IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 14-CR-00102-1
	)	
MARK ANSTETT,	)	Hon. Harry D. Leinenweber
	)	
Defendant.	)	

DEFENDANT ANSTETT'S POSITION PAPER ON SENTENCING FACTORS

NOW COMES the Defendant, MARK ANSTETT, by his attorney, Thomas K. McQueen, and respectfully submits his position paper pursuant to Fed. R. Crim. P. 32(c) and Local Crim. R. 32.1(g) for purposes of his sentencing by this Court on July 22, 2015.

I. INTRODUCTION

Defendant has entered a plea of guilty to Count 5 of the Indictment filed by the Grand Jury alleging a violation of wire fraud under 18 U.S.C. § 1343. The Defendant appears before the Court as a 59 year-old computer equipment salesman never before accused of a crime. The Defendant has frankly admitted to the charged conduct presented in Count 5. In accordance with the written plea agreement, the Government will dismiss the remaining counts of the Indictment at sentencing.

II. OBJECTIONS TO THE PRESENTENCE REPORT

As reflected in the Presentence Report, the Written Plea Agreement and the proceedings before this Court in January, the Defendant has completely and unequivocally entered a plea of guilty to the offense of wire fraud. Knowing that the Presentence Report ("PSR") follows a defendant after the ultimate imposition of sentence, it is important that errors should be corrected and that inclusion of improper material should be stricken from

the PSR before the imposition of sentence. The Defendant presents the following objections or corrections to statements in the Presentence Report:

Paragraph 9. In the description of Sheldon Player's role in this offense, the Presentence Report erroneously identifies the district of his prior federal fraud conviction as the Northern District of Illinois. Player was convicted in the District of Arizona. (No. 2:86-CR-0081).

Paragraph 20. The investigating FBI agent represents to the Probation Department that Mr. Anstett "was also the individual who met with the company accountant yearly and provided said accountant with misrepresented financial gross sales for EAR." That is an inaccurate statement unsupported by the massive discovery produced by the government. Mr. Anstett participated in purchases, sales and repair of equipment for EAR for 15 years. He had limited contact with outside accountants (Von Lehman & Company, Inc.) hired by Player and was neither responsible for maintaining financial records of EAR or presenting them to the company accountants. As Exhibit A to this Position Paper reflects, the July 2008 representations to the outside accountants by EAR management were signed by Sheldon Player as "Co-President" and Robert Langford, as CFO. (See also Exhibit C).

Paragraph 22. The investigating FBI agent states that "no one player in this scheme played a lessor role." Nothing could be further from the truth. While Mr. Anstett's role did allow for the continuation of the scheme in 2008 and into 2009, as we will show below, it strains credulity to compare Mr. Anstett's role with those of Sheldon Player and even George Ferguson.

Paragraph 23. The FBI forensic accountant suggests that, over four years, Mr. Anstett "received net wages of approximately $1,372,147 from EAR." As Exhibit B to the Government's version of the offense reflects, the forensic accountant, in establishing "net

wages", fails to subtract the sizable payments made to the Illinois Department of Revenue and the United States Treasury or to take into account the pass through of Subchapter S, Corporate Profit, appearing on Mr. Anstett's Form 1040, not a penny of which went to him. Further, when the IRS twice attempted to refund Mr. Anstett more than $97,000 based upon his 2009 estimated taxes, he returned that money to the IRS. (Exhibit B).

Paragraph 25. This paragraph should be stricken entirely. Apparently, the FBI agent failed to attend the session on constitutional rights and specifically the Fifth Amendment, as a new agent at the FBI Academy in Quantico. Defendant Anstett did not make a statement when he surrendered for processing and was questioned by law enforcement authorities because the undersigned told the agents after he was arraigned that he would not be making a statement and had been advised by his counsel not to do so. The agent's statement that the Defendant was "extremely arrogant and uncooperative" is entirely irrelevant to the purpose of this Presentence Report and the work of this Court, and should also be stricken.

Paragraph 84. The statement that the Defendant was granted a bankruptcy discharge is inaccurate. There were no debts dismissed as the Defendant voluntarily dismissed his bankruptcy petition on or about February 26, 2014.

We believe that the ultimate issue before this Court is whether a sentence within the advisory Sentencing Guidelines range (of 157 to 188 months) is appropriate in this case. We will address the bases of our arguments that the advisory range is wildly inappropriate and, in any event, where all sentencing factors are considered by the Court, the advisory range produces a sentence much greater than is necessary in this case for this Defendant.

III. THE APPLICABLE GUIDELINES

1. Application of a Mitigating Role Adjustment Under Section 3B1.2

Whether the Court would consider the application of a mitigating role as a minor or minimal participant in the criminal activity under Guidelines Section 3B1.2, or take the following facts into consideration under its 18 U.S.C. § 3553 analysis, it is clear that Mr. Anstett deserves substantial mitigating consideration where there has been such an overemphasis by the current guidelines on the singular component of loss. As the Court no doubt knows, the Sentencing Commission has proposed modifications to several white-collar guidelines, including those affecting economic crime and mitigating role. In its April 9, 2015 news release, the Sentencing Commission said that "the change [in the fraud guideline] is intended to encourage courts to ensure that the least culpable offenders such as those who have no proprietary interest in a fraud, receive a sentence commensurate with their own culpability without reducing sentences for leaders and organizers." Statement of Chief Judge Patti B. Saris, Chair of the United States Sentencing Commission (4/9/15).

The ultimate issue before this Court is certainly not one of liability, Mr. Anstett has admitted his participation in the latter stages of this offense. Having established liability though, the focus of the Court and the parties should be on the level of his criminal culpability. As we will show, the relative culpability considerations in this case between Mr. Anstett and Messrs. Player and Ferguson are substantially different. Mr. Anstett received virtually no personal benefit at all from this scheme. Mr. Anstett participated in a nearly eight year Sheldon Player scheme for fewer than two years. Mr. Anstett never knew the entire scope or the breadth of the scheme. Mr. Anstett had no participation in the

planning or organizing of the scheme, which had been underway for more than six years before he was drawn into the scheme by Player. For many transactions, his role was limited to executing documents as "President" of EAR and providing lenders with his personal guaranty while Donna Malone, Player's Wife, signed (or had her signature forged) as CEO.

It is important that the Court understand the gross culpability of Sheldon Player in assessing the ultimate sentence that is appropriate for Mr. Anstett. We doubt that the Government will challenge any of these statements, borne out in government discovery, about Mr. Player:

- He organized and orchestrated a multi-year $80 million leasing fraud scheme upon Greyhound Financial Corporation in the District of Arizona in the 1980s, leading to his 1986 indictment and his 1988 conviction and incarceration. (*United States v. Player*, No. 2:86-CR-0081, D. Arizona).

- Player established EAR in 1991 and controlled all the key aspects of its finances until the latter part of 2007.

- Despite his apparent withdrawal in 2007 from the corporate organizational scheme, Player continued to represent himself as "President" or "Co-President" of the company in 2008 and 2009. Indeed, in the February 2009 notes of Von Lehman & Company, EAR's outside accountants, they generally refer to Sheldon Player as the "owner and principal management figure" of EAR. The March 17, 2009 audit retention letter is addressed to Player. (Exhibit C).

- Player established EAR's accounting relationships, moving among several northern Illinois CPA firms until moving EAR's business to Von Lehman & Company, Inc. in Cincinnati, Ohio.

- He obtained certified audited financial statements for EAR on an annual basis.

- Player established EAR's equipment and property appraisal relationship with Joel Gonia of Gonia Consulting, LLC of Louisville, Kentucky.

- He established EAR financial broker relationships with Sam Fallenbaum, Tim Neider, and Cindy Gamboa and provided them with EAR audited

financial statements as they swept the Midwest and the nation to obtain lease financing for EAR.

- As early as 2001, Player began equipment leasing at EAR as he had previously done with Greyhound Financial in the 1980s.

- Player restructured the corporate form of EAR in 2006 so as to have his wife, Donna Malone, serve as CEO and corporate secretary, purportedly owning 90% of the company.

- Player frequently forged Donna Malone's signature to personal guarantees providing her a defense in collection actions that followed the EAR collapse.

- Player purportedly gave 10% "sweat equity" to Mr. Anstett along with the public title of "President" in the latter part of 2007, necessitating Mr. Anstett's signing leases and personal guarantees for EAR. The Player/Malone personal financial statement of June 30, 2008 claims 100% ownership of EAR. (Exhibit D).

- He hired Robert Langford as EAR CFO, a position which Langford held until going to the federal penitentiary in 2008 for tax offenses he had committed with a prior employer.

- Player established a relationship with Machine Tools Direct ("MTD") and its owner, George Ferguson, a Carlisle, Pennsylvania company, under which MTD received a 2% share of all funds MTD obtained for "financing" equipment to be sold to EAR.

- Player purchased a 3.1 acre parcel, a 20 acre parcel and a 40 acre parcel in Jackson Hole, Wyoming, with EAR funds and purchased homes and condominiums in Chicago (including the Trump Tower), Elgin, Illinois, Miami and Estero, Florida, among others. (Exhibit D; Player 2007 and 2008 Personal Financial Statements). At June 30, 2008, Player and Malone valued those properties at more than $41 million. (Exhibit D, pp. 3-4).

- He repeatedly moved EAR's banking relationships from the Chicago area to Jackson Hole, Wyoming, and back to the Chicago area. On June 6, 2008, using a check on the account of the Jackson Wyoming State Bank and Trust entitled "Sheldon Player, President, Equipment Acquisition Resource, Inc.," Player made his final restitution payment in the Arizona case in the sum of $462,265.99. (Exhibit E).

- Player obtained equipment and parts inventory valuations from Gonia and caused Gonia to present to Von Lehman & Company in April 2009 a Fixed Asset Audit Analysis of EAR reflecting a December 31, 2008 fair market

value of about $200 million in equipment and parts, which Gonia represented that he had personally observed. (Exhibit F).

- Player obtained EAR audited financial statements, produced by the government in discovery, reflecting the following values of EAR capital leases:

2002	$3.3 million
2003	$15 million
2004	$27 million
2005	$42 million
2006	$51 million
2007	$71 million
2008	$112 million

(2007 and 2008 represented in Exhibit G, page 9).

- He and his wife received stockholder distributions, according to EAR audited financial statements, of $9 million in 2007 and $14 million in 2008. They borrowed more than $10 million from EAR. (Exhibit G, pages 4 and 7, Note 4).

- In 2009, Player was caught with a duffel bag containing $774,506 in cash and other items in the State of Wyoming, which were later released to him personally. (Exhibit H).

- Player designed a "Company Overview" in an effort to sell the company in 2009 which identifies him as "Co-President" and nowhere mentions EAR's leases. (Exhibit I).

- During the 2009 Von Lehman audit of EAR for December 31, 2008, Player and Malone with 90% stock ownership, were shown to have received "Actual Distributions Paid" of more than$23 million necessitating a $1.7 million adjustment to avoid paying Mr. Anstett more than the $665,000 he had been paid for his 10% ownership. (Exhibit J).

- Finally, Player was an inveterate gambler who flew about the country at EAR's expense betting hundreds of thousands of dollars.

Regardless of the Court's ultimate conclusion on whether a "minor" or "minimal" participant reduction is appropriate under the Guideline § 3B1.2, the issue of culpability certainly should entertain consideration by the Court of a departure downward when it ultimately calculates the appropriate sentence. As the Guidelines further define potential

downward departure considerations, the Court may depart downward in "cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense." Section 2B1.1, Application Note 20(c). The Sentencing Commission uses as an example a security fraud in which there is a substantial loss, but relatively small losses by a large number of victims - - not unlike the case at bar. The Commission goes on to note: "In such a case, the loss table in subsection (b)(1) and the victim's table in subsection (b)(2) may combine to produce an offense level that substantially overstates the serious of the offense. If so, a downward departure may be warranted." *Id.* We commend this conclusion to the Court as it considers the appropriate sentence for Mr. Anstett.

2. Sentencing Considerations

A. The Post-*Booker* Era of Sentencing.

Designed as being mandatory under the Sentencing Reform Act of 1984, the Federal Sentencing Guidelines were rendered advisory by the Supreme Court in its decision in *United States v. Booker*, 543 U.S. 220 (2005). The sentencing court's ultimate sentence is to be derived from the Court's analysis of the statutory 18 U.S.C. § 3553(a) sentencing factors underpinning the Federal Sentencing Guidelines. In that analysis, several factors are of import including the defendant's age, his lack of any prior involvement with the criminal justice system, and the low risk of recidivism that he presents as he is sentenced. The Court's responsibility, as it well knows, is to establish and "impose a sentence sufficient, but not greater than" that which is necessary to reflect and accomplish the sentencing purposes of Section 3553(a).

In the post-*Booker* world, the trial court is recognized as being in a "superior position" to make an assessment applicable to the facts of the case and the individual defendant in determining the ultimate sentence and particularly whether a variance from

the Guidelines recommendation is appropriate. *Gall v. United States*, 552 U.S. 38 (2007). As the Court in *Gall* recognized, there is no longer a need for extraordinary circumstances existing for the sentencing judge to impose a non-Guidelines sentence. The focus of the Court is upon the "reasonableness" of the sentence imposed and the Guidelines are only advisory. *Gall* at 46-47. Today, the Guidelines are simply the "starting point and the initial benchmark." *Id.* at 49. As the Supreme Court has noted, "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensure." *Koon v. United States*, 518 U.S. 81, 113 (1996).

B. Section 3553(a) Considerations

The Court may sentence inside or outside the Guidelines range at its discretion, as long as all of the factors of Section 3553(a) have been considered. It is the Court's duty, indeed, to "make its own reasonable application of the Section 3553(a) factors, and to reject (after consideration of) the advice of the Guidelines" if the result of what the Guidelines suggests does not comport with the sentencing Court's views of an appropriate sentence. *Kimbrough v. United States*, 552 U.S. 85, 113 (2007) (Scalia, J. concurring). Thus, the sentencing courts once again enjoy sentencing discretion in the post-*Booker* world. *United States v. Castro-Juarez*, 425 F.3d 430, 436 (7th Cir. 2005).

The factors listed in 18 U.S.C. § 3553(a), which the Court shall consider, include: (1) the history and characteristics of the defendant and the nature and circumstances of the offense; (2) the need to provide just punishment; (3) the need to provide adequate deterrence; (4) the need to protect the public; and (5) the need to provide treatment to the defendant.

The sentencing Court has discretion to determine what weight to place upon each of these statutory factors. *See United States v. Johnson*, 471 F.3d 764, 766 (7th Cir. 2006) ("the statute does not weigh the factors. . . that is left to the sentencing judge, within the bounds of reason, which are wide.") More recently, the United States Supreme Court has emphasized that sentencing courts should impose a punishment that "fit[s] the offender and not merely the crime." *Pepper v. United States*, 131 S.Ct. 1229, 1240 (2011).

1. Mr. Anstett's Personal History, Characteristics and the Offense

Section 3553(a)(1) requires that the Court consider the nature and circumstances of the offense together with the history and characteristics of the Defendant. Mr. Anstett comes before the Court as a 59 year old with an otherwise unblemished record and a record of consistent employment success and a long-term devotion to the high tech equipment industry he served at EAR for 15 years and more recently at InspecGlobal Technologies for more than five years. *See United States v. Baker*, 445 F.3d 987 (7th Cir. 2006) (history and character of the defendant are grounds for a reduced sentence that meets the purposes of sentencing under Section 3553(a)). His family and employment background is well documented and accurately detailed in the Presentence Report.

His background, business ethics and personality have been aptly described by several of the persons who have provided the Court with letters on his behalf:

Charles M. Zureki, Esq:

> "Mark is a very good, caring, hard working, honest person. His top priorities are his wife and his two children, David and Rachel."
>
> "[I]n my observation, [Mark] was not privy to many things that have been disclosed after the failure of the company about the depth of Sheldon's dishonesty. Mark worked hard on the sales end of that business."

Richard N. Golding, Esq.:

> "Mr. Anstett's activities resulted in the prompt filing of a Chapter 11 case on behalf of EAR and the potential preservation of assets for the benefit of its many creditors."

Cynthia Pearson:

> "He is not extravagant . . . [and] has maintained a simple lifestyle. Mark has always been hardworking and concerned above all for taking care of his family."

Lou Primaveri:

> "I have found Mark to have always been of good moral character and with a high standard of business ethics."

William A. Scaife:

> "Mr. Anstett and I first met in 1999. . . . It is significant that over these 16 years, Mr. Anstett did not appear to have financial control over EARI's business. All payments from and to EARI were handled by Mr. Anstett's business associate, Mr. Sheldon Player."

There can be no question that the offense to which Mr. Anstett has entered this plea is a serious one. Tragically, his inability to avoid or later withdraw himself from this scheme has placed him at the mercy of the Court. That having been said, it is important that the Court focus on the sentence that gives Mr. Anstett a reasonable opportunity to re-energize his employment opportunities to provide a platform to make some reasonable restitution in this case recognizing his historic integrity and truly admirable character. His life has been in shambles since September 2009 with civil litigation, bankruptcy and ultimately this prosecution in 2014 weighing heavily upon him. A lengthy imprisonment is neither appropriate nor necessary for this good and decent man.

2. Section 3553(a)(2)(A)

The next consideration of the Court is that it impose a sentence which will reflect the seriousness of the offense and promote respect for the law as well as provide just

punishment for the offense. The Advisory Guideline calculation Total Offense Level 34 in this case yields a range of 157 to 188 months incarceration driven primarily (74%) by loss. Today and since 2003, a loss at this level yields a 26 level increase, but in 1989 an 18 level increase and in 1987, only an 11 level increase.

We respectfully suggest that a substantial downward departure is appropriate in this case (or a variance) as provided in Application Note 20 to Guidelines Section 2B1.1(b)(18)(B)(ii). The Application Note makes clear that it is appropriate for the Court to consider a downward departure where the Guideline calculation "substantially overstates the seriousness of the offense." App.Note 20. Here, a fair consideration by the Court is one which focuses upon the offense as a microcosm of the entirety of Mr. Anstett's more than 12 years of devotion to the proper, lawful business of EAR before ever being drawn into Shelton Player's on-going scheme and most importantly, his receipt of virtually none of the fruits of the crime.

3. Section 3553(a)(2)(B)

Next, the Court is to consider a sentence which affords adequate deterrence to the criminal conduct. In the case at bar, the manner and means of the criminal conduct are now negated by the destruction of EAR. The lesson learned by the dramatic damage to his years of professional development in the high tech equipment industry business, from his conduct and his plea in this case, reflects a very substantial deterrence to the Defendant himself. Further, it is well accepted that increases in the severity of punishment cannot be proven to deter others. Mr. Anstett does not need, for deterrence purposes, or deserve a prison sentence of the magnitude suggested by the Guidelines.

4. Section 3553(a)(2)(C)

The Court is next required to consider a sentence which will protect the public from further crimes of this defendant. Again, we suggest that the Defendant's spotless history and his own actions in cooperating with the EAR receiver and pleading guilty to Count 5, is evidence that there is little basis for concern about recidivism. Further, the admission of guilt negating the manner and means of future similar offenses, the total lack of criminal history, the lack of drug abuse and the Defendant's age, 59, all statistically militate heavily against recidivism.

The Court should also recognize Mr. Anstett's post-offense self-rehabilitation. With his wife, he has started and operated a business for more than five years.

5. Section 3553(a)(2)(D)

Finally, under this statutory analysis, the Court is required to consider a sentence that will provide the defendant with training or treatment in the most effective manner. In the case at bar, thankfully, Mr. Anstett has personally and successfully fought abuse of alcohol and kept himself "sober" for many years such that the Court need not consider a treatment program.

IV. CONCLUSION

When each of these factors is considered, and particularly the strong evidence of a Guidelines advisory calculation which substantially overstates the seriousness of Mr. Anstett's culpability in this aberration offense, we respectfully ask the Court to calculate a substantial variance or downward departure from the advisory Guideline level in imposing the sentence upon Mr. Anstett with a focus not on the loss, but Mr. Anstett's negligible gain from the fraud. As the facts make clear, Mr. Anstett was neither the originator of this scheme, a long time participant, nor its leader. That was Sheldon Player. Furthermore,

Mr. Anstett was neither the scheme's primary participant nor its primary beneficiary. That was Player and his family members.

Mr. Anstett has no prior criminal history and, but for this matter, has otherwise led not a simply blameless, but an exemplary life. We ask the Court to recommend that for any period of incarceration, the Bureau of Prisons assign Mr. Anstett to a Federal Correctional Institution which is relatively close to his family. Because, as the Presentencing Report clearly documents, he has limited financial means which ought to be focused on statutorily mandatory restitution, we respectfully request that the Court waive any penal fine and other discretionary costs and attendant interest.

Dated: July 9, 2015

Respectfully submitted,

MARK ANSTETT

By: s/ Thomas K. McQueen
Thomas K. McQueen

Thomas K. McQueen
Law Offices of Thomas K. McQueen, PC
41 South Wynstone Drive
North Barrington, IL 60010
(847) 381-1234
tkm@tmcqueenlaw.com
ARDC No. 1869671

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of **Defendant Anstett's Position Pater on Sentencing Factors** was filed July 9, 2015, via this Court's ECF filing system.

s/ Thomas K. McQueen