U.S. Department of Justice

United States Attorney
Eastern District of New York

DCP/LHE/NMA
F. #2016R00505

271 Cadman Plaza East
Brooklyn, New York 11201

November 8, 2023

By ECF

The Honorable Brian M. Cogan
United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Daniel Small, et al.
Criminal Docket No. 16-640 (BMC)

Dear Judge Cogan:

On August 12, 2022, a jury returned guilty verdicts against the defendant Daniel Small (the "defendant" or "Small") on Counts 6 and 8 of the above-captioned indictment, which charged the defendant and his co-defendants with conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371 (Count Six), and securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff (Count Eight).[1] The charges stemmed from the defendant's knowing and willful participation in a fraudulent scheme to defraud bondholders of an oil and gas company, Black Elk Energy Offshore Operations, LLC ("Black Elk"), from the proceeds of a lucrative asset sale ("the Black Elk Bond Scheme"). The defendant is scheduled to be sentenced on November 15, 2023. For the reasons stated below, the government respectfully requests that the Court impose a custodial term.

[1] The defendant was acquitted of Count Seven, charging wire fraud conspiracy.

I. Factual Background

A. Offense Conduct

The Court is deeply familiar with the facts of this case from, among other things, presiding over two trials in the case and the parties' post-trial briefing. The government therefore provides only a brief summary of the facts below, and respectfully refers to the trial record, the Presentence Investigation Report ("PSR") and the government's post-trial submissions.

1. Overview of the Black Elk Bond Scheme

Small and his co-conspirators perpetrated a scheme to fraudulently manipulate a vote among bondholders in Black Elk, and thereby to extract tens of millions of dollars that Small and his co-conspirators distributed to Platinum Partners, L.P. ("Platinum") investors, including the conspirators' friends and family. Specifically, in 2014, as Black Elk spiraled towards insolvency, Small and his co-conspirators David Levy and Mark Nordlicht successfully sought to pay back the friendly preferred equity holders (and limit Platinum's losses in the event of a Black Elk bankruptcy) by: (1) orchestrating the sale of Black Elk's most valuable assets and (2) fraudulently manipulating the priority structure by which Black Elk debt and equity holders would be repaid to ensure the proceeds of the asset sales went to Platinum's investors, rather than outside holders of 13.75% secured notes (the "the Black Elk Bonds"), who would otherwise have had priority to those proceeds. Small and his coconspirators successfully manipulated this priority structure by concealing his and his co-conspirators' control over certain bonds – held by certain Platinum entities (PPCO and PPLO) and a reinsurance company called Beechwood – and thereby rigging a vote of the bondholders to determine whether to consent to changes in the bond indenture that would allow the preferred equity holders to receive the proceeds of Black Elk's asset sales. As a result of this fraud, Small and his coconspirators looted Black Elk of approximately $70 million in proceeds, and gave that money to the preferred equity holders, who were not lawfully entitled to it.

2. Small's Role

As the government's evidence proved at trial, and as discussed further below, Small played a critical role in carrying out the Black Elk Bond Scheme. He was on the board of Black Elk and a portfolio manager at Platinum. He participated in both the conversations with Nordlicht and Levy, on the Platinum side, about which of the various entities across Platinum and Beechwood held bonds and in what quantities, and in conversations with Black Elk's lawyers, about what information about Platinum's bondholdings was required to be disclosed. See, e.g., GX-8, -584, -693, -731, -689, -692. He was in control of the flow of information to Black Elk's lawyers and in a position to dictate what would be disclosed to Black Elk's bondholders. See, e.g., GX-695, -726, -761. His unique role in the scheme meant that he knew that the bondholders were be lied to, and that he knew the truth that was being withheld.

Small was also aware of the importance of this transaction to his employer, Nordlicht. For example, at trial the jury was presented with abundant evidence demonstrating that Black Elk, one of Platinum's largest investments, was struggling. The testimony of Art Garza informed the jury that Black Elk was considering filing for bankruptcy following the explosion of one of its drilling platforms in the Gulf of Mexico. Trial Tr. at 80:11–82:1. This testimony was

buttressed by internal emails in evidence reflecting the co-conspirators' awareness that Black Elk might enter bankruptcy and lacked sufficient cash to pay its bills. For example, on January 22, 2014, Nordlicht emailed Hoffman, Shulse, Small and Levy and described Black Elk as moving from "crisis to crisis" and "moving towards a litigation," observing that "there is not enough value after all your sales to pay everyone off." GX-507. Similarly, later in January, Shulse emailed Levy, Small and Nordlicht and "put the over under on a notice of involuntary bankruptcy filing at February 19th." GX-513.

Other exhibits showed Nordlicht's desperation to extract some remaining value from Black Elk, specifically the proceeds of its asset sales. In GX-649, Nordlicht exchanged emails with Uri Landesman and described the situation at Platinum as "code red" and explained that "it can't go on like this." Similarly, on March 16, 2014, Nordlicht emailed Small and wrote "[t]his is also the week I need to figure out how to restructure and raise money to pay back 110 million of preferred which if unsuccessful, wd be the end of the fund." GX-552. This email supports a reasonable inference that Small felt under pressure from Nordlicht, given the crisis at Platinum, to find a way to pay the preferred. On June 23, 2014, Nordlicht emailed Levy, Small and Black Elk's counsel David Ottensosser about the upcoming asset sale to Renaissance, stating that Black Elk will "want to pay payables, WE NEED TO RESIST THIS. Get preferred paid off as quickly as possible . . . Let's get the mechanism done ASAP in terms of how we pay off bonds and get preferred paid. . . . I need liquidity ASAP." These emails showed that Small and his co conspirators were motivated to commit the fraud -- because they were motivated to get liquidity from the Renaissance transaction to the preferred as quickly as possible, and stooped to criminal conduct in order to do so.

Email correspondence presented at trial also established both that Small knew that Nordlicht, through Platinum, controlled approximately $98.6 million in bonds and intentionally dictated that the bondholders would be told, falsely, that the Platinum entities only controlled approximately $18.3 million in bonds. On July 3, 2014, Small sent an email to the lawyers at BakerHostetler, Brittany Sakowitz and Rob Shearer, copying Jeff Shulse, Black Elk's Chief Financial Officer, seeking to confirm his (correct) understanding of how the affiliate rule would apply to the consent solicitation transaction, asking them to "please confirm that under the TIA if $5MM of the bonds were owned by an affiliate then in order for the consent to be approved a majority of $145MM (greater than $72.5MM) would need to consent rather than greater than $75MM." GX-689. Small thoroughly understood how the affiliate rule applied to the transaction, namely that it would result in the bonds held by affiliates being excluded from the vote. The lawyers then wrote back confirming Small's understanding, and included the definition of "affiliate," namely "any person directly or indirectly controlling or controlled by or under direct or indirect common control with," the obligor.

Then, on July 7, 2014, nine days before the vote started on the consent solicitation, Small forwarded a draft of the consent solicitation document to his co-conspirators Nordlicht and Levy and wrote "[t]he company must disclose how many bonds are owned by affiliates in order to establish the requisite number to constitute a majority . . . let's discuss ASAP." GX-692. On July 8, 2014, one day later, the conspirators requested and obtained an updated list of the Black Elk bond holdings across the Platinum and Beechwood entities. GX-693. The following day, Small told Black Elk's lawyer that only the $18.3 million in Black Elk bonds held by PPVA should be disclosed and excluded from the consent solicitation vote. GX-695. These emails proved that

each of the conspirators, but specifically Small, as the author of the critical messages: (1) was aware of the prohibition on affiliate voting and why the number of bonds identified as being held by affiliates mattered; (2) was aware of the actual number of bonds controlled by Nordlicht across the Platinum/Beechwood entities, which they knew would consent to the amendments; and (3) collectively decided to instead provide a false number in order to make it easier for the vote to pass.

Later in the month, on July 29, 2014, Small sent a spreadsheet to Nordlicht and Levy that not only detailed the number of bonds held by the Platinum and Beechwood entities, but actually did the math to calculate how the vote would play out and showing that the outcome was guaranteed. GX-731. Small knew that Platinum and Beechwood controlled the vote because their votes were guaranteed, and that by concealing the bonds held by the entities other than PPVA the conspirators could guarantee the outcome.

On August 13, at around 6:00 p.m., right after the close of the vote, Shearer emailed Small and asked him (as he had before, to no avail) for a signed officer's certificate certifying the number of bonds held by Platinum and its affiliates. GX-26. Upon receipt of that email, Small forwarded it to Shulse and requested from Shulse the "latest activity report from the trustee," i.e. the report reflecting the number of bonds that decided to tender and consent. This information was not necessary to complete the officers' certificate as to Platinum's bondholdings, which requested only information as to what bonds Platinum held. But it was necessary in order for Small to determine which of Platinum's bondholdings needed to remain secret in order to guarantee a successful outcome to the vote, because the number of bonds that voted "no" and remained outstanding would need to be less than half the total of the tendering bonds and the consenting bonds, excluding any disclosed affiliated bonds. Upon receipt of the number of tendering bonds from Levy, who had been cc'd, and just 20 minutes after Shearer's initial request, Small emailed his co-conspirators, Nordlicht and Levy, and provided them with a chart detailing the outcome of the vote and Platinum's bondholdings.[2] GX-760.

[2] Notably, Levy did not send Small the requested "activity report." GX-26. He sent him only the number of tendering bonds. But as GX-670 demonstrates, that was all the information Small needed, and Levy, his co-conspirator, knew that. Small already was aware of the total number of consenting bonds because he was already aware that the bonds held by the Platinum and Beechwood entities had voted to consent.

From: Daniel Small
Sent: Wednesday, August 13, 2014 6:24 PM
To: Mark Nordlicht; David Levy
Subject: Officer Certificate

See attached wording and let me know if you are ok. Below is a table that shows under all three scenarios there is 50% approval.

Tender Analysis	Total	PPVA & Aff	PPVA and Possible Affil
Bonds Outstanding	150,000,000	131,679,000	88,386,000
Total Consents	98,631,000	80,310,000	37,017,000
Total Tenders	11,400,000	11,400,000	11,400,000
Total	110,031,000	91,710,000	48,417,000
Percent	73%	70%	55%

This chart showed that whether the count included the PPVA bonds, excluded the PPVA bonds, or excluded a third category of bonds, labeled "possible affil." (which were the bonds held by PPCO and PPLO), the vote passed. Then, the next morning on August 14, Small emailed Shearer another version of this chart referring to that third category as bonds held by parties "not deemed affiliates," and attached a version of the officers' certificate that referred to this category of bonds in which Platinum "disclaimed beneficial ownership." GX-761.

From: Daniel Small <dsmall@platinumlp.com>
Sent: 8/14/2014 12:36:23 PM -0400
To: "Shearer, Rob" <rshearer@bakerlaw.com>
CC: Jeff Shulse <jeffs@blackelkenergy.com>
Subject: Officer's Certificate
Attachments: Platinum Officer_s Certificate Re_ Tender Offer and Consent Solicitation.docx; Consent Tender Analysis.xlsx; Black Elk ACTIVITY REPORT 12 .xlsm

Rob, see attached officer's certificate and below analysis which is also set forth on the attached spreadsheet. Let me know if you have any comments and we will have executed.
Thanks, Dan

	Total	PPVA & Affil	PPVA & Not Deemed Affil
Bonds Outstanding For Calculation of Vote	150,000,000	131,679,000	88,386,000
PPVA & Affiliates	18,321,000	0	0
Not Deemed Affiliates	43,293,000	43,293,000	0
Other	37,618,000	37,618,000	37,618,000

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Total Consents	99,232,000	80,911,000	37,618,000
Total Tenders	11,433,000	11,433,000	11,433,000
Total Consents and Tenders	110,665,000	92,344,000	49,051,000
Percent	74%	70%	55%

Small waited until the vote was closed, and it was clear that the vote had passed, to disclose for the first time to Black Elk's lawyers that there existed another category of bonds that could possibly be deemed affiliates. Small understood that PPCO and PPLO would likely be deemed affiliates and chose not to disclose them until the vote was over. He did not include the PPCO and PPLO bonds in the number of bonds held by Platinum and its affiliates in the consent solicitation documentation and he directed Platinum employees to vote the PPCO and PPLO bond several weeks before he disclosed them to Shearer. See GX-294, -719. Small personally directed the vote of these bonds despite knowing that Platinum's control (his control) of these bonds had not been disclosed to investors and without asking Shearer or the other lawyers involved in the transaction for advice about their status.

Small was aware that what he was doing was wrong and violated the law. The string of emails described above in which Small revealed, after the vote had closed, the existence of the bonds held by parties "not deemed affiliates"—which were the bonds held by PPCO and

PPLO, undoubtedly affiliates of PPVA—was an effort to cover his and his co-conspirators' tracks, reflecting his consciousness of guilt. As described above, prior to providing Shearer with the officer's certificate signed by Nordlicht and the table depicting Platinum's bondholdings (but, critically, not Beechwood's bondholdings) Small first requested an updated activity report, so that he knew exactly how many "yes" votes he had, and thus how many affiliated bonds could be excluded from the vote without affecting the outcome. The only motivation he could have had to disclose, at this late date, the existence of the potentially-affiliated bonds was to insulate the fraudulent transaction by disclosing as much as he could without risking undoing the vote. But even then, Small did not disclose the Beechwood bonds, hiding them instead under a category called "other." Critically, while Small was aware from all of the email correspondence he sent and received throughout the spring and summer of 2014 that the Beechwood entities held Black Elk bonds, that bonds had been moved from Platinum to Beechwood, and that Beechwood was going to vote the way Nordlicht dictated, he never revealed to Shearer the existence of the Beechwood bonds. Small also never asked Shearer for advice regarding whether the Beechwood, PPCO, or PPLO were affiliates, despite his other communications with Shearer related to the affiliate rule.

Small knew that he and his co-conspirators were committing fraud by concealing the Beechwood bonds, and that he acted to minimize the risk that the fraud would be uncovered in the wake of the scheme's success.

B. Procedural Posture

On July 9, 2019, Small's co-defendant's Levy and Nordlicht were found guilty of Counts 6, 7 and 8 of the indictment. Small had been severed from the case on the eve of trial.

Following post-trial briefing, on September 27, 2019, this Court granted Levy's motion for a judgment of acquittal on Counts Six, Seven and Eight pursuant to Rule 29 and his motion for a new trial in the alternative pursuant to Rule 33; and Nordlicht's motion for a new trial on Counts Six, Seven and Eight pursuant to Rule 33. This Court acquitted Levy on the ground that the evidence presented at trial purportedly was insufficient to establish Levy's criminal intent. (ECF Dkt. No. 799 at 27-32). This Court found the evidence sufficient to sustain Nordlicht's convictions and therefore denied his Rule 29 motion. (Id. at 18-27). This Court nevertheless granted Nordlicht's motion for a new trial under Rule 33, on the ground that the government purportedly presented insufficient evidence to prove Nordlicht's knowledge and intent. (Id. at 33-37).

On January 7, 2020, the government appealed this Court's post-trial decision. On November 5, 2021, the Second Circuit vacated this Court's order and judgment granting Nordlicht's and Levy's post-trial motions and remanded for further proceedings consistent with its opinion.

Thereafter, Small's trial began on August 1, 2022. The defendant was convicted by the jury on Counts 6 and 8 of the indictment at the conclusion of his trial. After the jury's conviction, the defendant filed motions for a judgment of acquittal on Counts Six and Eight pursuant to Rule 29 and his motion for a new trial in the alternative pursuant to Rule 33. On July 6, 2023, the Court denied those motions in a memorandum decision and order. See ECF Dkt No. 1003 ("Post-Trial Order").

II. A Custodial Sentence is Warranted

A. Sentencing Guidelines Range

1. Guidelines Calculation

The United States Department of Probation for the Eastern District of New York ("Probation") calculates the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines") as follows:[3]

Base Offense Level (U.S.S.G. § 2B1.1(a)(1))	7
Total Offense Level:	7

The government respectfully submits that an enhancement, pursuant to U.S.S.G. § 2B1.1(b)(10)(C), is appropriate because the defendant's fraudulent scheme involved sophisticated means. As the commentary to the Guidelines notes "'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense . . . Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." U.S.S.G. § 2B1.1 Application Note 9(B). The evidence at trial demonstrated that the defendant's scheme involved sophisticated means. The defendant and his co-conspirators rigged a bond vote by secretly transferring tens of millions of bonds from Platinum to Beechwood for the sole purpose of hiding the true ownership of the assets. As the evidence at trial established, Nordlicht spent months secretly sending bonds from Platinum entities to Beechwood in a series of under-the-table trades that masked the true ownership of the majority of Black Elk bonds. The defendants then concealed the true control of the bonds from their attorneys, the trustee and the bondholders in order to complete fraudulent offering materials. With knowledge that they were false, the defendants approved sending these materials to investors, which resulted in a rigged vote. This is the very definition of a sophisticated fraudulent scheme. See United States v. Stitsky, 536 F. App'x 98, 112 (2d Cir. 2013) (Upholding application of the sophisticated means enhancement when the fraudulent scheme included "careful effort to conceal the fraud by lying to business partners, lawyers, and investors" and "relied on creating and disseminating marketing publications that contained material misrepresentations"); see also United States v. Bailey, 820 F. App'x 57, 62 (2d Cir. 2020) (finding sophisticated means where a defendant "moved money between several bank accounts and used his businesses as 'fronts' to hide his activity."). Furthermore, "tactics to conceal offense conduct" and "repetitive and coordinated conduct" indicate sophistication. See United States v. Fofanah, 765 F.3d 141, 146 (2d Cir. 2014). The defendants' efforts to conceal the true ownership of the Black Elk bonds and the rigged nature of the consent solicitation are thus hallmarks of a sophisticated criminal scheme under this Circuit's jurisprudence.

[3] This calculation is largely determined by the Court's July 18, 2023 ruling that no loss resulted from the fraudulent scheme that is the basis of the conviction. ECF Dkt. No. 1005. The government objects to this ruling.

Notably, each step in a scheme need not be elaborate if "the total scheme was sophisticated in the way all the steps were linked together." United States v. Jackson, 346 F.3d 22, 25 (2d Cir. 2003)). As noted above, while steps in this scheme were each complex, the way defendants linked them together was also sophisticated. The criminal scheme took months to perpetuate and required planning, timing and a series of lies. And it is through this lens that the Court should evaluate the defendant's entire criminal scheme.

When the sophisticated means enhancement is applied, the defendant's total Offense Level would be 12. See U.S.S.G. § 2B1.1(b)(10) (noting that the enhancement increases the defendant's offense level by 2 levels, but "if the resulting offense level is less than 12, increase to level 12.")

In his sentencing memorandum dated November 1, 2023, ECF Dkt. No. 1014 ("Def. Mem."), Small states that he is eligible for an amendment to the Guidelines, U.S.S.G. § 4C1.1(a), which was made effective on November 1, 2023 and yields a two-level reduction to Small's offense level. The government agrees that this amendment applies. Small has a criminal history score of zero, and thus a Criminal History Category of I. PSR ¶ 70. Based on a total offense level of 10 and a Criminal History Category of I, the defendant's Guidelines range of imprisonment is six to twelve months, applying the Court's ruling as to loss.

2. .Small's Guidelines Objections

In his objections to the presentence report, which the defendant filed on September 22, 2023, ECF Dkt. No. 1013 ("PSR Obj."), Small primarily seeks to relitigate the jury's verdict and objects to all facts in the PSR establishing his guilt. The government therefore responds only to the objections that raise legitimate disputes relevant to sentencing:

- Small objects to Paragraph 12 of the PSR and argues that paragraph should be amended to note that "various of Black Elk's oil properties were cash flow positive in 2014." (PSR Obj. at 2. Small's objection is wrong and should be rejected. The portion of the trial transcript that Small cites is testimony from Black Elk employee Art Garza that Black Elk did have "tier one" assets in early 2014 that were cash flow positive. But Small fails to acknowledge Garza's testimony, on the same page of the transcript, that those tier one assets were sold as part of various asset sales in 2014, leaving Black Elk with negative cash flow assets. (Tr. 94-96). Indeed, as the Court recognized, the defendant knew that Black Elk's financial condition was "cash strapped" and led Black Elk to sell its most valuable assets. (Op. at 5).

- Small makes various objections to statements in the PSR establishing his connection to Beechwood, his knowledge of Beechwood secretly owning Black Elk securities and Nordlicht's ability to control bond trading at Beechwood. See PSR Obj. at 4-6 (making objections to PSR ¶¶ 23-31). These objections should also be rejected. As the evidence at trial established, and the jury found, Nordlicht unilaterally transferred bonds from Platinum entities to Beechwood entities, Black Elk trader Israel Wallach did not make the investment decision for the purchase or sale of those bonds and Small had direct knowledge Platinum's Black Elk bonds had been transferred to Beechwood entities. Moreover, as the jury found

and the Court acknowledged, the evidence established that Small knew that Nordlicht controlled Beechwood, that Nordlicht was behind the transfer of Black Elk bonds to Beechwood entities and that the bonds were transferred in order to vote for the consent solicitation. (Post-Trial Order at 33-35). The PSR provisions related to Nordlicht's control of Beechwood are accurate and the defendant's attempt to reject the jury's verdict should be rejected.

- Small also makes myriad objections to facts in the PSR on the basis that he was not included on certain emails or did not have personal involvement in specific events described in the PSR. (See PSR Obj at 5, 7 (objecting to ¶¶ 29, 46, 47)). Those objections should be rejected. The PSR accurately describes those events and who was directly involved in the operative events. As the Court is aware, PSRs regularly describe the entire scope of a criminal scheme particularly where, as here, the defendant's conviction on Count Six was for being a member of a criminal conspiracy.

- Small repeatedly asserts that language in the PSR should be struck or rephrased based on his view that he did not commit a fraud, citing the Court's observation that it viewed the evidence as "pointing toward a mistake." (See PSR Obj. at 6, 8 9 (objecting to PSR pages 9, 11, 12 and ¶ ¶ 34, 36, 41)). Each of Small's objections should be overruled. The jury in Small's trial found that he did not make a mistake. It found that he committed and conspired to commit securities fraud when he] lied to investors and potential investors in Black Elk securities. Small cannot rewrite the PSR to remove evidence of his culpability.

- Finally, although the Court has made a finding that the crime of conviction caused no loss under the Guidelines, the government has objected to that ruling and is obligated to assert the rights of potential victims of the defendant's conduct and provide them with the opportunity to be heard. As the Court is aware, both Todd Pulvino of CNH and Dixon Yee of Phoenix Partners testified that their respective firms lost money from their investment in Black Elk securities and that those losses were directly related to their decision on the Black Elk consent solicitation. See Tr. 713 (Pulvino testifying that CNH lost $2 million on the $7.1 million it initially invested); Tr. 936 (Yee testifying that Phoenix lost $7.7 million in its Black Elk position). The PSR should note that potential victims have asserted losses.

B. The Appropriate Sentence

As a consequence of the Court's ruling on the issue of loss, the United States Sentencing Guidelines support a non-custodial sentence for this defendant. The government disagrees with the Court's ruling, and submits that the brazen theft, through deceit, of over $70 million is a sufficiently serious crime to warrant some period in custody.

1. The Applicable Law

It is settled law that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."

Gall v. United States, 552 U.S. 38, 49 (2007) (citation omitted). Next, a sentencing court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [it] may not presume that the Guidelines range is reasonable. [It] must make an individualized assessment based on the facts presented." Id. at 50 (citation and footnote omitted).

Title 18, United States Code, Section 3553(a) provides that, in imposing sentence, the Court shall consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct; [and]
>
> (C) to protect the public from further crimes of the defendant.

Section 3553 also addresses the need for the sentence imposed "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). "[I]n determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, [the Court] shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

It is well-settled that, at sentencing, "the court is virtually unfettered with respect to the information it may consider." United States v. Alexander, 860 F.2d 508, 513 (2d Cir. 1988). Indeed, Title 18, United States Code, Section 3661 expressly provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Thus, the Court must first calculate the correct Guidelines range, and then apply the 3553(a) factors to arrive at an appropriate sentence, considering all relevant facts.

2. Nature and Circumstances of the Offense

As an initial matter, the defendant's conduct in this case was serious. Small and his co-conspirators designed a scheme to defraud holders of the Black Elk bonds and thereby steal tens of millions of dollars for the benefit of their business and insider investors.

3. Nature and Circumstances of the Defendant

Much of Small's sentencing memorandum is devoted to depicting Small as a devoted father, partner and friend. The government is not in a position to dispute these aspects of Small's life. However, it is hardly uncommon in cases involving sophisticated financial fraud for the perpetrators to hold similar roles in their community, and the fact that Small was not otherwise engaged in a life of crime does not diminish the significance of his involvement in the fraud giving rise to his conviction.

Additionally, Small's involvement in the scheme is particularly notable because he was a licensed attorney, and therefore well positioned to understand the illegal nature of the conduct he and his colleagues were undertaking. His professional history and background therefore, does not weigh against a custodial term—if anything, it weighs in favor. In his sentencing memo, Small attempts to equate his conduct to that of Shearer, while ignoring one critical difference—Small knew the full truth of what bonds Platinum controlled and how they intended to corruptly deploy that control in the consent solicitation process. Shearer did not. As an attorney, Small was particularly well situated to understand that Shearer was relying on him to provide accurate information. Yet Small actively disregarded his role and training as a lawyer when he concealed critical information in order to perpetuate the fraud.

4. The Need for Deterrence

A custodial sentence is also necessary here in order to ensure that the sentencing goals of deterrence are appropriately met. The defendant has taken no responsibility for his conduct, in any way, at any point in this case. The government understands and respects that the defendant wishes to preserve his appellate opportunities. That said, in spite of all the evidence of repeated criminal conduct throughout the scheme, the defendant has refused in his sentencing memorandum, or anywhere else, to acknowledge any wrongdoing on his part—no poor choice, no mistake, no unethical act. Much of his sentencing memorandum is devoted to bemoaning that Small has lost career opportunities as a result of his prosecution—as though he were entitled to continue to be employed as a fiduciary to the investing public, if only the government hadn't gotten in his way. A non-custodial sentence would only further this internal misconception that the defendant has not done anything wrong.

In cases involving sophisticated fraud, the need for general deterrence is acute. The legislative history of 18 U.S.C. § 3553 demonstrates that "Congress viewed deterrence as 'particularly important in the area of white collar crime.'" United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006) (citing S. Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259); see also United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006) (deterrence of white collar crime is "of central concern to Congress"). Courts have found it to be an important sentencing factor in fraud cases, because it is believed to be most effective in such cases. See Martin, 455 F.3d at 1240 ("Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence.") (internal quotation omitted); United States v. Gupta, 904 F. Supp. 2d 349, 355 (S.D.N.Y. 2012) (observing where a crime is hard to detect, "others similarly situated to the defendant must therefore be made to understand that when you get caught, you go to jail"). Therefore, while Small claims he will be sufficiently deterred from future crimes by the fact of his prosecution alone, there remains a substantial interest in ensuring that similarly situated individuals

operating in the financial markets learn that cheating results in serious consequences. A custodial sentence will provide the necessary deterrent effect.

III. Conclusion

For the foregoing reasons, the government respectfully requests that the Court impose a substantial custodial sentence, which is sufficient, but not greater than necessary, to achieve the goals of sentencing. See U.S.S.G. § 3553(a)(2).

Respectfully submitted,

BREON PEACE
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