company (or within 10 years of the agreement), under the terms of his buyout, Grant would receive half of the proceeds received by Bennett (or of the value of Bennett's stake in Refco) up to \$275 million.

As the Court knows, after the LBO, Refco moved rapidly to an Initial Public Offering ("IPO"). As at the time of the LBO, Grant was aware at the time of the IPO that investors were being defrauded, as he was aware, for example, that Refco continued to pad revenues after the LBO. (Tr. at 1903-04). Just a year after the LBO closed, investors paid \$583 million for shares of stock in Refco. For his part, Bennett received shares worth \$1.3 billion. Under the terms of his agreement, Grant was entitled to half of the value of those shares up to \$275 million (after the remaining RGHI debt was paid off), money that would become available to Grant once Bennett was able to sell his shares after a lock-up period. In other words, just outside of a year of defrauding Lee, Grant was on the verge of making \$275 million.

As would be expected in a fraud of this scope, individuals from all backgrounds and walks of life were victimized. As the Court knows from trial, the list of victims included the sophisticated private equity fund Lee, charitable 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 \$5,000 she

invested in Refco, and the countless Refco customers who saw their accounts plundered by in the effort to keep the company afloat.

The losses suffered by Grant'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 Refco 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 originated by Grant and Bennett. 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.¹

II. Grant's Trial and the PSR

As a result of his conduct, Grant was charged in an indictment in five counts with conspiracy, securities fraud, wire fraud, bank fraud, and money laundering. The statutory maximum for his crimes is 85 years' imprisonment.

On March 24, 2008, trial commenced against Grant. After 18 days of trial and less than a day of deliberations, on April 17, 2008, a jury returned a verdict of guilty on all counts.

In connection with Grant's sentencing, the Probation Office has prepared a Presentence Investigation Report (the "PSR") which calculates Grant's Sentencing Guidelines offense level as 51, calling for a Sentencing Guidelines sentence at the statutory maximum, 85 years'

¹These numbers were provided to us by counsel for the victims.

imprisonment, calculated as follows:

- A base offense level of 7 pursuant to § 2B1.1(a). (PSR ¶ 82).
- 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 ¶ 83).
- 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 ¶ 84).
- An increase of 2 levels pursuant to U.S.S.G. § 2B1.1(b)(9)(C) because the offense involved sophisticated means. (PSR ¶ 85).
- 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 ¶ 86).
- 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 ¶ 88).

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

Guidelines range is the statutory maximum of 85 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, Grant's conduct, weighed in view of the factors set forth in Section 3553(a), warrants a sentence of imprisonment on par with that imposed on Bennett.

A. The Nature and Circumstances of the Offense

As we noted in the Bennett sentencing memorandum, the crimes Grant and Bennett committed were, simply put, historic. Together, they 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. As we also noted, unlike some of the largest frauds of recent times, the fraud here was not simply one where loss was calculated by a loss in market capitalization and where there can be an argument that factors unrelated to Bennett's and Grant's conduct resulted in the losses. Here, the fraud directly and demonstrably resulted from the lies told by Bennett and Grant to the victims of the fraud. The offense conduct was serious, multi-faceted, costly to individual and institutional investors across the country, and damaging to investor confidence in general.

Grant counters with one central argument: No matter what his level of culpability, Grant claims that he is much, much less guilty than Bennett. (Br. at 45 ("By any objective measure, Mr. Bennett's culpability dwarfs Mr. Grant's.")). Indeed, Grant essentially recommends to the Court that it begin its sentencing analysis with the sentence imposed on Bennett – 16 years² –

² In fact, even assuming that Bennett's sentence is a benchmark from which Grant's sentence should be calculated, the appropriate starting point would be greater than 16 years, as set forth in Section B, *infra*, of this Memorandum.

and work down to a sentence that is just a fraction thereof largely on the basis of the asserted difference in Bennett's and Grant's levels of culpability. (*Id.*). In doing so, Grant minimizes his own role in the Refco fraud considerably and suggests a gap in culpability of a size that finds no support in the record.

To say that the Refco fraud was "Phillip Bennett's creation," (Br. at 45), is to ignore entirely Grant's role in the fraud at its outset. For example, as the evidence at trial made clear, both Bennett and Grant were at least equally responsible for Refco's handling of the Niederhoffer debacle, and Grant's role was far from passive. Together, Grant and Bennett traveled to Connecticut to confront Niederhoffer about the size of the losses that he was incurring. Together, they signed documents that released Niederhoffer of responsibility for those losses and absorbed those losses into Refco. And, as the Court knows from the trial evidence, they subsequently lied about those losses – together. Just as they were equal partners in ownership of Refco, they equally hatched and executed a plot to conceal Refco's losses. Grant was just as much an originator of the Refco fraud as Bennett and is equally responsible for its genesis.³

Similarly, Grant's efforts to minimize his lies are likewise unmoored from the trial evidence. (*See, e.g.*, Br. at 49 ("Even accepting the Government's evidence, Mr. Grant lied to almost no one . . .")). During the initial period of the fraud, Grant alone lied to the public about the Niederhoffer losses through his statements to Greg Burns of the Chicago Tribune. He

³ Grant notes that "he was initially lied to about the Asian losses, the single biggest component of the RGHI receivable," (Br. at 59), which were also suffered in 1997. Of course, as Grant apparently concedes and as borne out by the trial evidence, while Bennett told Maggio that he initially did not tell Grant about the Asian losses, Grant was fully aware of the Asian losses by late 1998 or early 1999 when Maggio discussed them with him, (Tr. at 1774-75), and by February 26, 1999, when they were a part of the briefing from Rossi.

conceived of the plan to deal with the threat from Soros to withdraw its funds from Refco, and with Maggio and Bennett, lied about the same losses to Doug Reid from Soros. He lied to Refco's auditors when he signed the management representation letter to Arthur Anderson in 1998. He also lied to William Pappas from Prudential, a ratings agency, and prospective customers of Refco about whether Refco engaged in proprietary trading. In other words, during the time he was at the company, Grant was just as willing and able to "engage[] in frontline lying and deception," (Br. at 45), about Refco's dirty laundry as Bennett was. And he was effective: William Pappas testified that he was impressed by Grant when he met him in connection with Prudential's potential investment in Refco, all while Grant and Bennett were lying to him about the Niederhoffer losses and proprietary trading. (Tr. at 660-61). Of course, Prudential subsequently made a substantial investment in Refco that would not have been made had Grant been truthful.⁴

Also unsupported is Grant's claim that he is less culpable than Bennett because "Bennett's involvement in the conspiracy also lasted far longer than Grant's purportedly did." (Br. at 47). As the trial evidence demonstrated, Grant was a member of the conspiracy for the long-haul for the simple reason that the success of the fraud promised him up to \$275 million. As set forth immediately above, Grant helped hatch the Refco fraud. Moreover, contrary to what he would ask the Court to believe, Grant did not disappear from Refco after he ceased being an officer of the company in 1999. First, he was not "permanently expelled" (Br. at 47) from the company in 1999; he could not be "expelled" from the company because he owned it. In fact, after he was "expelled" his ownership share increased to 50-percent. And just as he did not

⁴Grant's efforts to trivialize such lies as mere "puffery," (Br. at 49), amply demonstrate the speciousness of the argument. Grant's lies were the central lies of the fraud.

disappear from the company altogether, he did not disappear from the Refco fraud. He remained in close contact with Bennett. He participated in macro-level decisions. And, significantly, he encouraged Maggio to continue his fraudulent acts. And, of course, Grant's role in the LBO was pivotal to the consummation of that deal.

Indeed, the fragile footing of Grant's efforts to minimize his responsibility for the fraud becomes particularly apparent with respect to the LBO. According to Grant, he should receive a light sentence because, for example, he "had no contact with purchasers in the debt offering or bank financing components of the Lee LBO" and "had no contact with any employee of Lee." (Br. at 47). But of course he had contact with the LBO participants. The contact came in the form of the EPMA – the central transaction document – which he signed, thereby endorsing the false representations contained therein. It came by way of the financial statements that were circulated to the LBO victims – financial statements for *his* company that he knew to be false. And it came in the form of the offering circular for the notes – the offering circular that he received and knew contained materially false information.

Grant's argument that he is less culpable than Bennett and deserving of a lesser sentence because Bennett "personally profited" from the offense to a greater extent, (Br. at 51), is similarly overstated. Grant asserts that Bennett received \$25 million in LBO proceeds and \$1.3 billion in Refco stock and compares those sums to the \$16 million he received around the time of the LBO. (*Id.*). As Grant well knows, this is far from an apples-to-apples comparison. Had Bennett been able to sell his shares, \$275 million would have been Grant's under the terms of the buyout agreement. Put differently, Grant stood to gain nearly \$300 million for his role in the fraud. There is no question that this is less than Bennett would have received, but not by a

margin nearly as wide as he suggests. Indeed, he stood to profit from the offense to a much greater extent than either Trosten or Maggio, whose future sentences Grant urges the Court to consider in fashioning a sentence for him. (Br. at 51-52).

Relatedly, Grant's suggestion that he is less culpable than Bennett because he was not motivated to participate in the fraud for money similarly misses the mark. (Br. at 51). Grant and Bennett had the same motivations for participating in the fraud. As owners of a company that was a financial train wreck and rife with fraud, they needed to sell the company to make money and stay out of jail. Contrary to Grant's assertions, there is ample evidence in the record to support the proposition that these twin motives were held in common by both Grant and Bennett. At the very same time in 1997 that Grant and Bennett agreed to hide losses and lie to banks, customers, and potential investors about those losses and about proprietary trading, Grant and Bennett were contemplating a sale of the company. (*See* GX-21 (Memo from Bennett to Grant and Dittmer ("If [selling the company] is the goal, then we should work towards a plan that produces a certain dollar value. We should be aware of what it will take to produce that value and try hard to stick to that plan.))). Grant participated in efforts to sell the company, both in connection with the PPA, which gave BAWAG an economic interest in Refco, and ultimately the sale of the company. Throughout the conspiracy, Grant assured Maggio that he and Bennett were going to deal with the financial wreck that the fraud-addled company had become by selling it. (*See, e.g.*, Tr. at 1818-19, 1825). Indeed, why else would Grant, knowing that the LBO participants had not been told about the \$1.1 billion in debt that RGHI owed Refco and were otherwise being defrauded, agree to sign the EPMA and allow the LBO to go forward? There can be no question that he hoped to avoid the detection of the fraud and expected a

massive payout in the process.

As to the payout, Grant makes the puzzling claim that Bennett “required” him to sign his buyout agreement and that the \$275 million payout was “essentially a fanciful construct of Mr. Bennett.” (Br. at 51). But there is no evidence that Bennett in any way coerced Grant to sign the agreement. And, of course, the prospect of a \$275 million payout was not at all fanciful – Bennett had \$1.3 billion of stock as a result of the IPO, and Grant was on the verge of receiving his substantial share of this sum at the time the fraud was revealed. To suggest that Tone Grant, a graduate of Yale College and Vanderbilt Law School, who is described in his sentencing memorandum as a strong-willed corporate executive, was strong-armed into an agreement that further committed him to participate in a fraud when he had no expectation of receiving any benefit in return simply blinks reality.

Grant is correct, however, that his role and Bennett’s role differed in one significant respect. While the core of the fraud – hiding the losses and the related-party receivable, lying about proprietary trading, and ginning up performance through revenue padding and expense shifting – was hatched by Bennett and Grant jointly, the mechanics of executing these facets of the fraud were left principally to Bennett. While Grant plainly lied whenever the opportunity presented itself, by virtue of Grant not being an officer of the company after 1999, Bennett clearly had more opportunities to do so. And, as Grant points out, creating the precise means for achieving the fraud – such as devising sham foreign exchange transactions – and then executing them fell to Bennett, who remained at the company after Grant left.

Of course, that Bennett’s and Grant’s roles in the fraud differed in these ways sheds little light on how those differences should be factored into a sentence for Grant. Grant makes no

claims that the differences in their roles are attributable to some effort on his part circumscribe his participation in the fraud, nor could he. The evidence at trial showed that he ably lied in service of the fraud whenever the opportunity presented itself, whether during his tenure as an officer of the company or later, through his written representations, when he played a pivotal role in the LBO. Rather, while he may not have been as active as Bennett in the execution of the fraud, his role as the passive owner of a fraud-riven company of course afforded him the precise type of deniability he offered at trial and now offers again at sentencing. The Government respectfully submits that, to the extent the Court considers giving Grant any credit for not having been responsible for the day-to-day operations of the fraud, it should be minimal in that while Grant's exposure may have diminished in the 1999-2004 period,⁵ he also took steps to increase his take from the fraud: first by assuming an increased ownership interest in RGHI and later through negotiations with Bennett to earn a hefty price for his agreement to sign off on the misrepresentations in the EPMA, namely, \$275 million. (*Compare* Email dated July 26, 2004, attached hereto as Exhibit E (reflecting a capped amount of \$193.5 million under the Grant buyout agreement) *with* unexecuted copy of buyout agreement, attached hereto as Exhibit F, at 2 (containing capped amount of \$243.5 million) *with* GX-1005.28, attached hereto as Exhibit G, at 2 (the final, executed buyout agreement containing capped amount of \$275 million).

In sum, for close to a decade, Grant and Bennett perpetrated a fraud to inflate the value of their ownership interests in Refco so that they could eventually convert those interests into

⁵ Of course, as the trial evidence made clear, once Thomas Dittmer and Ed Cox were no longer in the company by August 1999, there was no impediment to Grant returning to Refco. In fact, by that time he owned 50-percent of RGHI. Instead, Grant chose to allow Bennett, Maggio, and Trosten to be the public face of the fraud while he watched his the value of his ownership interest increase.

staggering wealth. For his part, Grant lied to the press, customers (such as the Soros Funds and Paribas), institutional investors such as Prudential, the participants in the LBO, and others. He supported the fraud in all of its facets from its start to its disastrous finish.

The Government respectfully submits that the nature and circumstances of Grant's offenses warrant a sentence that adequately reflects his Sentencing Guidelines offense level and is far in excess of the three-and-a-half years he seeks.

B. Acceptance of Responsibility

Of course, certain differences in Grant's and Bennett's conduct cut clearly and decidedly against Grant. Bennett pleaded guilty before trial, and his sentence reflects a reduction for acceptance of responsibility. Grant, on the other hand, went to trial and is not entitled to any credit for acceptance of responsibility. Indeed, he persists in his claims of innocence.

Accordingly, Grant is mistaken when he essentially recommends to the Court that it begin its sentencing analysis with the sentence imposed on Bennett – 16 years – and work down to a lesser sentence. Even assuming that Bennett's sentence is a benchmark from which Grant's sentence should be calculated, the appropriate starting point would be greater than 16 years.

The Sentencing Guidelines provide a mechanism for quantifying just how much greater than 16 years the starting point for an analysis of Grant's sentence should be. Under the Guidelines, a defendant is entitled to a three-level reduction of his or her offense level for acceptance of responsibility. Sentenced to 192 months' imprisonment, Bennett, with a Criminal History Category of I, was effectively sentenced to an offense level of 36 (188-235 months' imprisonment). Adding three levels to reflect no credit for acceptance of responsibility would yield an offense level, in Criminal History Category I, which is similarly applicable to Grant, of

39, with a sentencing range of 262-327 months' imprisonment, or at least approximately 22 years.

C. History and Characteristics of the Defendant

The bulk of Grant's brief is devoted to his background and discusses, among other things, his charitable works. (Br. at 1-40, 55-58). While it is certainly appropriate for the Court to consider the defendant's good works, which are not insubstantial, the Government respectfully submits that any credit given them must be balanced against the fact that his ability to perform many such good works resulted directly from the position in society that he achieved and the wealth⁶ that he accumulated as a result of the nearly decade-long fraud for which he is responsible.

Likewise, the Government submits that the testimonials to the defendant's character and honesty by his family and friends, which are recounted at length in Grant's sentencing memorandum, ought to be given little, if any, weight. Whatever experience of the defendant these people have had, the trial evidence made clear that he is someone deserving of no such esteem. There are some cases where it can be said that the defendant's offense conduct was in some way aberrant or representative of so brief a lapse in judgment that perhaps it is appropriate to give significant weight to an otherwise blameless life. This is not such a case. For nearly a decade of his professional life, the defendant lied, cheated, and stole his way through a scheme that defrauded victims out of \$2.4 billion and conferred upon him substantial personal wealth.

⁶ Grant argues that he deserves a lesser sentence than Bennett because he was not as wealthy as Bennett during the period of the fraud, as reflected in, among other things, a comparison of the cars that Bennett and he owned. (Br. at 50 & n.64). While it appears that Bennett may have lived more extravagantly than Grant, that is not the same as saying that Grant lived a monkish existence. For example, as the PSR makes clear, Grant has interests in multiple homes that, combined, are estimated to have a value of nearly \$10 million. (PSR ¶¶ 127-131). Of course, had the fraud been successful, he would have received \$275 million in addition to the \$16 million he received around the time of the LBO alone.

Of course, once the fraud was discovered, Grant attempted to shield some of his assets, transferring properties to both his wife and his girlfriend. (PSR ¶¶ 135-36). Even crediting the testimonials he has submitted at sentencing, the defendant, through his conduct in connection with Refco, has shown that he is not someone who deserves any benefit of the doubt with respect to this Court's judgment of his character.

In short, Grant's good works are simply overwhelmed by the enormity of his criminal conduct, as described above.

D. Application of Sentencing Guidelines

As we noted in the Bennett sentencing memorandum, 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, and continue to reflect "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 Grant.

As noted above, Grant has an offense level of 51, eight levels above the highest offense level in the Guidelines.

While the Guidelines themselves are certainly not controlling, the fact that Grant's advisory range is off the charts obviously reflects the seriousness of the offenses of conviction and the particular aggravating factors relating to his conduct.

Grant objects to only one aspect of the Probation Office's calculation of this offense level.⁷ Specifically, Grant challenges the application of the four-level sentencing enhancement for his having been "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" pursuant to U.S.S.G. § 3B1.1(a). (Br. at 42).

This enhancement is plainly applicable. The Commentary to Section 3B1.1 indicates that when considering whether a defendant is an organizer or leader, a court should weigh the following factors: "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed 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." U.S.S.G. § 3B1.1 App. n. 4.

Grant easily satisfies these factors. For example, Grant exercised decision making authority when, at the time of the Niederhoffer losses, he and Bennett committed Refco to a path of concealing the losses. As Maggio testified, it was Grant who came up with the plan to lie to Soros and implicitly directed his subordinate, Maggio, to lie as well in that meeting. (Tr. at

⁷ He argues generally, of course, that a non-Guidelines sentence should be imposed.

1701-04). He also exercised decision making authority by agreeing to permit Refco to publish fraudulent financial statements and agreeing, as 50-percent owner of RGHI, to sign off on the LBO when he knew that banks, bond purchasers, and investors were being defrauded in the process.

Grant's participation in the offense was, obviously, central to its commission. Not only did he lie repeatedly in service of the fraud about losses and proprietary trading, he was a pivotal actor in the LBO, which would not have happened had he not agreed to be bought out or to sign the EPMA.

Although Bennett arguably recruited the likes of Maggio and Trosten to the fraud, Grant played an important role in making sure that they continued their roles in the fraud, offering Maggio reassurances, for example, at times when Maggio reached levels of pique.

Grant certainly had a claimed right to a share of the fruits of the fraud that was considerably more substantial than any of his coconspirators except for Bennett.

Grant was also heavily involved in planning and organizing the offense, as he hatched both the scheme to lie about the losses and the "plan" to sell the company (as he repeatedly reassured Maggio), and was plainly aware of such things as revenue padding and expense shifting, which he obviously approved by allowing them to persist. Obviously, the scope of the Refco fraud, of which Grant was fully apprized, was breathtaking.

Finally, Grant exercised control and authority over others. As indicated above, he provided Maggio reassurance and provided Trosten encouragement for the job he was doing, which he knew to be in service of the fraud. Only a leader and someone with authority can provide such assurances. There was also evidence at trial that Grant, even after he left, kept tabs

on how his coconspirators were being compensated, (GX-3001 (July 16, 1999 Memo detailing Trosten’s compensation)), compensation that was plainly inflated to reflect their participation in the fraud and which, by virtue of his owning the company, was coming out of his pocket. In short, there is little question that Grant organized and led the Refco fraud. See *United States v. Wisniewski*, 121 F.3d 54, 58 (2d Cir. 1997) (vacating sentence and finding that record supported enhancement under Section 3B1.1 because defendant was owner of company where money laundering took place, he participated in criminal activity at the company, and he was a principal beneficiary of the conduct); *United States v. DeRiggi*, 72 F.3d 7, 8-9 (2d Cir. 1995) (“[W]hen a business’s top officer knows of corruption in the business and implicitly approves it by participating in the corruption, a four-level enhancement under § 3B1.1(a) is proper.”); *United States v. Duncan*, 42 F.3d 97, 105-106 (2d Cir. 1994) (affirming application of 3B1.1(a) where defendant, the president of a company through which the fraud was perpetrated, claimed to be a passive participant, because evidence supported the finding that he “knew of the corruption and profited from it.”).

In the face of these facts, Grant appears to suggest that he should not receive an enhancement for being an organizer or leader because “Phillip Bennett was *the* creator, organizer, initiator and leader of the fraud.” (Br. at 43) (emphasis in original). But “[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.” U.S.S.G. § 3B1.1 App. n. 4. See also *United States v. Huerta*, 92 F.3d 88, 92 (2d Cir. 2004) (“[T]he fact that others in the conspiracy also played leadership or managerial roles is ‘not dispositive’ of whether Huerta played such a role.”); *Wisniewski*, 121 F.3d at 58 (vacating sentence finding that “[t]he fact relied on by the district court, that

Wisniewski's co-conspirator, Stuart Solomon, played a larger role in the day-to-day management of the criminal activity of this case does not foreclose a finding that Wisniewski was also a 'leader' of the activity.'").

Finally, at all relevant times, the fraud involved at least five people (including, among many others, the defendant, Phillip Bennett, Santo Maggio, Robert Trosten, Steven Rossi, and Joseph Collins). Grant's claim to the contrary, (Br. at 42), is simply without foundation. Accordingly, a four-level enhancement under Section 3B1.1(a) is warranted.

To the extent that Grant objects to the leader or organizer enhancement – and more generally to a sentence in the order of the one Bennett received – on the ground that he was not an officer of Refco during much of the fraud period, it is worth noting that the Guidelines address this concern, in part. As the Court will recall, Bennett's Guidelines calculation differed from Grants in two ways. While on the one hand Bennett's calculation included a reduction for acceptance of responsibility, it also included a four-level enhancement for Bennett having been and officer and director of a publicly-traded company pursuant to Section 2B1.1(b)(15)(A)(I). This enhancement is not applicable to Grant because Grant was not an officer of Refco when it was public. In this way, the Guidelines account for the fact that Grant was not an officer of Refco, at least for certain period of the fraud. Grant nevertheless faces a Guidelines sentence of 85 years' imprisonment because his conduct was otherwise so egregious.

E. 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 to

achieve the goals of general deterrence in this case.

The positions Grant has taken at sentencing underscore the necessity of a substantial sentence to achieve the goals of general deterrence. Grant both persists in claiming that his conduct was not criminal and, assuming it to be criminal for purposes of argument at sentencing, trivializes it. He attempts to portray himself as a passive owner of Refco and then tries to use that portrayal to shield himself from any meaningful penalty on the ground that others had their hands on the levers of the fraud. He does this even though, apart from Bennett, he was the most significant beneficiary of the fraud, one of the largest in American history. If Grant is not given a substantial sentence, a clear signal will be sent to the owners, officers, and directors of America's corporations: If you are able to distance yourself from the levers of fraud – no matter your awareness that the fraud is occurring, no matter your desire that it occur, and no matter how much you stand to benefit from it – you can hide behind “plausible deniability” and hope for a significantly reduced sentence even after trial. A stiff sentence, however, will reaffirm the sobering message of the Court's imposition of a 16-year sentence on Bennett: Corporate fraudsters who expect to reap hundreds of millions of dollars in illicit profits will be sentenced to terms of imprisonment proportionate to the crimes they commit and the harms they inflict.

Of course, Grant's argument is precisely the type that the reforms implemented after Enron were meant to address by making corporate executives more accountable for what happens in their companies and by depriving them of the ability to escape responsibility because they were not in the trenches of the fraud daily. A significant term of imprisonment is warranted to deter others from ignoring those same warnings today.

Thus, to effect the goal of general deterrence, the Court should impose a sentence on par

with the sentence Bennett received in order 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.

F. 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 the Refco fraud with other major frauds are the unique characteristics of the Refco fraud. The Court is aware from the extensive briefing in connection with the Bennett sentencing of the ways in which the Government believes the Refco fraud is similar and distinguishable from the more notable frauds that have been prosecuted in this District and, to the extent applicable, those arguments are incorporated by reference herein.

The Government will address in this Memorandum, however, the one (and only) comparison that Grant makes to another case in this District, principally because Grant requests to receive substantially the same sentence.

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 three-and-a-half years' imprisonment, a non-Guidelines sentence. Superficially, *Adelson* offers Grant some argument for a reduced sentence:

like Grant, Adelson took the Government to trial.

Even a cursory review of Judge Rakoff's sentencing opinion, however, reveals that Grant and Adelson are nothing alike in ways that matter most to Grant'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 Grant's conduct amounted to \$2.4 billion.

More significantly, Adelson's role in the fraud at Impath is wholly dissimilar to the role Grant 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, 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 Grant, who was not only the President of Refco at the fraud's inception but who also, with Bennett, helped concoct the fraudulent "plan" for Refco. As explained in detail elsewhere in this memorandum – and as the testimony at Grant's trial plainly demonstrated – Grant was one of the originators of the Refco fraud, remained a pivotal player for the life of the fraud, and, apart from Bennett, stood the most to gain from the fraud.⁸

⁸ In any event, the Government's view is that Judge Rakoff's sentence in *Adelson* was substantively unreasonable and has appealed the sentence.

G. 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 on the same schedule as Bennett. 18 U.S.C. § 3664(d)(5) (granting up to 90 days to finalize restitution order).

H. 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 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, reflect a step in the progression toward greater deterrence of white-collar crime, and reflect decisions by Congress and the Sentencing Commission that such increased deterrence is necessary and fair.

Grant's willful frauds on Refco's investors, purchasers, customers, counterparties, banks, the public and others resulted in countless victims being defrauded out 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, brought him to the brink of great wealth. In terms of scope, length, sophistication, harm, and criminal benefit, the fraud at Refco ranks among the worst white collar crimes in history and Grant, along with Bennett, was primarily responsible for that crime. Accordingly, the Government respectfully

submits that an appropriately stiff term of imprisonment, consistent with the sentence imposed on Bennett, 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, Grant should be sentenced to a term of imprisonment consistent with the sentence imposed on Bennett and far in excess of the three-and-a-half years he seeks.

Dated: New York, New York
July 31, 2008

Respectfully submitted,

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