UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

TONE N. GRANT,

Defendant.

S4 05 Cr. 1192 (NRB)

DEFENDANT TONE GRANT'S REPLY SENTENCING MEMORANDUM

Zuckerman Spaeder LLP
1800 M Street, NW
Washington, DC 20036-5802
Telephone (202) 778-1800
Facsimile (202) 822-8106

Attorneys for Tone Grant

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I. INTRODUCTION

Found guilty of five counts of conspiracy and related offenses in connection with the Refco fraud, Tone Grant stands before the Court for sentence. As by now is well known, Grant was a Refco executive for about 26 months of the seven year conspiracy, a co-owner of Refco with Phillip Bennett throughout, gone from his executive position with the company for five years before the leveraged buyout by Thomas H. Lee Partners, barred from entering the premises of the business by direction of Phillip Bennett throughout that period, periodically lied to by Bennett about Refco's financial condition in the early years of the fraud, and the victim of Bennett's thievery of the NAVTEQ stock during the later years. In addition, Grant bore no role in the round-tripping that Bennett conceived and implemented, bore no responsibility for the financial affairs of the company, had no connection of consequence with the auditors or accountants of the company, had no connection with the company's lenders after 1999 nor with its other counterparties, and was kept outside of the negotiations and discussions attending the Lee transaction and all of the activities that followed.

We have urged that these undeniable circumstances necessarily yield the conclusion that Phillip Bennett played a far superior role in the charged conspiracy, that in any objective sense Grant's role was a mere fraction of Bennett's, that Grant's knowledge of the core activities of the company (received in the main from Bennett) was far more limited, incomplete and at times much less accurate than Bennett's, and that as a consequence of these factors Grant's culpability is a mere fraction of Bennett's.

The government zealously takes issue with that proposition. The quality of its argument may be measured in two ways, the most important of which is the content of the record. In the body of this pleading, we compare the government's assertions against that record. But the

quality of the government's argument may also be measured against its own prior articulation of Bennett and Grant's relative culpability. We are fortunate enough to have a written exposition of the government's view of Phillip Bennett's culpability in its Bennett Sentencing Memorandum (cited herein as "BSM"), filed on June 6, 2008. A comparison of the government's assertions to this Court in its Bennett Sentencing Memorandum with its assertions in its Grant Sentencing Memorandum (cited herein as "Br."), filed less than two months later on July 31, 2008, is instructive. For the convenience of the reader, we set out in chart form below a few examples from the two documents.

<table>
<tr><th colspan="2">WHO STOOD AT THE PINNACLE OF THE FRAUD?</th></tr>
<tr><td>June 6 Bennett Memo:

Bennett "stood on top of a conspiracy of historic proportions." Page 1.</td><td>July 31 Grant Memo:

Grant "stood side-by-side with partner and coconspirator Phillip R. Bennett in perpetrating a fraud of historic proportions." Page 1.</td></tr>
<tr><th colspan="2">WHEN DID THE FRAUD BEGIN?</th></tr>
<tr><td>June 6 Bennett Memo:

The Refco fraud started in the mid-1990s. "Starting with horrific losses born from a customer called Trade & Marine..." Pages 1-2.</td><td>July 31 Grant Memo:

No mention of Trade & Marine in the Grant memo. Grant had a role in the fraud "at its outset" when he lied about the Niederhoffer losses. Page 14.

"Grant's involvement in the Refco fraud started no later than 1997." Page 2.</td></tr>
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WHO ORIGINATED THE FRAUD?	
June 6 Bennett Memo:	July 31 Grant Memo:
"Bennett originated the fraud." Page 30. Bennett was the "instigator-in-chief of the fraud at the company." Page 48.	"Grant was just as much an originator of the Refco fraud as Bennett and is equally responsible for its genesis." Page 14. "[Bennett and Grant] equally hatched and executed a plot to conceal Refco's losses." Id. "Grant was one of the originators of the Refco fraud." Page 29.
WHO WAS THE MASTERMIND OF THE FRAUD?	
June 6 Bennett Memo:	July 31 Grant Memo:
"Bennett, of course, was the mastermind of the Refco fraud in all of its many facets." Page 51. Bennett was "the architect of the Refco fraud." Page 2. "Bennett . . . was [the fraud's] organizer and leader." Page 30.	"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." Page 24. "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." Page 18.

Given that the government is about the business of doing justice and not merely advocating zealously, one might have expected a more consistent recitation of its views. It is fair to question the seriousness of its positions regarding Mr. Grant, we respectfully observe, in light of the considered remarks to the contrary offered to this Court less than two months ago.

It is also fair, as we have observed above, to hold the government to the record in this case. And that record also gives it no comfort in its present reversal of position.

II. ARGUMENT

A. History and Characteristics of the Defendant

Contrary to the government's argument that "Grant's good works are simply overwhelmed by the enormity of his criminal conduct" (Br. at 22), the Court's evaluation of Mr. Grant's culpability must take account of his life's work. 18 U.S.C. 3553(a) instructs the Court to consider, *inter alia*, "the history and characteristics of the defendant." The government seeks to read this provision out of the statute entirely. Under the government's interpretation of the sentencing statute, if the crime itself is sufficiently serious, the court need not consider any of the other factors set forth in § 3553(a). Because, in the government's view, this is such a case, Mr. Grant's lifetime of pursuing good causes counts for nothing; for purposes of sentencing he may as well have been the career criminal that Santo Maggio was. Yet Mr. Grant has not lived the corrupt and venal life that Mr. Maggio has and, under our sentencing framework, that matters. The manner in which Mr. Grant has lived his life is instructive on issues of motive, criminal intent, and relative culpability. Compared to his co-conspirators, Mr. Grant has never been motivated by money; he has never lived a lavish lifestyle; he has demonstrated no reason for an objective observer to think that he would reject the principles of honesty and integrity that he has attempted to instill in his family and hundreds of young people simply so he could accumulate greater wealth. Thus, whatever the basis for the jury's finding that Mr. Grant intended to join the conspiracy, it makes no sense to argue (without support) that his motivation for doing so was pure, unadulterated greed.

The government seeks to minimize the significant social contributions that Mr. Grant has made throughout his life. (Br. at 21). The government argues that these contributions, which it concedes "are not insubstantial," should "be given little, if any, weight" because "his ability to

perform many such good works resulted directly from the position in society that he achieved and the wealth that he accumulated as a result of" the fraud. (Br. at 21). This characterization of Mr. Grant's efforts to make other people's lives better simply does not square with the facts. Mr. Grant co-founded the Music City Track Club in 1979, before he even worked at Refco. (Lewis Letter). He did so not with any accumulated wealth; rather, he took loans to support the program in its early years. Mr. Grant's financial support of Adrian Aragon, the troubled former Marine whom he successfully defended from court martial in Vietnam, occurred in the 1980's, well before the government claims there was any fraud at Refco. (Aragon Letter). Mr. Grant's support for the Better Boys Foundation in Chicago has been longstanding; he helped raise over $1 million for the organization in the early 1990's, also before the government alleges the conspiracy commenced. Mr. Grant's decorated service to his country during the Vietnam War cannot be tarnished by any subsequent association with the fraudsters at Refco. Perhaps it is the case that most white collar criminal defendants finance their charitable efforts with the proceeds of fraud, but that is not the case here. The government's attempt to summarily dismiss Mr. Grant's good works as having "resulted directly" from the fraud simply does not hold up under scrutiny. The government simply cannot challenge the fact that Mr. Grant has lived a life uncommonly devoted to serving as a positive and constructive influence in the lives of others.

The government attempts to lump Mr. Grant in with his profligate co-conspirators by claiming that he owns houses worth nearly $10 million. (Br. at 21). What the government ignores is that the value of Mr. Grant's home in Evanston and two condominiums in Chicago is the result of rising real estate prices, not extravagant spending. As documented in the materials provided to the Probation Office, Mr. Grant bought the house in Evanston more than 20 years ago, at a significantly lower cost than its present value. The two Lake Shore Drive apartments

were first rented by Mr. Grant during the mid-1980's and then purchased by him approximately 18 years ago when the building converted to condominiums. All three properties were bought well before any fraud occurred at Refco. Moreover, for almost 20 years Mr. Grant has lived in the small one-bedroom apartment at 680 Lake Shore Drive, despite having the means to purchase a much larger home. This is not the conduct of a man who finds motivation in ostentatious displays or the accumulation of wealth.

When one combines the humble and modest nature of Mr. Grant's lifestyle with the truly significant contributions he has made to his country, community and family, one discovers a sentencing profile that differs dramatically from those of the other co-conspirators in this case, and from those typically encountered by sentencing courts. Section 3553(a) compels the Court to take these differences into account in arriving at a sentence that is proportionate and just.

B. Nature and Circumstances of the Offense

1. The Guidelines Analysis

(a) The Role of the Guidelines

The government's argument on the Guidelines, which they insist "continue to play a critical role" in sentencing, could have been written in 2005. (Br. at 11). It never mentions Gall v. United States, 128 S.Ct. 586 (2007), United States v. Kimbrough, 128 S.Ct. 558 (2007), or Rita v. United States, 127 S.Ct. 2456 (2007). These cases, of course, transformed the role of the Sentencing Guidelines and made clear that, contrary to the government's argument (Br. at 11), the applicable Sentencing Guidelines range will *not* necessarily be the benchmark point of departure for a sentencing court in any particular case. Instead, the Court is free to reject the Sentencing Guidelines, a particularly appropriate reaction where, as here, the applicable Guidelines range are the result of political considerations instead of the Commission's

"characteristic institutional role" to "take account of empirical data and national [sentencing] experience." Kimbrough, 128 S.Ct., at 568-70.

2. Role Enhancement Under § 3B1.1

As explained in Grant's initial Sentencing Memorandum, at 42-43, he should not be assessed a role enhancement under U.S.S.G. § 3B1.1, because Mr. Grant did not supervise *anybody*. Under § 3B1.1, Application Note 2, "to qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." Application Note 1 makes clear that "a 'participant' is a person who is criminally responsible for the commission of the offense." The Second Circuit has repeatedly confirmed that, absent proof that the defendant "supervised or managed" another participant *in the crime*, the enhancement may not be applied. See, e.g., United States v. Garcia, 413 F.3d 201, 223 (2d Cir. 2005); United States v. Birkin, 366 F.3d 95, 101 (2d Cir. 2004) (vacating sentence where there was no finding that defendant managed or supervised another participant); United States v. Burgos, 324 F.3d 88, 92 (2d Cir. 2003) (finding that court erroneously applied enhancement without evidence that defendant "managed or supervised" at least one other participant).

The government certainly has a large field of participants from which to choose people whom Mr. Grant ostensibly supervised, since there is no requirement that the criminally culpable participant be someone who was convicted (or even charged). U.S.S.G. § 3B1.1, Application Note 1. It is therefore telling that the two people whom the government claims Grant supervised were Trosten and Maggio, and that the proffer for Grant's supervision of these men is as weak as it is.

According to the government, "[a]lthough Bennett arguably[1] 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." (Br. at 24). However, a review of Maggio's and Trosten's testimony in this regard reveals that, even if one accepts their testimony as wholly truthful and unshaded, Grant did nothing more than express gratitude for their hard work. Maggio testified that Grant called him to thank him for his hard work, offer encouragement, and wish him Merry Christmas. (Tr. at 1712-14, 1774-75, 1904). Trosten testified that he spoke to Grant "infrequently" after 1999, and the topic of these limited conversations was to congratulate Trosten for completing an audit, or to simply "say hello." (Tr. at 913).

These "attaboy" conversations do not constitute "supervision" or "management" by Grant. Both Trosten and Maggio took direction from, and reported to, Bennett; neither man had a dual reporting responsibility to Grant at any time. The evidence shows that both men were willing to, along with Bennett, lie to and conceal material facts from Mr. Grant (Maggio with the Asian losses and Trosten with the theft of the NAVTEQ stock). The sole concrete "example" of supervision offered by the government was that Grant purportedly "came up with the plan to lie to Soros and implicitly directed his subordinate, Maggio, to lie as well in that meeting." (Br. at 23). As set forth below, this is simply false, since Maggio himself lied to Soros at least twice before Grant was even aware of the issue.

Even if the government could show that Grant supervised another participant, the factors set forth in Application Note 4 (the exercise of decision making authority, the nature of

[1] It is a measure of the government's disingenuousness that they couch this "concession" in this form. What is "arguable" about the fact that Bennett recruited both Maggio and Trosten to the fraud, a fact that both cooperating witnesses testified to at some length?

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) militate against application of the enhancement. Grant's alleged role in the offense was far too minor, and passive, to satisfy these factors, and, contrary to the government's repeated claim, Grant did not claim a "larger share of the fruits of the crime." (Br. at 24). As discussed, *infra*, the $275 million figure that the government likes so much was nothing more than a cap, and according to the terms of the Stock Purchase Agreement, Grant would never see a penny of that until such time as the receivable was completely paid off. In contrast, Bennett, Trosten, Maggio and others at Refco all became fabulously rich while the receivable still existed.

Nor does the caselaw cited by the government assist it. (Br. at 25). The government cites no case where a court found that minimal and casual contacts of the sort present here constituted "supervision" or "management." The cases cited by the government, in contrast, all involved actual supervision or leadership. See United States v. Wisniewski, 121 F.3d 54, 58 (2d Cir. 1997) (Defendant was "ultimately responsible for hiring and supervising the other conspirators in this case."); United States v. DeRiggi, 72 F.3d 7, 9 (2d Cir. 1995) (Defendant in taxi inspection corruption case was "responsible for assigning inspectors to specific lanes, and he took care to assign the corrupt inspectors to work together in the same lanes."); United States v. Duncan, 42 F.3d 97, 106 (2d Cir. 1994) (Defendant was "frequently the central figure" in corrupt real estate venture, and was "directly involved in dispensing favors and payments," as well as "a principal figure in numerous other entities that were also instruments of corruption.").

The government cited these same cases in Burgos, in arguing that the owner of a business who actively participated in criminal activity through that business should be awarded a role adjustment under § 3B1.1. 324 F.3d at 93. The Second Circuit rejected this argument, noting "we have never upheld such an adjustment solely on the basis that the business premises were the location of some of the criminal activity, or that one of the company's employees also participated in the illicit business." Id.

Finally, the Court should reject the government's purported attempt (Br. at 26), to give Grant "credit" for the fact that he was "not an officer during much of the fraud period" by pointing to the inapplicability of U.S.S.G. § 2B1.1(b)(15)(A)(I), which provides a four-level enhancement to defendants, like Bennett, who were officers or directors of a publicly-traded company. This addresses Grant's absence from the company for only two months, from August 2005 until October 2005. Grant would get the same "benefit" if, instead of being expelled from Refco in April 1999, he had remained a company executive and actively participated in the fraud until just before the IPO in 2005.

C. Grant's Role in the Offense

1. Grant did not "originate" the Refco fraud.

As part of its effort to equate Mr. Grant's role to Mr. Bennett's (and to distance Grant from the defendant in United States v. Adelson, 441 F.Supp.2d 506 (2d Cir. 2006)), the government repeatedly accuses Grant of, together with Bennett, originating the fraud at Refco. Thus, according to the government, "Grant was just as much as an originator of the Refco fraud as Bennett and is equally responsible for its genesis." (Br. at 14; see also Br. at 15 ("Grant helped hatch the Refco fraud."); 18 ("[T]he core of the fraud … was hatched by Bennett and

Grant jointly); 24 (Grant "hatched both the scheme to lie about the losses and the 'plan' to sell the company."); p. 29 ("Grant was one of the originators of the Refco fraud.")).

This is simply false. The evidence at trial shows that the Refco fraud started in the mid-1990's and continued with the Asian losses in the summer of 1997. The government, of course, knows this. (See BSM at 1-2 (fraud started "with horrific losses born from a customer called Trade & Marine.")). Mr. Grant had nothing to do with, and no knowledge of, either these losses or Bennett's decision to hide them. In fact, Maggio himself testified about a conversation he had with Bennett in which Bennett acknowledged that he had withheld from Grant, who was the President of Refco at the time, information about the Asian losses, which were the single-largest source of Refco's financial problems. (Tr. at 1983-84). It is therefore clear that, unlike Bennett, and like Adelson, to the extent Mr. Grant was a member of the conspiracy, he joined it later, after it had already been created by others, and that he cannot fairly be termed a "founding father" (Br. at 2), or an "originator" of the "Refco fraud." (Br. at 29).

One way that the government attempts to evade this simple truth is by redefining the Refco fraud and essentially postdating its inception until such time that there was some involvement by Tone Grant. Thus, according to government, the Niederhoffer losses represent the fraud's "outset" (Br. at 14), and Grant was "a founding father of the fraud that ensued." (Br. at 2). This directly contradicts the position taken by the government at Bennett's sentencing and the facts in the record.

Moreover, it is simply not true that "both Bennett and Grant were at least equally responsible for Refco's handling of the Niederhoffer debacle."[2] Although it is true that, because the Niederhoffer losses occurred in Refco, Inc., the futures brokerage managed by Mr. Grant, Grant had some involvement in this incident, the record at trial reveals that Bennett took the lead in both liquidating Mr. Niederhoffer's investments and transferring a portion of the loss off of Refco's books. According to Mr. Niederhoffer, he had a series of conversations with Mr. Bennett during and after the losses, and Bennett was the one who negotiated the mutual releases between the Niederhoffer funds and Refco. (Tr. 118-22). According to Maggio, it was Bennett who instructed him to get an intraday loan to cover the losses, leading to the need to increase the "fails" in order to cover the hole (Tr. 1684), and it was incontrovertibly Bennett who handled the arrangements by which the Niederhoffer collateral was acquired, managed and disposed of. (Tr. at 118-19, 1683, 2031-32, 1173). Tone Grant had no involvement in any of this, a point driven home rather forcefully by the fact that one of the most valuable pieces of the Niederhoffer collateral — the NAVTEQ stock — was later stolen from the company by Bennett, Trosten and Phil Silverman. (Tr. at 1170).

Nor is it true that Grant took the lead in lying to people about the Niederhoffer losses. He had one conversation with Greg Burns, the reporter from the Chicago Tribune, and this was early on, before it was clear what the fallout from Niederhoffer would be. (Tr. at 1261). In fact, at that time, Niederhoffer himself told Mr. Burns that he believed that he would be able to cover the

[2] This phrase, assigning both Bennett and Grant "at least equal" responsibility in the Niederhoffer chapter, is another example of the government twisting the English language in its zeal to exaggerate Grant's culpability and persuade the Court to impose a harsh sentence. Two people can be "equally responsible" for an act (although this is not the case here, where Bennett bears primary responsibility), but it is difficult to understand how two people can both be "at least" equally responsible, since this phrase is, by its nature, a measure of relative culpability. If one person is more than equally responsible, then the other is necessarily less than equally responsible. The government's illogic is reminiscent of Garrison Keillor's Lake Wobegon, where all the children are "above average."

losses in his Refco accounts. (Tr. at 1262-65). When Burns called back later, he did not speak to Grant. (Tr. at 1267). Moreover, Greg Pappas' best recollection was that it was Bennett, and not Grant, who told him that the Niederhoffer losses were minimal. (Tr. at 667).

Finally, the government's description of Grant's role with respect to the Soros fund is simply contradicted by the evidence. According to the government, it was Grant who conceived of the "plan" to lie to Soros about the Niederhoffer losses. The government, in fact, makes this statement three times. (Br. at 3 ("[Grant] 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"); at 15 ("[Grant] "conceived of the plan to deal with the threat from Soros to withdraw its funds from Refco."); at 23 ("As Maggio testified, it was Grant who came up with the plan to lie to Soros")). It's still false. Maggio *himself* testified that he had lied to Soros *twice* (and Doug Reid once) about the Niederhoffer losses before Grant was even conscious of Soros' threat to withdraw its funds. (Tr. at 2038-40). Grant could not have "conceived" or "devised" or "come up with" a plan to lie that Maggio had already put in action.

In addition to the clear fallacy that lying to Soros was Grant's idea, there is no evidence that Grant was the primary author of the specific presentation during the Reid meeting. In fact, the only distinction between Grant, on the one hand, and Maggio and Bennett on the other, in the days before meeting with Reid was that, while Bennett and Maggio were panicked, Grant was "very strong." (Tr. at 1700). Of course, this is precisely what one would expect from someone who believed that Refco was a fundamentally sound company and was kept wholly ignorant of the preceding losses, like Trade & Marine and the Asian customers.

The government's reliance on the Soros meeting as proof that Grant was a driving force behind the conspiracy is also misplaced, given Reid's trial testimony. Reid testified that the central message of the meeting was a plea to Soros to keep its money in Refco, and an argument that, while the company was not in financial extremis at the moment, a withdrawal by Soros could have that effect. Reid did not recall being told that there were only minimal losses from Niederhoffer. (Tr. at 2279-80). Indeed, as a fund that itself provided money to Niederhoffer to manage, Soros was one institution that knew that Niederhoffer had suffered severe losses in the market's recent plunge. (Tr. at 2280).

2. Any criminal involvement by Grant was of far more limited duration than the other co-conspirators.

The government resists Grant's claim that Bennett's involvement in the conspiracy lasted longer than any involvement by Grant, arguing that Grant was a member of the conspiracy "for the long haul," and that he could not have been "expelled" from Refco "because he owned it." (Br. at 15). This is precisely the point. As a part owner of RGHI, Grant could not be forced to give up his indirect ownership interest in Refco. However, he could be, and was, expelled from the company itself, and from all affiliated boards, and from its offices and buildings. In this vein, it is interesting to contrast Bennett's attitude toward Grant's exit from Refco with his reaction to the possible departures of other, key, co-conspirators. Although Bennett actively joined with Cox's business partner, William Graham, and Dittmer to expel Grant from Refco (Tr. at 555-56), he went to great lengths to ensure that co-conspirators whose presence he deemed important to the success of the fraud, like Rossi, Trosten and Maggio, stayed with the company. (Tr. at 323-37, 870-71, 1812-13).

In an effort to minimize the impact of the paucity of lies told by Grant, the government argues, essentially, that Grant would have lied far more, if he had only been given the chance. Grant lied, the government argues, "whenever the opportunity presented itself," and any lack of lying on Grant's part is "not attributable to some effort on his part [sic] circumscribe his participation in the fraud." (Br. at 18-19).

First, this is wholly inconsistent with the government's (unsupported and untrue) claim on the same page that "as the trial evidence made clear, once Thomas Dittmer and Cox were no longer in the company by August 1999, there was no impediment to Grant returning to Refco."[3] (Br. at 19 n.5). If the door had been open to Mr. Grant to return to Refco after Dittmer and Cox were bought out, presumably he had the opportunity to participate in Bennett's campaign of deception between 1999 and 2005 and declined to do so.

Second, the government ignores the fact that Bennett chose his lieutenants for a reason: he knew that they could be counted on to tell the most bald-faced lies to auditors, counterparties and potential investors alike. The fact that Mr. Grant was not in those meetings with Lee, and that he had virtually no contact at any time with the company's auditors, and that he didn't participate in the pre-LBO or pre-IPO selling of Refco, is a function of Bennett's recognition that Mr. Grant, unlike himself (and unlike Mr. Maggio and Mr. Trosten, and others) is a fundamentally honest person.

This is why the government's attempt to transform Tone Grant into a mini-Bennett is so misplaced. The evidence at trial established that Mr. Bennett lied to everyone, including Mr.

[3] In fact, Grant was ousted from Refco by a corporate resolution signed by, among others, Philip Bennett, and it was Bennett who told Maggio that he didn't want Mr. Grant to come to Refco's offices, so that no one would be confused about who was in charge. (Tr. at 1840).

Grant, and including Thomas Lee and Scott Schoen, and that he was very, very good at it. (Tr. at 767, 1065). In response, the government attempts to persuade the Court that Grant, too, was an excellent liar. They argue that Mr. Grant was "just as willing and able to 'engage in frontline lying and deception'" as Bennett. (Br. at 15). They claim that Grant was an "effective" liar and cite to a portion of the transcript where Pappas testified that he was "impressed by Grant."

Mr. Pappas, however, testified there that he was "impressed" with Bennett and Grant because Refco had sent such senior executives to the meeting, and because he felt that "they knew the business." (Tr. at 660). Pappas did not testify that he was impressed with Grant's ability to lie. In fact, Pappas was unable to recall any specific statements made by Tone Grant and testified that Bennett did most of the talking (Tr. at 654), and was, in particular, likely the one who described the Niederhoffer episode to him. (Tr. at 667-68).

3. Proprietary Trading

The government also accused Grant of ignoring "his role in lies told about proprietary trading," (Br. at 3), which the government characterizes as part of "the core of the fraud." (Br. at 18).

Proprietary trading was not part of "the core" of the Refco fraud. The fraud, as described by the government itself, was a scheme "to hide the true financial health of Refco from its banks, counterparties, auditors and investors" and thereby keep Refco in business until it could be sold for a profit. (S4 Indictment, at ¶ 6). As the evidence at trial showed, Refco's "true financial health" was poor, due to a number of large losses, caused by events like the Asian debt crisis, market crashes, insufficiently hedged customers, and the Russian Government's default on its debt. But proprietary trading was not the culprit in these huge losses. In fact, the Indictment's

sole "example" of a loss from proprietary trading, the $40 million loss from the Russian bonds investment,¶ 14, was revealed at trial to have resulted from *non*-proprietary trading. (Tr. at 1742, 2150-53). And the sole "example" of Mr. Grant's knowledge of proprietary trading had to do with Arlene Busch's group, which actually *made* money each year. (Tr. at 623).

Not only was proprietary trading not the cause of the $1.1 billion hole at Refco, lying about proprietary trading was never a topic of discussion among the conspirators. This is apparent from the portions of the transcript cited by the government itself, such as Maggio's testimony regarding the discussions of proprietary trading at the leadership retreats in 1998 and 1999. (Br. at 3). Later, Maggio conceded that these discussions involved whether and how to conduct proprietary trading profitably, not how to lie about it. (Tr. at 2127). Maggio further testified that, while the co-conspirators went to great lengths to hide the existence of the hole, he could not recall ever discussing the need to disguise the fact that Refco engaged in proprietary trading. (Tr. 2174). Finally, the evidence at trial was that the existence of proprietary trading at Refco was open and notorious. (Tr. at 630-31 (Arlene Busch testimony that no one at Refco told her to hide the fact that she was proprietary trading, about which she gave interviews to journalists and authors, and that "everyone knew what we were doing."); Tr. at 682 (documents provided to Prudential describing "haircuts for proprietary positions"); Tr. at 2421-22, GX 1416 (documents provided to HSBC explicitly state that Refco may invest money in entities or individuals conducting proprietary trading)).

4. The Lee Transaction

As it did at trial, the government's argument for Mr. Grant's criminal culpability in the context of the leveraged buyout of Refco by Thomas H. Lee rests almost wholly on Mr. Grant's handwritten notes of his May 17, 2004 meeting with Phillip Bennett, produced by Mr. Grant

himself. Describing the Lee transaction as Mr. Grant's "most significant contribution to the fraud," the government flays him for information he received at the May 17 meeting that the "real debt" was $1.1 billion, an amount not found in the financials but rather appearing in Mr. Grant's notes of the meeting.[4] (Br. at 7). Thus, to understand what, in fact, Mr. Grant's "most significant contribution to the fraud" was, it is instructive to examine the details of the Lee transaction. Under such scrutiny, the government's contention that Mr. Grant received full, complete and unvarnished disclosure from Mr. Bennett not only of Refco's financial predicament but also of Thomas H. Lee's ignorance of that predicament is far from certain and ultimately speculative.

First and foremost, it is essential to keep in mind that by the time of the Lee transaction, Mr. Grant had been out of the company – literally out of the building and removed from any position of authority – for approximately five years. During that time, Mr. Grant's primary (indeed, for all intents and purposes, sole) source of information regarding the company was Phillip Bennett. Mr. Bennett's prowess at deception is well-documented in the trial record and need not be recounted in depth here except to highlight that the record is also replete with instances in which Mr. Bennett deceived Mr. Grant or withheld information from him in order to serve his purposes.[5] We know Bennett told Grant that the "real debt" was $1.1 billion and that certain other obligations existed, for that is contained in Grant's careful notes. (See GX 8047). The only other evidence regarding the content of the May 17 meeting is co-conspirator testimony regarding Bennett's remarks that he was going to meet with Grant to tell him the company was

[4] Oddly, unlike other portions of its memorandum, the government studiously avoids any citation to the notes, GX 8047, despite the fact it is the only evidence proving that Mr. Grant knew the "real debt" to be $1.1 billion at the time of the closing.

[5] Notable examples include the Trade & Marine losses, the Asian losses, and the theft of the NAVTEQ stock. See also, *infra* at 24.

in poor shape, that thereafter he had met with Grant and Grant seemed reasonable. Precisely what Bennett said and whether Bennett was candid or his famously dishonest and manipulative self is just speculative.

Second, Mr. Grant had no contact with any representative of Lee or any other counterparty or their representatives. In a functional sense, he was sidelined in precisely the manner he had been for the preceding five years. The government contends that Mr. Grant had contact in the form of documents that he signed, which were transmitted to Lee and others involved in the transaction. This is not "contact" in any commonsense use of the word. Mr. Grant never spoke to or negotiated with any representative of Thomas H. Lee. Mr. Grant was never contacted by Lee or any member of Lee's due diligence team to discuss any aspect of Refco's operations. Mr. Grant did not prepare the 2004 financial statement (which he received but did not sign); he did not prepare the Equity Purchase and Merger Agreement or the Stock Purchase Agreement. Nor did he transmit those documents to Lee, or others. To equate Mr. Grant's conduct during the LBO – signing two documents presented to him by Mr. Bennett – with that of the other co-conspirators who engaged in front-line deception and daily manipulation of Refco's financial markers in order to accomplish the fraudulent scheme is nonsensical.

Third, a close examination of the documents reviewed and signed by Mr. Grant does little to clarify whether Mr. Grant was fully aware of the ongoing deception of Thomas H. Lee. The evidence fairly allows the inference that he had access to the deal documents: the April 19, 2004 letter of intent which Lee sent to Bennett; the Equity Purchase and Merger Agreement ("EPMA"), which Grant signed; and the Stock Purchase Agreement ("SPA"), which Mr. Grant

also signed. The evidence also fairly allows the inference that he had access to the February 29, 2004 financial statement.

The February 29, 2004 financial statement showed that all related party debt had been retired as of that date. (GX 1004, Note I at 13.) Yet the April 19, 2004 letter of intent showed that something in excess of $100 million was in fact still owed by RGHI to Refco and that a distribution of $120 million would be made to retire that amount at or before closing (GX 1003, ¶ (3)(iii)). The Equity Purchase and Merger Agreement itself, executed in August 2004, references the same extant related party obligation running from RGHI to Refco (GX 1005.1, section 5.1(c), (iii)). So there is an uncertain, if not confusing, lack of congruence between the financial statement on the one hand, and the letter of intent and the EPMA on the other hand, as to whether substantial funds were still owed to Refco by related parties during the summer of 2004. The government has not introduced evidence that reconciles these contradictory documents.

Mr. Grant's understanding of the accuracy of the EPMA and letter of intent vis a vis the 2004 audited financial statement is not at all clear from the record. It is clear from Mr. Grant's handwritten notes that, when he met with Bennett on May 17, 2004, Bennett gave him the full amount of the related party receivable ($1.1 billion). Mr. Bennett's explanations to Mr. Grant regarding the numbers are less clear. Santo Maggio testified only that Bennett said he was going to "remind" Tone the company was in bad shape, presumably so that Grant would temper has demands for money.[6] (See Tr. at 1885, 1887).

[6] Of course, Mr. Bennett would not need to "remind" Mr. Grant about Refco's financial problems if he had truly been keeping him apprised of Refco's *real* financial condition during the numerous phone calls that the two men had between April 1999 and May 17, 2004.

Grant thereafter executed two documents. He signed the Stock Purchase Agreement, under which in paragraph 2.6(e) he promised to take nothing of his capped amount until the Aggregate Obligations of RGHI , the related party debt whatever its amount, was paid in full. (See GX 1005.28, Section 2.6 (e)). Under the Stock Purchase Agreement, which was available to Lee as part of the closing documents, Grant received the sum of $4,000,000 from the $1.8 billion purchase price. The government makes much of the potential $275 million interest Mr. Grant retained under the SPA but it ignores the fact that by the terms of that document, Mr. Grant would not receive a penny until RGHI's related-party debt was paid off in full. This is absolutely critical. Mr. Grant was alone among Refco executives in this regard. Mr. Trosten, Mr. Maggio, Mr. Dittmer, Mr. Klejna, and even Mr. Bennett received huge sums of money from the sale of Refco, free and clear of any responsibility to pay off the "hole." Mr. Bennett, who achieved a personal net worth of roughly $1.3 billion through the sale of Refco and the IPO, was under no obligation to pay down the receivable prior to pocketing his money. Only Mr. Grant, under the terms of a document drafted by Mr. Bennett, deferred the bulk of his portion of the proceeds of the sale of the company and made it contingent on the complete repayment of the RGHI receivable.

Mr. Grant's only other affirmative act during the LBO was to sign the Equity Purchase and Merger Agreement, but only as an indemnitor. Like the SPA, the EPMA was available to Lee and all others doing due diligence on the transaction. Also like the SPA, the EPMA contains provisions that seem to indicate that related-party debt continued to exist, the 2004 audited financial notwithstanding. Moreover, as an indemnitor signatory rather than a principal, Mr. Grant only warranted that if the information contained in the EPMA was inaccurate, he would himself be liable.

Finally, within days of his May 17 meeting with Mr. Grant, Mr. Bennett and his cronies were divvying up and pocketing the NAVTEQ stock assigned to Refco by Victor Niederhoffer – of which Mr. Grant, as a 50% owner of Refco, essentially owned one-half. It is impossible to square the outright theft of Mr. Grant's interest in the NAVTEQ stock by Bennett and others, at the very same time that Mr. Bennett was supposedly telling Mr. Grant he could only receive $4 million out of a $1.8 billion transaction, with the notion that Bennett gave Grant a fulsome and accurate picture of the Lee transaction or with the government's argument that Mr. Grant and Mr. Bennett stood "shoulder to shoulder" in perpetrating this fraud. There is no way to conclude that Mr. Grant was a full and equal partner in this conspiracy, much less a *leader* of it, when Mr. Grant's purported colleagues in the conspiracy were picking his pocket.

From this sparse mix of events and inconsistent documents, and without illuminating through testimony what explanations Mr. Bennett gave Mr. Grant to explain Mr. Grant's conduct, the government assigns Grant a major role in the Lee transaction and perfect knowledge of its structure, illegitimacy and consequences. There can be no disputing what Grant did in connection with the Lee transaction: he signed two documents at Mr. Bennett's behest after having been excluded from any participation in the negotiations surrounding the deal. This is precious little on which to claim Mr. Grant's culpability is "on par" with Bennett's.

We do not argue from the foregoing circumstances Mr. Grant's innocent knowledge of the deal. We do argue, fairly and rationally, that on this record inferences regarding Mr. Grant's perception of the illegitimacy of the transaction, Mr. Grant's perception of the knowledge which various counterparties had or didn't have, Mr. Grant's perception of the approvals or disapprovals which various accounting personnel rendered or did not render, are speculative and chancy. The government could have presented the Court, in fulfillment of its burden, a much

cleaner and more precise record of Mr. Grant's knowledge of this affair: it could have called Phillip Bennett. It chose not to do so. That is its "hole." It cannot fill that hole with speculation any more than we can. To paraphrase the government's rebuttal argument (attacking Mr. Grant for asserting that the production of his notes was knowing) "there is no evidence to support these inferences…when you enter this game of guessing, you can come up with all sorts of good guesses." (Tr. at 2975). The government would do well to tread easy here, for the record provides insufficient support for the mind-reading exercise it attempts in its effort to pin co-equal blame on Mr. Grant and Mr. Bennett for the Lee transaction.

D. Mr. Grant's Mental State: The Quality of the Information He Received

Mr. Grant's culpability is significantly a function of the quality of the information he received about Refco and its operations. He is being held to the choices he made, and those choices are a function of the information he had. The government asserts that Grant's information about the "hole" and its fraudulent consequences was plain and clear, citing in the main the February 26, 1999 Rossi meeting and various conversations thereafter that Santo Maggio described himself as having with both Bennett and Grant. (See, generally, Br. at 4-7). We believe the evidentiary picture is far more complex and nuanced. Accepting for purposes of sentencing that Grant knew "enough" to have a culpable mental state, what he knew and how he knew it places him in a vastly different position than Phillip Bennett.

First, the overwhelming bulk of the information that Grant received about the financial and operational affairs of the company, particularly after 1999, came from Bennett. Bennett was an unrestrained and brilliant liar and manipulator of people, facts, and figures. He is so described by virtually everyone who came in contact with him. (See, e.g., Tr. at 488-489, 1065-1066, 1645, 1504-07, 767; BSM at 5 ("as was demonstrated at trial, those who listened to

Bennett's lies were convinced that Bennett was not only truthful, but one of the most extraordinary businessmen they had ever met")).

Second, Bennett's loyalty and candor to Grant were questionable and driven largely by Bennett's own personal agenda. Thus, Bennett found it appropriate to conceal from Mr. Grant the Asian losses that occurred in the summer of 1997 (Tr. at 1645); to conceal from Mr. Grant huge quantities of information about the company's financial affairs in other respects in 1997 and 1998, including information about the February 1997 round-tripping and the loss of money in the RCM Phillip Morris investment. (See, generally, GX 21 at 2 and 4). Bennett thought it equally useful to conceal from Grant the 1998 round-tripping and to retain jealously the ability to make all financial and cash management decisions, something easy to do since Grant was not perceived as being heavily into the numbers. (Tr. at 446, 448).

As matters worsened toward the end of 1998, Bennett moved Grant further and further away from the nerve center of the company. He was terminated as President of Refco and moved to Forstmann-Leff in the fall of 1998; thereafter terminated from each and every position at the company in late April 1999. (See generally, DX 0256; DX 45). His termination, engineered by Bennett and Ed Cox (individuals engaged in the round-tripping that had recently then occurred) included a specific directive limiting the information to which he was entitled. And by direction of Phil Bennett, Grant was kept off the premises.

Thereafter, in 2002, Bennett engineered a profit participation agreement for himself and various executives, excluding Grant, that ultimately yielded senior executives (including Bennett) over $100 million. (GX 3004). Having excluded Grant from this windfall (which yielded Bennett alone $25 million), Bennett then proceeded on May 20, 2004 (three days after

the May 17 meeting he had with Grant), to steal Grant's share of the NAVTEQ stock (and divide the proceeds with Silverman and Trosten), stock held as collateral from the 1997 Niederhoffer transaction. (Tr. at 1170).

With respect to the May 17 meeting, during which Mr. Grant took copious notes (see GX 8047), the government argues that the content of Bennett's explanations of the numbers can be inferred by reference to Bennett's conversation with Tom Dittmer's attorney, Earl Melamed, around the same time. (Tr. at 2975-76, 2978, 2809-13). Yet a simple comparison of Mr. Grant's notes and the information provided by Bennett to Melamed reveals many numbers which wildly fail to jibe. (See, generally, Tr. at 2353-2355; GX 8047).

There is a pattern here. From 1997 to 2004, Phillip Bennett manipulated the information Tone Grant received to suit his own personal needs, without regard to the falsity, incompleteness or misleading quality that his communications contained. Throughout the conspiracy, Bennett played his audiences perfectly, doling out the information that would achieve the result he desired. The audience for Bennett's performance, the recipient of that information, was Mr. Grant. As the record reflects, Mr. Grant was not motivated by money, not interested in material possessions, not in large measure a numbers person, trusting to the point of naiveté, distanced from the events Bennett reported on, and outwardly honorable, decent, and fair-minded.

One can, as for sentencing purposes one must, accept that at some point Mr. Grant heard and knew enough that his mental state passed from one of innocence to one of culpability. But that is a far cry from asserting, as the government does, that Mr. Grant bore the same level of malevolent and fraudulent intention as Mr. Bennett, that the mental states of two men are "on par" and that their overall culpability and sentences should be "on par". Fairly viewed, the

record does not sustain that assertion. It rather demonstrates that whatever culpable mental state Mr. Grant may be said to have possessed, it bears no comparison to that of Mr. Bennett.

III. PROPORTIONALITY, DETERRENCE, AND A JUST SENTENCE

We conclude with brief observations on deterrence, proportionality and a just sentence, all statutory imperatives in or flowing from Section 3553(a).

As regards general deterrence, the government seeks a "stiff sentence" that is "on par" with the sentence Mr. Bennett received, reasoning that Mr. Grant, "motivated by greed," behaved in ways comparable to Mr. Bennett, concocting the fraud at its "inception" and otherwise serving as its creative mastermind. (Br. at 27, 29, 30). We have urged that this has not always been the government's view of the severity of Mr. Grant's behavior, at least in comparison to Mr. Bennett's. Less than two months ago, the government saw them not in parity, as we have set out, *supra*. And indeed on this record they are not. It is a stretch in every conceivable way to assert that by conduct, by direction and design, by knowledge and understanding, by venality and greed, by intensity or endurance of behavior, by character and inclination, or by any other rational measure Phillip Bennett and Tone Grant occupy similar positions on the hierarchy of culpability. In its zealous advocacy, the government presents a revisionist history of the case that is inconsistent with its earlier and far more accurate presentation to this Court in connection with Mr. Bennett's sentencing.

The government is, of course, correct that general deterrence is an important aim of sentencing. It contends that "a substantial term of imprisonment is necessary" to achieve this goal. (Br. at 26-27; see also Br. at 27 ("If Grant is not given a substantial sentence, a clear signal will be sent," "A significant term of imprisonment is warranted to deter others.")). The

government used virtually identical verbiage in Adelson, (Government Brief in Adelson, at 30, Bennett Reply Memorandum, Ex. 11), where it advocated for a sentence "consistent" with the Guidelines range of life imprisonment and the sentences imposed in cases such as Ebbers and Rigas. (Government Brief in Adelson, at 39).[7]

In imposing sentence on Mr. Adelson, Judge Rakoff *agreed* with the government that "meaningful prison time was necessary to achieve retribution and general deterrence," and for that reason, he imposed a sentence of 42 months incarceration. 441 F.Supp.2d at 514. As Judge Rakoff noted, this sentence was not "a short sentence in any practical sense." Id. He noted further that the government "at no time here presented any evidence or cited to any studies indicating that a sentence of more than three-and-a-half years was necessary to achieve the retributive and general deterrence objectives applicable to a case like this one." Id. at 515.

The government here has similarly failed in this regard. Although it repeatedly asks for a term of incarceration "significant" or "substantial" enough to deter others from similar misconduct in the future, it never explains why it believes that sentencing a 64-year old man who has led, in all other respects, an exemplary life, to spend 42 months in prison is unlikely to deter other people in Mr. Grant's position.

Where one is periodically lied to by the chief conspirator about key financial affairs; dismissed from his executive positions; bears no responsibility for the financial affairs of the company nor the machinations said to constitute the key fraudulent transactions; kept apart from

[7] It is instructive to note that, while the government cites portions of Judge Rakoff's opinion in Adelson to support its contention that "Grant and Adelson are nothing alike in ways that matter most to Grant's sentencing," (Br. at 29), the government's description of Adelson in its sentencing brief in that case was, in fact, *very much* like its characterization of Grant in its brief in this case. Moreover, Judge Rakoff was clearly deeply impressed with, and affected by, Adelson's history of good works, 441 F.Supp.2d at 513-14. Grant's history of service to others is at least as compelling as Mr. Adelson's.

the key negotiations said to constitute the gravamen of the offense – which occur five years after his departure from the company and coincide with the chief conspirator's theft of company assets owned in part by him; where one's active executive role in the life of the company occupies 26 months in a conspiracy said to run over seven years; where one exhibits all of these markers and yet receives a period of incarceration of several years that fairly reflects his culpability, the sentence imposed cannot be perceived as anything other than "stiff." This is particularly the case if one factors in, as the Court must, almost fifty years of humility, grace and good works that have characterized this modest man's life.

The sentence we seek is just. It is supported by the record. It accords with the imperatives of § 3553. The sentence the government urges is none of these. It is, rather, a clear violation of the sentencing statute's directive that the sentence imposed be "not greater than necessary" to achieve the purposes of sentencing.

IV. CONCLUSION

For the reasons set forth above and in our Sentencing Memorandum filed July 19, 2008, counsel for Mr. Grant respectfully requests that the Court sentence Mr. Grant to a term of years that is a small fraction of that given to Phillip Bennett.

Respectfully submitted,

/s/ Roger E. Zuckerman

Roger E. Zuckerman (admitted *pro hac vice*)
Aitan D. Goelman (AG-7040)
Benjamin M. Block (admitted *pro hac vice*)
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036-5802
Telephone: (202) 778-1800
Facsimile: (202) 822-8106
Attorneys for Tone N. Grant

CERTIFICATE OF SERVICE

I, Aitan D. Goelman, hereby certify that on August 4, 2008, a copy of Defendant Tone N. Grant's Sentencing Memorandum was served via e-mail on the following:

Neil M. Barofsky, Esq.
Christopher Garcia, Esq.
United States District Attorney's Office
Southern District of New York
One St. Andrew's Plaza
New York, NY 10007

/s/ Aitan D. Goelman
Aitan D. Goelman (AG – 7040)