IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 03-496**
GEORGE CAPELL	**:**	

GOVERNMENT'S SENTENCING MEMORANDUM

Defendant George Capell, acting as the President and sole shareholder of two significant corporations, now bankrupt, orchestrated a series of related frauds which ultimately inflicted approximately $39 million dollars in losses upon his companies' customers, suppliers, and financial institutions. Further, while imposing these losses on others, the defendant himself profited handsomely from his position as President of his companies. Finally, after having pleaded guilty to the wire fraud, mail fraud, and money laundering charges in this case, the defendant nonetheless obstructed justice while awaiting his sentencing hearing by failing to disclose to the Probation Office the existence of a business and a bank account in Florida, over which the defendant had authority and control, thereby concealing from this Court the existence of assets which could have been used for the payment of fines and restitution to the defendant's victims.

Pursuant to United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006), this Court must calculate the advisory guideline range, and then consider that range along with all the pertinent considerations of sentencing outlined in 18 U.S.C. § 3553(a) in determining the final sentence. Similarly, under United States v. Grier, 449 F.3d 558

(3d Cir. 2006), this Court must explain on the record its consideration of all of these pertinent factors and the reasons for its final sentence. See id. at 574-75 (holding that the solitary statement, "The Court believes that 100 months is reasonable in view of the considerations of section 3553(a)," was insufficient to explain the district court's reasoning, and remanding for resentencing).

The government explains below its view of the proper consideration in this case of the Sentencing Guidelines and the Section 3553(a) factors, which amply support a sentence at the high end of the guidelines here. In this case, and as the Probation Office has found, Capell has a total offense level of 27, with a criminal history category of I, producing an advisory guideline range of imprisonment of 70 to 87 months. Capell has not objected to this guideline range calculation.

I. BACKGROUND

On August 6, 2003, a federal grand jury returned an indictment against defendant George Capell, charging Capell and co-defendant Patrick Buttery with multiple counts of wire fraud, mail fraud, and money laundering. On February 16, 2006, Capell, pursuant to a written guilty plea agreement, entered pleas of guilty to 41 counts of the indictment. Specifically, Capell pleaded guilty to (i) 25 counts of wire fraud, in violation of Title 18, United States Code, Section 1343, as charged in Counts 1 to 19, 21 to 25, and 27; (ii) one count of wire fraud against a financial institution, in violation of Title 18, United States Code, Section 1343, as charged in Count 20; (iii) eight counts of mail fraud,

in violation of Title 18, United States Code, Section 1341, as charged in Counts 28 to 35; and (iv) seven counts of money laundering, in violation of Title 18, United States Code, Section 1957, as charged in Counts 36 to 42.

The wire and mail fraud offenses arise from Capell's participation from in or about September 1999 through at least March 21, 2001, as the Chief Executive Officer for the company Computer Personalities Systems, Inc. ("CPSI"), in wire and mail fraud schemes designed to defraud (i) individual consumers from across the country, (ii) financial companies, and (iii) suppliers of products and services. The money laundering offenses arise from Capell's payment of an approximate total of $340,522.41 through four checks, knowing that these checks derived from a specified unlawful activity, that is, the wire and mail fraud schemes at issue, in order to acquire for himself (i) a 2000 Dodge Durango; (ii) a 1967 Chevrolet Corvette; (iii) 17.93 acres of property, located adjacent to the residence at 4970 Furham Road, Gardenville; and (iv) a 2001 Monaco Recreational Vehicle. The money laundering offenses also arise from Capell paying to co-defendant Buttery three checks in the amounts of $60,000, $40,000 and $35,000, respectively, knowing that these checks also derived from the wire and mail fraud schemes at issue.

Capell owned and operated two corporations, Computer Personalities Systems, Incorporated (hereinafter "CPSI"), and the Direct 2 U Network, Incorporated (hereinafter "D2U"), which were located in Bucks County, Pennsylvania, and which were involved in the sale of computers and related merchandise, and the acquisition of cable

television air used for their sale. Capell was the sole shareholder and President of CPSI, which did business as Video Computer Store ("VCS"), and which sold computers and computer-related merchandise and services to consumers across the country by advertising through infomercials broadcasted on various cable networks, the internet website of VCS, and a retail VCS building. Capell was the "star" of the cable television infomercials. Typically, CPSI solicited orders from consumers placed over the telephone to CPSI sales representatives, or through the internet. Consumers would pay CPSI for their orders through personal checks or money orders, credit cards, or financing offered through CPSI in conjunction with a financing institution. Capell also was the sole shareholder and President of D2U, which produced infomercials featuring Capell and computers and computer-related merchandise and services offered by CPSI to consumers.

Capell's schemes, which created approximately $39 million in losses to a variety of victims, generally worked as follows.

First, Capell defrauded consumers from across the country by (1) charging the customer immediately for computer packages, but delaying by months the delivery of the computer packages; (2) delivering only parts of the computer package, but billing for the entire computer; (3) often failing to deliver any computer at all; (4) refusing to refund consumers' money as promised; and (5) failing often to send CPSI rebates to consumers, as promised on the informercials used to sell the computer packages. To date, consumers still have lost over $3 million dollars.

Second, Capell defrauded suppliers of computers and television air time by intentionally failing to pay suppliers for many of the computers and computer products they shipped, despite the fact that the defendants already had collected the full purchase price of the computers from consumers and/or the consumers' financial institutions. Vendors collectively lost approximately $13.5 million dollars as a result of the schemes.

Third, to attempt to maintain the ability of CPSI to continue in business and to attempt to force other commercial entities to bear the financial burden of CPSI's cost of doing business, Capell made and caused to be made false representations to financial companies about the nature and business practices of CPSI and D2U, and the ability of CPSI to make payments owed. Through fraud and misrepresentations to financial companies who did business with CPSI and D2U, Capell caused another approximately $22.6 million of losses.

The full factual description of the schemes is outlined in the parties' joint pleading regarding the facts underlying the guilty pleas of defendant Capell, filed with the Court on March 20, 2006, and attached to this pleading as Attachment A.

II. SENTENCING CALCULATION

A. Statutory Maximum Sentence.

The Court may impose the following statutory maximum sentence for wire fraud, as charged in Counts 1 to 19, 21 to 25, and 27: 5 years of imprisonment, a 3-year period of supervised release, a $250,000 fine, and a $100 special assessment. Further, the

Court may impose the following statutory maximum sentence for wire fraud, as charged in Count 20 (involving a financial institution): 30 years of imprisonment, a 5-year period of supervised release, a $1,000,000 fine, and a $100 special assessment. The Court also may impose the following statutory maximum for mail fraud, as charged in Counts 28 to 35: 5 years of imprisonment, a 3-year period of supervised release, a $250,000 fine, and a $100 special assessment. The Court also may impose the following statutory maximum sentence for money laundering, as charged in Counts 35 to 42: 10 years of imprisonment, a 3-year period of supervised release, a $250,000 fine, and a $100 special assessment.

Total Maximum Sentence is: 265 years imprisonment, a 5-year period of supervised release, an $11,000,000 fine, and a $4,100 special assessment. Full restitution shall be ordered on a schedule to be set by the Court. Forfeiture of personal property used to commit the offenses and any property constituting, or derived from, proceeds obtained directly or indirectly as the result of the violations of Title 18, United States Code, Section 1957 also may be ordered.

B. Sentencing Guidelines Calculation.

In imposing sentence, the Court must take into account the considerations of sentencing set forth in 18 U.S.C. § 3553(a). United States v. Booker, 543 U.S. 220, 261 (2005). First, as stated in Section 3553(a)(4), the Court must determine and consider the sentencing range established in the Sentencing Guidelines. The Third Circuit has confirmed: "In consideration of the § 3553(a) factors, a trial court must calculate the

correct guidelines range applicable to a defendant's particular circumstances." Cooper, 437 F.3d at 330. This Court must make findings pertinent to the guideline calculation by applying a preponderance of the evidence standard, the same approach employed prior to the Booker decision. Id.; Grier, 449 F.3d at 574-75.

The necessary calculation of the guideline range includes the determination of whether there should be a departure, either upward or downward, pursuant to the Guidelines. The issue of guideline departures is distinct from the Court's authority, recognized in Booker, to impose a final sentence which varies from the Guideline range. Although the final sentence is subject to appellate review for reasonableness, this Court's decision to deny a requested departure is not itself subject to review if the Court makes clear that its denial is based not on a legal determination that the departure is unavailable but on the Court's exercise of its discretion. Cooper, 437 F.3d at 332-33.

In this case, as stated in the presentence report (PSR), the correct guideline calculation is as follows:

Base level offense, under U.S.S.G. § 2F1.1(a):	6
Adjustment for causing losses between $20 million and $40 million, under U.S.S.G. § 2F1.1(b)(1)(Q):	+16
Adjustment for more than minimal planning, and/or more than one victim, under U.S.S.G. § 2F1.1(b)(2)(B):	+2
Adjustment for committing offense through national, mass marketing, under U.S.S.G. § 2F1.1(b)(3):	+2

Adjustment for role in the offense as supervisor/manager, under U.S.S.G. § 3B1.1(c):	+2
Adjustment for obstruction of justice, under U.S.S.G. § 3C1.1:	+2
Acceptance of responsibility, under U.S.S.G. § 3E1.1:	-3
Total offense level	27

PSR ¶¶ 106-14-50. Further, Capell has a criminal history category of I. PSR ¶ 117. Accordingly, Capell has an advisory Guideline range of 70 to 87 months. PSR ¶ 151. The defendant has informed the probation office that he has no objections to the final presentence report.

C. Obstruction of Justice.

The defendant has not objected to the finding of the presentence report that he deserves a two-level enhancement on the basis of obstruction of the justice. This enhancement is the only enhancement which is not the subject of a stipulation within the parties' plea agreement, because the obstructive activity occurred after the defendant's guilty pleas. Although the presentence report provides a very brief factual basis for this enhancement, PSR ¶¶ 96-99, the following generally outlines the factual and legal basis for the imposition of this enhancement, which the Court must find even if the defendant does not object to its application. Further, the government is submitting to the Court and counsel a series of sentencing exhibits, Exhibits 1 through 20, all of which pertain to the obstruction, and which form the complete factual basis for the enhancement. The

following discussion of the obstruction will not reference all of the exhibits, which are detailed. A list of these exhibits is included with this pleading as Attachment B.

1. The Law.

Sentencing Guideline Section 3C1.1 provides for a two-level increase for obstructing or impeding the administration of justice "[i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction; and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." The government bears the burden of proving, by a preponderance of the evidence, the facts in support of the adjustment. See United States v. Brennan, 326 F.3d 173, 200 (3d Cir. 2003).

The application notes to U.S.S.G. § 3C1.1 recognize that "[o]bstructive conduct can vary widely in nature, degree of planning, and seriousness." See U.S.S.G. § 3C1.1, Application Note 3. Among the non-exhaustive list of examples of conduct to which this provision applies is "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." Section 3C1.1, Application Note 4(h). Compare Section 3C1.1, Application Note 5 (providing incomplete or misleading information to a probation officer that does not amount to a material falsehood is not grounds for an adjustment).

Accordingly, in cases where a defendant willfully refuses to supply information to the probation officer that is necessary to determine the defendant's ability to pay a fine or restitution, numerous courts have applied the obstruction of justice enhancement under U.S.S.G. § 3C1.1. See United States v. Milton, 147 F.3d 414, 421 (5th Cir. 1998) (defendant obstructed justice by providing to probation officer materially false financial information regarding his assets); United States v. Anderson, 68 F.3d 1050, 1056 (8th Cir. 1995) (defendant's providing incomplete financial information and refusing to provide readily available financial information justified enhancement for obstruction of justice); United States v. Clements, 73 F.3d 1330, 1342 (5th Cir. 1996) (intentional misrepresentation regarding defendant's financial affairs was grounds for obstruction enhancement when defendant had reported an unsecured debt to his probation officer when in fact it was secured); United States v. Nelson, 54 F.3d 1540, 1544 (10th Cir. 1995) (obstruction enhancement applied when defendant lied to probation officer regarding bank account; court observed that, "[w]hen a defendant provides false information regarding his financial assets, he 'makes it impossible to reasonably determine whether [he] is able to pay a fine within the established guideline range' . . . [; a] small amount of money could form the basis of an award of restitution or imposition of a fine.") (internal citations omitted); United States v. Smaw, 993 F.2d 902, 903-04 (D.C. Cir. 1993) (intentional omission of a pending agreement to purchase real estate by defendant supported an obstruction enhancement); United States v. Beard, 913 F.2d 193,

198 (5th Cir. 1990) (enhancement applied when defendant willfully obstructed justice by deliberately refusing to supply to probation officer information that was readily available to defendant and necessary to determine defendant's ability to pay a fine or restitution; defendant's deliberate refusal to supply information did not constitute "mere silence").

2. The Facts.

On or about April 7, 2006, after his pleas of guilty, Capell executed under penalties of perjury a declaration regarding his net worth and cash flow, and then forwarded that document to the Probation Office. The front page of this document, signed by the defendant, provided that the attached net worth statement and cash flow statement "fully describe my financial resources, including a complete listing of all assets owned or controlled by me as of this date and any transfers or sales of assets since my arrest. The Cash Flow statement . . . also includes my financial needs and earning ability and the financial needs and earning ability of my spouse [.]" Sentencing Exhibit 1A, at 1.

The instructions for the net worth statement, upon which Capell wrote his name, explained to the defendant that he was "required to prepare and file with the probation officer an affidavit fully describing your financial resources, including a complete listing of all assets you own or control as of this date and any assets you have transferred or sold since your arrest." Sentencing Exhibit 1A, at 2. Assets subject to reporting included joint assets, and assets held by a spouse, for which the defendant enjoyed the benefits. Id. Moreover, the instructions for the net worth statement specifically explained to the defendant that the assets which he jointly owned or controlled were "relevant to the court's decision regarding the ability to pay." Id. (citing 18 U.S.C. §§ 3663 and 3664, the statutory provisions pertaining to restitution to victims).

The "Bank Account" section of the net worth statement required the defendant to list, among other assets, "all personal and businesses [sic] checking and savings accounts[.]" Sentencing Exhibits 1A, at 3 (emphasis added); 1B. On this section, the defendant listed in his own handwriting three personal bank accounts held either individually or jointly with his spouse. However, the defendant did not disclose the existence of bank account number 48868582, held at AmSouth Bank in the name of Lawrence Media LLC. As explained below, this concealment was a material lie.

The net worth statement also included sections entitled "Other Assets," "Anticipated Assets," "Business Holdings," "Transfer of Assets," "Assets You Will Liquidate," and "Prospect of Increase in Assets." Id. at 5-7. The "Business Holdings" section specifically required reporting of all businesses in which Capell had an ownership interest, and/or with which Capell had an affiliation. All of these additional sections were entirely blank. Capell therefore did not disclose the existence of the business Lawrence Media. Moreover, he did not disclose the agreement, or the anticipated agreement, in which the company WizeBuys agreed in April 2006 to pay $5,000 per week to buy back a 45% ownership share of WizeBuys held by Technical Media Associates, another company controlled by Capell and held in the name of his spouse. This agreement covered a total of 55 weeks, for a total payment of $275,000, through April 2007. See Sentencing Exhibit 13. These acts of concealment also were material.

The instructions for the monthly cash flow statement were very similar to the instructions for the net worth statement, and made clear that Capell was to answer broad questions regarding his individual and joint assets for the purposes of determining his ability to pay restitution. Sentencing Exhibit 1A, at 14. On the monthly cash flow statement, initialed by Capell, the defendant listed in his own handwriting his monthly gross salary as $4,000 per month, and his net take-home pay, after payroll deductions, as $2,847. Id. at page 15; Sentencing Exhibit 3A. The many other potential sources of income identified by the monthly cash flow statement, including lines asking about the existence of any cash advances or business income, were left blank. The only other cash inflow reported by Capell on this sheet was an unspecified loan amount of $14,000 per month; next to this line item, Capell wrote "spouse." Id.

Capell in fact controlled Lawrence Media, a company which he should have disclosed. When Lawrence Media was incorporated in Florida in 2004, Shanna Johnson was listed as its supposed President. Sentencing Exhibit 9. Capell, however, was in fact the person who controlled Lawrence Media. When Lawrence Media was incorporated, Johnson was only 21 years old. She currently is 23 years old. Prior to becoming the nominal President of a media corporation with significant gross income, Johnson had received very limited income from part-time work at restaurants and retail stores. Sentencing Exhibit 11. Although Lawrence Media was run in Florida, Capell's home, Johnson has lived in Tennesee since at least 2005. Sentencing Exhibits 5, 10, 11, 12.[1]

[1]Even after Capell's obstructionist scheme was uncovered and a court hearing was held, he provided the government with financial statements in July 2006 which continued to describe Lawrence Media as a company merely owned by a "third party." Sentencing Exhibit at 8.

The fact that Capell controlled Lawrence Media is further revealed by the fact that he is a signatory for the AmSouth bank account which he concealed, and that Capell signed the vast majority of the checks written from that concealed account, including numerous checks made out to cash or Capell himself. Sentencing Exhibit 3D. There are only a small handful of checks made out to, or signed by, Shanna Johnson.[2] No one else signed any of the checks, and there do not appear to be any other employees.

Moreover, Steven Conduit, the operator of WizeBuys, the primary customer of Lawrence Media, dealt almost entirely with Capell. Conduit did not know who Johnson was. Sentencing Exhibit 13. Finally, "Lawrence" is Capell's middle name. Capell previously held himself out to a third-party business as "George Lawrence," rather than as George Capell: representatives of RBS Lynk, a financial institution centered in Georgia, believed that their primary contact at Technical Media Associates, which was receiving financing from RBS Lynk, was "George Lawrence," when in fact it was Capell.

A review of the concealed AmSouth bank account reflects that, from approximately December 12, 2004 through May 12, 2006, there were approximately $2.96 million in total deposits made into the account, and approximately $2.91 million in total withdrawls or expenditures. Sentencing Exhibits 4A; 4B. The underlying bank

[2]Shanna Johnson directly received slightly over $5,000 through three checks from Lawrence Media in 2005. Sentencing Exhibit 4C, at 5. Although Johnson was the nominal President of Lawrence Media, the person who signed these checks written to Johnson was George Capell. Sentencing Exhibit 3B.

statements reflect that money consistently flowed in and out of the concealed account. On April 7, 2006, the date that Capell signed his false submissions to the Probation Officer, the account held over $60,000. Sentencing Exhibit 3A.

From February 1, 2006 through June 30, 2006, the time period immediately before and after the April 7, 2006 submission to the Probation Office, there were approximately $213,000 in expenditures made from the concealed AmSouth account. Sentencing Exhibit 4D. Approximately $100,000 of these expenditures occurred during April through June, id., thereby belying any suggestion that the bank account already was inert by the time of the April 7, 2006 submission. Of the February through June expenditures, over $12,800 were ATM cash withdrawls, over $3,400 were at restaurants, over $50,300 were made at strip clubs, over $58,000 were other miscellaneous expenditures, including but not limited to apparent business expenses, and over another $30,000 in expenditures represented checks. Id. Many of the checks were large, round checks made payable to cash, or to the defendant himself. Sentencing Exhibit 4C.

Included within the miscellaneous expenditures were wirings to ADP, the payroll service, for traditional salary checks ultimately paid to both Capell and Shanna Johnson. From approximately January 2006 through June 2006, Capell received $20,000 in gross salary, and Johnson received $28,500. Sentencing Exhibit 5. During 2005, both Capell and Johnson received $56,000 each in gross salary from Lawrence Media. Id.

Capell also paid the mortgage for his Florida condominium through Lawrence Media. Capell nonetheless reported to the Probation Office the monthly condominium mortgage – paid for through the concealed corporate bank account – as his own personal liability, thereby again reducing his reported net monthly income available for restitution. Sentencing Exhibit 1A, at 16-17. A review of the underlying bank records, see generally Sentencing Exhibits 3A to 3D, and the summaries of those bank accounts created by IRS Special Agent Jonathan Schnatz, see generally Sentencing Exhibits 4A to 4D, reflects numerous other payments made through the concealed bank account to the benefit of both Capell[3] and Shann Johnson,[4] including prior to and subsequent to Capell's April 7, 2006 false submissions to the Probation Officer.

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[3]For example, up until at least May 2006, Capell drove a 2005 silver SL500 Mercedes Benz sedan, leased under his name. Lawrence Media paid for the $25,000 down payment for this Mercedes Benz with a check from the concealed AmSouth Bank account. Sentencing Exhibit 7, at page 23. Further, Lawrence Media paid for the defendant's $876 monthly lease payment for this Mercedes-Benz, and the $103 monthly insurance to All State, up through May 2006. Sentencing Exhibit 4A, at page 14; Sentencing Exhibit 4D, at 2, 4, 8-10. Even though Capell concealed the income which he was receiving from Lawrence Media, Capell nonetheless reported to the Probation Office the monthly lease payment and monthly insurance – paid for through the concealed corporate bank account – as his own personal liabilities, thereby again reducing his reported net monthly income available for restitution. Sentencing Exhibit 1A, at 16-17.

[4]Shanna Johnson also was the recipient of leased 2005 Cadillac Escalade, a vehicle priced at approximately $67,914, and acquired in Nashville, Tennessee on or about May 21, 2005. Sentencing Exhibit 10. Lawrence Media paid for the $15,000 down payment for this Cadillac Escalade, and for $8,094 in options, with checks signed by Johnson from the concealed AmSouth Bank account. Id. Further, up until April 17, 2006, Lawrence Media paid for Johnson's $736 monthly lease payment for this Cadillac Escalade, as well as varying amounts of monthly car insurance. Sentencing Exhibit 4A, at 14, 18.

After the above conduct was discovered, the defendant finally provided the government with the financial statement which he was required to submit pursuant to his plea agreement; this statement, dated July 13, 2006, were provided during the July 17, 2006 hearing before the Court. Sentencing Exhibits 2A; 2B. Within this financial statement, Capell finally stated that he was earning approximately $21,580 per month, Sentencing Exhibit 2B, thereby essentially confirming his prior false statements regarding his income.[5] This representation was an apparent reference to the fact that WizeBuys had agreed in approximately April 2006 to pay $5,000 per week to buy back a 45% ownership share of WizeBuys held by Technical Media Associates, another company controlled by

[5]Capell, however, did not make it clear in his submission to the government that this approximate monthly income was the result of a guaranteed agreement worth a total of $275,000, and lasting through April 2007, resulting from the sale of the Capells' ownership share in WizeBuys. Compare Sentencing Exhibit 2B with 13. See also Sentencing Exhibit 19 (bank records reflecting receipt of $4,980 wire transfers as of April 24, 2006). The government only discovered this fact by interviewing Steve Conduit of WizeBuys. Moreover, Capell continued in his submission to the government to describe Lawrence Media misleadingly as a company owned by a "third party," an apparent reference to Shanna Johnson. Sentencing Exhibit 2A at 8; 2B.

Capell[6] and held in the name of his spouse. See Sentencing Exhibit 13. This $5,000 weekly payment was independent of the monies in the AmSouth bank account.

Finally, the obstruction of justice adjustment applies not only to successful obstructions, but also to attempted obstructions, such as Capell's ultimately failed attempt to conceal the AmSouth bank account, income, and assets relating to Lawrence Media, or the April 2006 sale of his interest in WizeBuys, netting he and his spouse approximately $5,000 per week. Cf. United States v. James, 328 F.3d 953, 957 (7th Cir. 2003) ("A defendant who commits perjury at trial does not evade the enhancement just because the jurors see through the facade. Likewise with unsuccessful attempts to intimidate.").

D. Section 3553(a) Factors.

Once the Court has calculated properly the guideline range, the Court must next consider all of the sentencing considerations set forth in Section 3553(a). Those factors are:

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[6]Similar to holding Shanna Johnson out as the nominal President of Lawrence Media, Capell also listed his wife, Lynn Capell, as the President of Technical Media Associates Corp., which was incorporated in Pennsylvania in 2001, after the personal and corporate bankruptcy filings at issue in this case. Similar to the Direct-2-U, one of the defendant's companies at issue in the underlying fraud schemes, Technical Media Associates Corp. was in the business of acquiring and selling cable air time, including to another related company, Gems and Jewelry, which sold jewelry to the public through cable television and the Internet. Although Lynn Capell signed the most recently filed corporate tax return for Technical Media Associates Corp. (for the year 2003) as its President, Conduit of WizeBuys again confirmed that the person with whom he dealt when dealing with Technical Media Associates Corp. was the defendant. See Sentencing Exhibit 13. Regardless, and as noted, the statements submitted by Capell to the Probation Office broadly required the disclosure of spousal assets in which he had an interest.

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed--
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> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> > (B) to afford adequate deterrence to criminal conduct;
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> > (C) to protect the public from further crimes of the defendant; and
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> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
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> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for--
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> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced; . . .
>
> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

As explained below in detail, a full review of all pertinent factors supports the conclusion that a sentence at the high end of the Guideline range of 70 to 87 months is appropriate in this case.

III. ANALYSIS

A. Importance of the Guideline Range.

The advisory guideline range carries considerable weight even after Booker. As the Third Circuit stated, "a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range . . . ." Cooper, 437 F.3d at 331. The importance of the final guideline range has nothing to do with the guidelines' former mandatory status, which was eliminated in Booker. Rather, the final guideline range is the starting point for determining reasonableness for three reasons: (1) only the guidelines comprehensively examine the full panoply of sentencing considerations; (2) the guidelines represent decades of nationwide experience and study; and (3) they are the only measure for avoiding unwarranted sentencing disparities.

First, the guidelines are much more comprehensive than any other Section 3553(a) factor. Each of the other 3553(a) factors addresses only a single facet of the many issues posed by sentencing. "[T]he factors the sentencing commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under Booker and § 3553(a)." United States v. Shelton, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005); Statement of Judge Ricardo H. Hinojosa, Chair of the United States Sentencing Commission, quoted in United States v. Peach, 356 F. Supp. 2d 1018, 1020-22 (D.N.D. 2005). In formulating the guidelines, the Commission

was required to and has considered all of the Section 3553(a) factors. See 28 U.S.C. §§ 991(b)(1), 994(b)(1), (c), (f), (g), (m); U.S.S.G. § 1A1.1 Editorial Note.

Second, the guidelines are the product of years of nationwide experience and sustained study. In drafting the original guidelines in 1988, the Sentencing Commission canvassed both prior and post-guidelines sentencing practice, identifying aggravating and mitigating factors. 28 U.S.C. § 994(m); U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 16-17 (1987). Since then, the Commission has continued to study district court and appellate sentencing decisions, and has fine-tuned the guidelines to take them into account. U.S.S.G. App. C. Indeed, the Booker Court specifically affirmed that the Commission will continue to study appellate and district court sentencing decisions, and "will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." Booker, 543 U.S. at 263 (Breyer, J.).

The Sentencing Commission's incomparable flow of nationwide information, and its years of concentrated study on this topic, merit strong consideration by judges who are assigned the task of determining appropriate sentences for criminal conduct. United States v. Wilson, 350 F. Supp. 2d 910, 914-25, reaffirmed on denial of reconsideration, 355 F. Supp. 2d 1269, 1271-88 (D. Utah 2005); United States v. Wanning, 354 F. Supp. 2d 1056, 1060-62 (D. Neb. 2005); Peach, 356 F. Supp. 2d at 1020-22.

Third, the correctly calculated guideline range is the only means to evaluate the statutory sentencing goal on which Booker placed so much emphasis: "the need to avoid unwarranted sentence disparities," 18 U.S.C. § 3553(a)(6). Congress, the Court, and the guidelines all seek to minimize such disparity compared to "all other similar sentences imposed nationwide." United States v. White, 406 F.3d 827, 837 (7th Cir. 2005). The Sentencing Guidelines provide the comprehensive information and guidance about sentencing around the nation that is essential to accomplishing Congress' goal of uniform federal sentencing. "The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines." Wilson, 350 F. Supp. 2d at 924; Wanning, 354 F. Supp. 2d at 1061-62 ("we have no meaningful substitute for the neutrality, coherence, and equality" that the guidelines provide). Thus, measuring reasonableness in relation to the guideline range serves "to minimize the wide disparity in sentencing across the country for similarly situated defendants that led to the enactment of the Guidelines in the first place." United States v. Paulus, 331 F. Supp. 2d 727, 733 (E.D. Wis. 2005).

Thus, the Third Circuit in Cooper stated that "'[t]he Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country,' and provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct." Cooper, 437 F.3d at 331, quoting United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

B. Application of the Section 3553(a) Factors.

In this case, no unusual circumstances exist which warrant an exception to the preference for guideline sentencing. Section 3553(a)(4) and (5) specifically direct the Court to consider the applicable guidelines, and Section 3553(a)(6) commands that the Court strive to avoid disparity in sentencing, which, as explained above, is best accomplished through faithful application of the Guidelines. The other 3553(a) factors also point to this conclusion.[7]

The crimes which Capell committed resulted in an enormous loss of approximately $39 million.[8] These losses were suffered over time by a wide variety of individuals and entities which encountered Capell and his businesses, including consumers, suppliers, and financial companies. Although this loss figure is huge, the raw dollar figures alone do not fully capture the unfortunate experiences of Capell's various victims. For example, the raw dollar figures do not reflect the intense frustration experienced by the multitude of hapless consumers who repeatedly contacted CPSI in vain to obtain the products, refunds, and rebates promised to them, only to put on hold for

[7]It is incumbent on the Court to address any defense argument in determining the final sentence. See Cooper, 437 F.3d at 329 (directing that "[t]he record must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors. . . . [A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it.").

[8]The ceiling for the Guideline loss figure enhancement applicable to Capell is $40 million.

hours and then receive an empty explanation designed to pacify them. Similarly, the $7.25 million dollar loss suffered by former computer supplier Everex Systems, Inc. does not reflect the fact that this mid-level computer supplier went out of business as a direct result of the losses that it suffered from this fraud. See Attachment A, at 34.

Further, Capell orchestrated the underlying schemes, which depended upon Capell's direction of not only co-conspirator Patrick Buttery, but also numerous mid-level managers and consultants. CPSI was a large company, and grew to have hundreds of employees, including many telemarketers. Capell was extremely hands-on when it came to maintaining the schemes, and when problems began to arise and his victims began to realize that doing business with CPSI was problematic, Capell then often dealt directly, either over the phone, through e-mail, or in person, with his corporate and financial institution victims, in order to ensure that his victims continued to supply product or financing. Capell himself was the constant "star" of his own televised infomercials, and personally profited from his schemes, including a handsome salary as the President and sole shareholder, as well as bonus checks used to buy luxury automobiles and property.

In addition, and as explained supra, Capell took the extraordinary step of obstructing his own presentence investigation report by lying about his finances. Capell saw fit to commit his obstruction at time when he already was under intense scrutiny for having committed a string of significant financial crimes. Moreover, by attempting to conceal certain assets, and by consistently squandering significant sums of money on

restaurants, strip clubs, and checks to cash, Capell sought to undermine the ability of his victims to obtain restitution. Although Capell recently has paid $100,000 towards restitution, these payments were made only after the Court issued an order requiring such payments, under threat of remanding the defendant, as a result of his obstruction.

The reasonableness of a sentence at the high end of the Guidelines is perhaps best reflected by the fact that, as the PSR notes, if Capell were being sentenced according to the current version of the Guidelines, which better recognize the seriousness of white-collar crime and therefore impose generally greater consequences than those imposed under the November 2000 version of the Guidelines, Capell would be facing a higher advisory guideline range. Specifically, and due to the enormous amount of loss in this case, Capell's offense level would have been a 36, rather merely a 27, after applying the adjustment for the loss to the base offense level. PSR ¶ 101 n. 3, citing U.S.S.G. § 1B1.1.[9] This calculation would have resulted in an advisory range of 188 to 235 months, which is well over double the range faced by the defendant under the older guidelines.

Moreover, Capell continues to receive the three-point reduction for acceptance of responsibility, due primarily to the fact that he has admitted to his own

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[9]Specifically, under the current version of the Guidelines, Capell would have had a base level offense of 7, with an additional 22 levels added due to the amount of the loss in this case. U.S.S.G. § 2B1.1(a)(1), (b)(1)(L). Another 6 levels would be added due to the large amount of vicitms in the case. U.S.S.G. § 2B1.1(b)(2)(C). Another 4 levels combined would be added due to Capell's role in the offense, and his obstruction of justice. After a 3-level reduction for acceptance of responsibility, Capell would have had a final offense level of 36.

obstruction of justice, and has admitted to receiving $5,000 per week in income from WizeBuys, thereby in effect conceding that he previously had been untruthful.[10] Further, Capell initially undermined his claims to having acted in good faith to rectify his own obstructive activities by stalling significantly before taking any real measures to sell his Plumstead home, as he had represented to the Court during the July 17, 2006 hearing, as a remedy for his obstruction. Capell initially obtained listing agreement to sell his home in form only, and he thereafter failed to take the most basic steps to actually sell that home, as he had promised, until his lack of effort was uncovered.[11] See Sentencing Exhibit 17, IRS Memorandum of September 7, 2006 Interview with Jeffrey Plesser.

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[10]Frequently, a defendant who obstructs justice by undermining his own court proceedings, after having entered into a guilty plea, is denied a reduction for acceptance of responsibility, regardless of whether he had pleaded guilty. Although "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility," the entry of a guilty plea does not entitle a defendant to a reduction as "a matter of right." See U.S.S.G. § 3E1.1, app. note 3. Evidence of a plea "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." Id. See also United States v. Baker, 94 Fed. App. 118, 119 (3d Cir. 2004) (not precedential).

[11]Similarly, as a result of his fraud schemes at CPSI, Capell entered into a consent decree and order for injunctive relief on November 15, 2001, with the Federal Trade Commission ("FTC"), in order to resolve a case filed against Capell by the FTC in Case No. 01-CV-5740, EDPA (Weiner, J.). In that decree, Capell was enjoined from participating, either directly or indirectly, in the advertising, sale or distribution of any goods in connection with mail or phone order sales, unless he obtained a $400,000 performance bond in favor of the FTC. Further, Capell was obligated to inform the FTC for a period of five years of any changes in his residence or mailing address, or changes in his employment status. See Sentencing Exhibit 20. Capell apparently violated both of these provisions of his consent decree by 1) moving to Florida without notifying the FTC, and, 2) without obtaining the necessary performance bond, working on behalf of Technical Media Associates (as "George Lawrence") and Lawrence Media to sell gems and jewelry to the public through the Internet and the televised Gem Shopping Network.

Ultimately, the factors under 18 U.S.C. § 3553(a) call for a significant Guidelines sentence. Only a significant Guidelines sentence will reflect the seriousness of this course of conduct and promote respect for the law. Likewise, only a significant Guidelines sentence will adequately punish the defendant and help protect the public from further potential crimes. Moreover, and perhaps more importantly, only a significant Guidelines sentence will deter other potential white-collar criminals from committing serious fraud. Cases such as this are difficult to investigate and prosecute. It is important that other executives and professionals inclined to violate the law receive the message that fraud is a serious crime, and they will be punished if caught. It also is important that the general public receive assurance that criminals with the capacity and the drive to defraud consumers and others out of millions will face serious punishment.

Therefore, in sum, all of the appropriate considerations of sentencing favor the imposition in this case of a sentence at the high end of the Guidelines. For all of these reasons, the government respectfully recommends that the Court sentence Capell at the high end of the advisory Guideline range of 70 to 87 months of incarceration.

IV. RESTITUTION AND FORFEITURE

Restitution in this case requires a separate sentence that is distinct from the other aspects of sentencing such as prison time, fines, supervised release and special assessments. This is because the liability for restitution continues for twenty years from the entry of judgment, twenty years after the defendant is released from custody, or the

death of the defendant. 18 U.S.C. §§ 3613(b) and (f). For this reason, certain findings pertinent to restitution are required. As explained below, the Court should place on the record its findings regarding: (1) the nature of the offense; (2) the identity of the victims and whether those victims may be treated as a class; (3) whether the victims were harmed by the offense of conviction; (4) the total amount of restitution, and the amount each victim should receive; and (5) a determination of an appropriate payment schedule.

A. The Nature of the Offense.

Courts are required to determine whether the Mandatory Victims Restitution Act (MVRA) is applicable to any offenses of conviction. If the MVRA applies, restitution is mandatory: "the court shall order, in addition to . . . or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victims estate." 18 U.S.C. § 3663A (a)(1). The MVRA requires that restitution must be ordered for the entire amount of the victims' losses, regardless of the defendant's ability to pay. 18 U.S.C. § 3663A (b).[12] United States v. Myers, 198 F.3d 160, 169 (5th Cir. 1999) ("The MVRA required the district court to order the full amount of restitution without regard for Myers' economic circumstances or ability to pay"); United States v. Jacobs, 167 F.3d 792, 796 (3d Cir. 1999) (same).

[12]In cases where restitution is discretionary, the courts must consider the ability of the defendant to pay. 18 U.S.C. § 3663(a)(1)(B)(1).

The MVRA is applicable in cases involving property, where the victim has suffered a pecuniary loss. 18 U.S.C. § 3663A (c)(1)(A)(ii).[13] In this case, the Court should make a finding that the MVRA does apply, because the defendant has pled guilty to mail and wire fraud charges, and the victims have suffered a financial loss.

B. The Identity of the Victims and Whether the Victims May Be Treated As a Class.

The government presented uncontested facts at the change of plea hearing in which it identified as victims consumers who purchased computers from CPSI, financial institution victims, including MBNA, Fleet Bank and NOVA Systems, and vendors, including Ingram Mico, Micron and Ocean Communications.[14]

The Third Circuit requires that the victims entitled to restitution be identified. United States v. Seligsohn, 981 F.2d 1418, 123-124 (3d Cir. 1992) ("the court should designate recipients of the restitution…."). In this case there were thousands of consumer victims, and there were significant legal and factual issues underlying their claims. By statute, the provisions of the MVRA do not apply when the Court finds that

[13]18 U.S.C. § 3663A (c)(1)(A)(ii) makes the MVRA applicable:

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense–

(A) that is-

(ii) an offense against property under this title . . . and

(B) in which an identifiable victim has suffered a physical injury or pecuniary loss.

[14]Everex, one of the victim companies, no longer exists, and therefore restitution to that company is not possible.

"the number of identifiable victims is so large as to make restitution impracticable." 18 U.S.C. § 3663A (c)(3)(A). It also does not apply when "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A (c)(3)(B).

In this case, the identity of the consumer victims, and the validity of their claims might, under ordinary conditions, make restitution impossible. Here, however, the Bankruptcy Court, after years of investigation and litigation, has determined the identity of the consumer victims. It has also resolved potential legal and factual issues pertaining to those victims, and possible victims. This was a lengthy and complicated process, because although all consumer victims were defrauded by the defendant's scheme, they were not all defrauded in the same manner or by the same amount. For this reason, the government is making a request, unopposed by the defense, that the Bankruptcy Trustee be designated as the representative of the victims named by the Court in its restitution order who have had their claims resolved in Bankruptcy Court. We are further recommending that all restitution be paid to the Bankruptcy Trustee, who will be responsible for making distribution to the victims named in this Court's order under the supervision of the Bankruptcy Court. The Bankruptcy Trustee has a computerized system in place, and is capable of making administering payments to consumer victims. Indeed, using this system, the Bankruptcy Court previously oversaw the distribution of

approximately $1 million in funds to the approximately 3,338 identified individual consumer victims, according to their respective claims. In the alternative, the government asks that consumer victims be treated as a class, and that the Bankruptcy Trustee be designated as their representative.[15]

The government is not asking that the Bankruptcy Trustee be given discretion to identify victims, because the Court may not delegate that authority.

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[15]The government will submit a proposed restitution order and schedule prior to the sentencing hearing. Regardless of whether the Court chooses to designate the Bankruptcy Trustee as representative of only consumer victims, or of all of the victims in the criminal case, the restitution order should state the name of each corporate victim, and then list the consumers who had claims resolved in bankruptcy court. This will ensure that restitution is limited to victims designated by this Court as victims of the particular mail and wire fraud charges to which the defendant pled guilty. This list should be attached to the Court's restitution order.

It should be noted that the Bankruptcy Trustee would be a representative of identified victims, and not a victim himself. In some instances under prior law, the courts have rejected the use of a bankruptcy trustee or other agency as a representative for the victims, but those situations have differed substantially from the one in this case. For example, in a case under prior law, the Second Circuit approved the award of restitution to students defrauded by a trade school rather than to the bankruptcy trustee representing the business creditors of the school, because presumably it would be bad policy to award restitution to the "bankruptcy trustee's pot to be used for, presumably, the computer school's electric bills [and] water bills." United States v. Grundhoefer, 916 F.2d 788, 790-791, 794 (2nd Cir. 1990). The Grundhoefer court also rejected Legal Services as a representative of the students, choosing instead to have Legal Services supply a list of representative of victim students, and giving funds received in restitution to the Department of Education so that the accounts of student victims could be credited against their loan obligations. Here, the defendant's business is no longer functioning, and there is no concern that restitution will be used to maintain its operation. Also, unlike the situation in Grundhoefer, discretion as to the identity of the victims would not be delegated to the Bankruptcy Trustee. Rather, the Court would have the Trustee distribute restitution only to victims specified by the Court.

Seligsohn, 981 F.2d at 1423-24 ("the unguided discretion to determine who are 'victims' should not be entrusted to either the U.S. Attorney or the Probation Office"); United States v. Stover, 93 F.3d 1379, 1389 (8th Cir. 1996) ("we hold that the district court lacked authority to leave the designation of the payee or payees entirely to the discretion of the probation office. . . . As a general rule, the district courts should designate the recipient or recipients when ordering restitution[.]"). Rather, the government is seeking to have the Bankruptcy Trustee act as the representative of victims identified by the Court in its restitution order. The Third Circuit has noted that it is permissible to treat victims as a class in situations where "the victims are numerous and difficult to identify, the court may define an appropriate victim class[.]" Seligsohn, 981 F.2d at 123-124. By treating the Bankruptcy Trustee as the representative of the victim class, the Court will ensure that payments may be made to victims in a complex case where restitution might otherwise be precluded by the difficulty of determining the validity of thousands of individual claims.[16]

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[16]Payment schedules for victims are decided by the district court based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. See 18 U.S.C 3664(i), which states:

> If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

C. The Victims Were Harmed By the Offenses of Conviction.

In order for a victim to receive restitution, the Court must make a finding that each victim was harmed by the offense of conviction. In this case, the agreed upon facts act stated at the guilty plea hearing established that consumers, as well as MBNA, Fleet Bank, NOVA Systems, Ingram Micro, Micron, and Ocean Communications were all victims of the fraud scheme and that each suffered pecuniary loss as a direct result of the scheme. For this reason, the Court should make a finding that these individuals and entities were victims of the fraud scheme to which the defendant pled guilty, and that their financial losses were a direct result of the fraud scheme.

D. Amount of Restitution.

The total amount of restitution which should be included in the Court's order is $31,962,750.[17] Any order should also include directives that the listed victims are entitled to restitution in the following amounts:

[17]District courts are required to determine on the record that the victims have suffered the losses for which restitution is ordered, and that those losses were a direct result of the defendant's scheme. In a case such as this one, where it is impractical to name all victims, designations may be made that are sufficiently specific to provide guidance to the United States Attorney to whom to payments should be made. Seligsohn, 981 F.2d at 1424.

VICTIM		AMOUNT
Consumers	(3,338 consumers, as identified in Bankruptcy Court)[18]	$3,008,755
MBNA		$10,054,852
Fleet Bank		$ 5,965,583
NOVA Systems		$ 6,618,348
Ingram Micro		$701,730
Micron		$ 3,542,373
Ocean Communications		$ 2,071,109

E. Schedule of Restitution Payments.

The government previously had placed a lis pendens on the real property adjoining the defendant's home, which he owns jointly with his wife. As the Court is

[18]Although victims suffered total losses of about $39,214,502 in this case, the total amount of restitution due is reduced by the amount of restitution which would have been awarded to Everex, a victim company that is no longer in business and therefore cannot receive restitution. Also, the defendant originally owed $4,058,755 to consumers. In order to avoid double recovery, however, the amount due for restitution to consumers should be $3,008,755, the amount on the schedule above. This amount takes into account the $1,050,000 (approximately 25.87 percent of their claims) that consumer victims have received as a result of proceedings in Bankruptcy Court; specifically, a civil lawsuit brought against the defendant by the State of Pennsylvania. By statute, the amount that victims receive is reduced by civil recoveries: "[a]ny amount later recovered shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in-(A) any civil proceeding." 18 U.S.C. § 3664(j)(2)(A). See, e.g., United States v. Ruff, 420 F.3d 772, 775 (8th Cir. 2005)(holding without deciding that proceeds from administrative forfeiture probably did not qualify as compensatory damages under restitution statutes, but that there should nonetheless be a bar against double recovery).

aware, the indictment included criminal forfeiture provisions, pertaining to that real property and certain vehicles. Unfortunately, however, criminal forfeiture statutes only permit forfeiture of the defendant's interests in identified property. In cases such as this one, where the defendant's assets were all either jointly held, or were held in the name of corporate entities or his wife, the government would be unable to force a sale of those assets in forfeiture proceedings. Thus, even if the government prevailed on all forfeiture matters, the government still would have nothing of value until such time as the defendant and his spouse chose to sell a forfeited asset, at which time the government would obtain the value of the defendant's interest only. This same issue tended to protect the defendant's assets from attachment by his creditors during personal and corporate bankruptcy proceedings in which he was involved.

The government therefore has elected to forego at this time pursuing its rights to forfeiture, in order to enable victims to receive as much money as possible in restitution. Although the Court cannot force the sale of jointly held property in either forfeiture or restitution proceedings, there are important differences between the two proceedings with regard to joint assets. Jointly held assets, as well as assets held in the names of others, may be considered in determining restitution schedules. United States v. Caldwell, 302 F.3d 399, 419 (5th Cir. 2002) (district court had properly considered statutory sentencing factors, including wife's assets, in determining restitution amount); United States v. Blanchard, 9 F.3d 22, 25 (6th Cir. 1993) (wife's earning ability

considered in setting restitution schedule for defendant husband); United States v. Braunstein, 1997 U.S. App. LEXIS 5548, at *2 (2nd Cir. 1997) (not precedential) (affirming district court's inclusion of defendant's wife's assets and financial resources when fixing the defendant's restitution schedule, "[g]iven the whole complexion of using the wife to cover for the husband as to who was earning what . . . , [and given the] long-standing record here of the shilly-shallying around with the husband's and the wife's assets").

Although the defendant's ability to pay restitution is not relevant in determining the total amount of restitution, the Court must take the defendant's financial condition into account, along with other factors, in determining the payment schedule for restitution. The MVRA requires that the court shall "specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid[.]" 18 U.S.C. § 3664(f)(2). In determining this schedule, that statute requires that courts consider:

> (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
>
> (B) projected earnings and other income of the defendant; and
>
> (C) any financial obligations of the defendant; including obligations to dependants.

Id.

As stated previously, virtually all of the defendant's known assets are jointly held with his wife, and/or are held in his wife's name. In examining the factors mandated by the MVRA, it is apparent that the defendant should be required to pay a substantial sum of restitution within the next several months. He has substantial jointly held assets, and virtually no obligations to his dependants. While in prison, he should be required to participate in the Inmate Responsibility program. As his future ability to earn money for additional restitution is good, the defendant should be expected to continue to pay reasonable amounts of restitution after he is released from prison. United States v. Narvaez, 995 F.2d 759, 764-65 (7th Cir. 1993) (present indigency does not bar restitution where defendant has some earning potential and may be able to pay in the future); United States v. Blanchard, 9 F.3d at 25 (6th Cir. 1993) (earning potential of defendant and his wife could be considered in setting restitution); United States v. Paden, 908 F.2d 1229,1237 (5th Cir. 1990) (restitution may be based on earning potential).

It should be noted that failure to pay restitution according to the schedule ordered by the Court can result in substantial sanctions for the defendant. If the defendant knowingly fails to pay restitution, the Court may resentence the defendant, revoke his supervised release, hold the defendant in contempt of court, order the sale of property or "take any other action necessary to obtain compliance with the order of fine or

restitution." 18 U.S.C. § 3613A.[19] Indeed, a defendant who willfully fails to meet a restitution payment schedule does so at his peril. See, e.g., United States v. Lippitt, 180 F.3d 873, 874 (7th Cir. 1999) (district court imposed 47 additional months of incarceration upon defendant serving prison term for failing to pay a criminal fine[20] that was ordered in conjunction with his original sentence).

Thus, for the reasons stated above, the government requests that the Court enter an order imposing restitution of $31,962,750, payable to consumers identified in bankruptcy court, MBNA, Fleet Bank, NOVA Systems, Ingram Mico, Micron, and Ocean Communications. The government further requests that restitution payments be given to the Bankruptcy Trustee for disposition to the victims listed in the Court's order.

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[19]Indigence, however, if it is the sole reason for a defendant's inability to pay restitution, however, cannot lead to defendant's incarceration under Section 3614. 18 U.S.C. 3614(c).

[20]Failure to pay a criminal fine is governed by the same statute as failure to pay restitution. 18 U.S.C. § 3614.

V. CONCLUSION

For all of the above reasons, the government respectfully recommends that the Court impose a period of incarceration within the high end of the applicable Guidelines range of 70 to 87 months of incarceration. The government also respectfully requests that the Court enter an Order of restitution as described in this pleading.

Respectfully submitted,

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_____
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