

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 07-80138-CR-MARRA/VITUNAC(S)

UNITED STATES OF AMERICA,

Plaintiff,

-versus -

FRANK SARCONA,

Defendant.

_____ /

**GOVERNMENT’S OBJECTIONS TO THE PRE-SENTENCE
INVESTIGATION REPORT, MOTION FOR UPWARD DEPARTURE AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW the UNITED STATES OF AMERICA, by and through the undersigned Assistant United States Attorney, and objects to the Pre-sentence investigation report, moves for an upward departure from said report and states as follows:

The Pre-sentence investigation report has calculated the defendant’s offense level as set forth in ¶73 (page 19) to be 43, “life.” The undersigned has reviewed the calculations in said report and noted that the calculation total at ¶42 (page 14) was level 41. The undersigned has contacted the United States Probation Office and advised them of the disparity. The undersigned also advised them that the report did not increase the defendant’s offense level by 2 levels for sophisticated means as stated in United States Sentencing Guidelines §2B1.1 (b)(9). The undersigned was told that the omission of the sophisticated means enhancement was a clerical error, and in fact that is how they arrived at level 43. The undersigned has advised defense counsel of this conversation.

The United States objects to the Pre-Sentence Investigation Report part E, ¶ 82, which

states that there are no factors which warrant a departure. The Government is not attempting to be disingenuous by seeking an upward departure from “life;” but recognizes that if successful, defendant’s objections to any of the calculations, may alter that total guideline level. The United States advances three areas for an upward departure and seeks leave at sentencing to expand upon them:

1. Under representation of criminal history:

The first basis for the upward departure is the under representation of the defendant’s criminal history. United States Sentencing Guidelines §4A1.3, Departures Based on Inadequacy of Criminal History Category (Policy Statement), provides for consideration of “Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.” §4A1.3 (a)(2)(C).

Recently, the Sixth Circuit affirmed an upward departure from a criminal history category V to VI, in part, based on the extensive scope of the defendant’s tax fraud activities and the civil judgments against him. United States v. O’Georgia, 569 F.3d 281, 296 (6th Cir. 2009). See United States v. Smith, 424 F.3d 992, 1017 (9th Cir. 2005)(justifying sentence, albeit in that case not a departure, reasoning that a civil judgment could be a factor in the defendant's history); United States v. Fletcher, 322 F.3d 508, 519-520 (8th Cir. 2003)(affirming upward departure based on civil adjudications); United States v. Cooley, 68 Fed. Appx. 804, 806 (9th Cir. 2003) (affirming upward departure).

In the instant prosecution, the defendant’s numerous prior civil cease and desist orders as set forth in the final judgment (DE 173) of the SlimAmerica case (97-6072-cv-Ferguson)

(attached) were made known to the Court during this trial.¹ At page 11 of that final judgment Judge Ferguson recounted 13 prior state/administrative orders arising out of fraud investigations of Sarcona and his businesses. In the pages that followed, Judge Ferguson discussed each in great detail. The United States would also point out that many of the civil fraud complaints arose from similar fraudulent methods used in the Lipoban scheme; also that the Ferguson list was not exhaustive of all of Sarcona's cease and desist orders.

Further, the United States refers this Court, as a basis for departure, to that portion of the final judgment referencing the more than \$2 million in unpaid restitution as set forth in footnotes 4, 5 and 6 of that order. The United States would advise the Court that the National Marketing Data, Inc. account did not show any restitution payments being made to Sarcona's prior victims. The United States would also point to Sarcona's false statements to the Ferguson Court about Sarcona's income and involvements in other enterprises (DE 173:10-11) as another basis for determining that there is an under representation of criminal history.

2. Victims in number far beyond the heartland of the Guidelines.

The Sentencing Guidelines sets forth a 6 level offense enhancement for crimes involving more than 250 victims. United States Sentencing Guidelines §2B1.1(b)(8)(C). In the instant case, the defendant through his enterprise, defrauded tens of thousands of victims (possibly in excess of 100,000). This is so far in excess of the guidelines heartland that it merits an upward departure. See United States Sentencing Guidelines §5K2.0(a)(3).

¹ The defendant testified about his cease and desist orders in Utah; how he was told that he could not use a mail drop pretending it was a medical office; which occurred in the instant case.

3. Possibility of harm due to improper medical/health/diet advice.

It is without question that obesity is a major national health problem. The undersigned believes that the defendant's own experts discussed it as such at trial. Yet, the Sentencing Guidelines do not make any adjustment or take into any account in mail/wire fraud cases (the primary sentencing guidelines section) the physical/mental harm to one's health which occurred and, potentially occurred, to persons because of the sale of the Lipoban product.

Initially, this Court may recall that the Lipoban advertisements falsely claimed there were no side effects from taking the product when, in reality, various digestion problems were a known side effect. However, and of far greater significance, Lipoban ads, mailings, etc. claimed that large amounts of weight could be lost simply by taking the product without diet or exercise; persons were told that they could continue to eat as they previously had. This lack of diet and exercise, and endorsement of continued bad eating habits, created a harmful situation by which persons who are obese, and who otherwise might have sought help for their problem, were discouraged from doing so through the fraudulent advertising of Lipoban as a "magic pill." This is to say nothing of the harm to persons, who by virtue of the advertising, continued to ingest large amounts of fatty (high cholesterol) foods under the mistaken belief created by Lipoban that it absorbed 100 times its weight in fat in the body.²

As the Court heard during trial testimony, even Vanson, the producer of the product re-labeled as Lipoban, stated in its FAQ's that its use should be part of a diet and exercise program.

² The Court may recall that during final argument the defendant recognized the potential harm he created by arguing that he never suggested that Lipoban absorbed "100 times its weight in fat" in the body; the government displayed the newspaper insert showing that the next phrase was that it was flushed out of the body.

This Court may also recall Dr. Muss's testimony, who stated, during cross examination, that her endorsement of chitosan, which was falsely altered to appear as an endorsement of Lipoban, was taken out of context by the omission of the fact that her endorsement was as part of a program of diet and exercise. Ultimately, even the defendant recognized this as he attempted to present the sale of Lipoban as a "program," rather than merely the "miracle pill" which he advertised it as.

The United States Sentencing Guidelines permits an upward departure for physical injury. U.S.S.G. §5K2.2. See also U.S.S.G. §5K2.3 (which discusses psychological/behavioral changes). The United States suggests that the harm which was likely to occur, was known to the defendant (see the section above as to his long time involvement in fraudulent diet schemes) and he knowingly chose to create the risk of harm, and in fact harm, his numerous victims.

Consequently, the above upward departures discussed above should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

____s/____Kerry S. Baron_____
KERRY S. BARON
ASSISTANT UNITED STATES ATTORNEY