UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	:	Case No. 1:03-CR-050
	:	1:04-CR-018-002
Plaintiff,	:	
v.	:	
	:	
A. WILLIAM ERPENBECK, JR.	:	
	:	
Defendant.	:	

ORDER ON OBJECTIONS TO PRESENTENCE REPORT AND ADVISORY GUIDELINE SENTENCE CALCULATION

The Court held a sentencing hearing on August 22, 2006, following the transfer of this matter to this Court's docket. This case is before this Court pursuant to the Sixth Circuit's order remanding for resentencing, consistent with the Supreme Court's decision in United States v. Booker. (See Doc. 107).

The Court will first address two initial matters raised by Defendant.

(1) Defendant requested preparation of a new presentence investigation report, particularly to update or correct the facts used to determine the amount of loss and restitution. The Government opposes this request. The Court finds that it is fair to both parties to resentence Defendant based on the exhaustive record that existed as of the date of the original sentencing. Defendant is free to argue that any facts stated in that record, and any prior sentencing rulings, are erroneous. The Court

therefore denies Defendant's motion for preparation of a new presentence investigation report.

(2) Defendant argues that, after Booker, any sentencing enhancement imposed by the Court must be found beyond a reasonable doubt by the trier of fact. (See Doc. 122, p. 2 n. 3.) The Court rejects this argument. The Sixth Circuit has repeatedly held, since Booker, that the court may find facts under the pre-Booker preponderance of the evidence standard for sentencing purposes. See United States v. Williams, 411 F.3d 675 (6th Cir. 2005) [Booker does not eliminate judicial fact-finding in sentencing after defendant's guilty plea]; United States v. Stone, 432 F.3d 651 (6th Cir. 2005) [Confrontation Clause does not apply in sentencing proceedings, and judicial fact-finding as to amount of loss and obstruction of justice sentence enhancement was proper]. In United States v. Gates, ___F.3d ___ (Dkt. Nos. 05-1818/2006), 6th Cir. August 24, 2006, the Sixth Circuit affirmed the propriety of judicial fact-finding based on preponderance of the evidence, and rejected the contention that such fact-finding violates a defendant's Fifth Amendment due process or Sixth Amendment right to trial by jury. The Court therefore overrules Defendant's objection.

The Court will address the objections to the presentence report, and then determine the advisory Guidelines sentencing range.

1. Applicable Version of the Sentencing Guidelines

Defendant argues that the Court should calculate the advisory sentence under the 2000 version of the Guidelines, rather than the 2001 version. The 2001 Guidelines substantially increased the sentence ranges for "white collar" financial crimes. Defendant argues that all of the "held" loans that formed the basis for the fraudulent scheme were applied for and obtained before the effective date of the 2001 Sentencing Guideline Amendments. Defendant's company had actually received the proceeds of those loans by that time, and thus the extent of potential losses could be determined by that date. Defendant also argues that only one-tenth of the closings on properties affected by the "held" loans were scheduled to occur after the November 1, 2001 effective date. Given these facts, Defendant argues that application of the 2001 Guidelines violates the ex post facto clause of the constitution, as Defendant's punishment would be substantially increased over the punishment he would have faced at the time his offense was committed.

The flaw in Defendant's argument is that the criminal activity in this case is not the original loan applications. There is no evidence that those applications were fraudulent at the time they were submitted. The criminal activity occurred at the closings on the properties covered by the "held" loans, and the diversion of the closing funds to Defendant and his company

from the lenders who should have been paid with those funds.

In addition, the Statement of Facts attached to Defendant's Plea Agreement specifically states that the scheme spanned the time period from the beginning of 1999 to about March 2002. Defendant admits that he participated in that scheme from mid-2000 and was its leader from January 2001. Thus Defendant was engaged in a continuing offense. United States v. Buckner, 9 F.3d 452 (6th Cir. 1993) holds that the court's use of the most recent Guideline to sentence a continuing offense does not violate the ex post facto clause, if some of the offense conduct occurred while those Guidelines were in effect. Defendant cites no persuasive authority that contradicts Buckner.

Defendant alternatively argues that this Court should exercise its discretion and apply the 2000 Guidelines to avoid a miscarriage of justice. Defendant cites media reports describing sentences imposed in other high-profile "white collar" fraud cases, including John Rigas (Adelphia Communications Corporation), who received a 15-year sentence when his case involved allegations of stealing $100 million and hiding huge amounts of debt from the company shareholders; and Bernard Ebbers (WorldCom), who was sentenced to 25 years for "orchestrating an $11 billion fraud." The Court lacks any reliable evidence concerning these cases, the facts underlying those convictions, or the facts relied upon by those trial courts in arriving at

these sentences.

Defendant also cites the sentences given to other individuals involved in his fraudulent scheme, including John Finnan and Marc Menne (63 months and 54 months, respectively); Lori Erpenbeck (12 months and a day); and Michelle Marksberry (24 months). With respect to Finnan and Menne, Defendant states that their sentences were not enhanced based on sophisticated means or based on the number of victims involved in the fraud. Again, this Court lacks reliable evidence and the facts concerning these other cases, and cannot conclude based simply on the ultimate number of months that the sentences are so disparate that Defendant's sentence must be in the same range in order to avoid a miscarriage of justice.

The Court therefore overrules Defendant's objection to use of the 2001 Sentencing Guidelines in calculating Defendant's advisory sentence range.

2. Calculation of Defendant's Guideline Sentence under 2001 Sentencing Guidelines.

Pursuant to U.S.S.G. Section 3D1.2(c), the offense to which Defendant pled guilty in Case No. 1:04-CR-18-2 shall be grouped with the offense in Case No. 1:03-CR-050, because the later charge is treated as an adjustment to the Guideline applicable to the original bank fraud count. Application Note 5 states that this grouping is intended to prevent double counting of offense behavior.

The two cases are therefore grouped under the offense charged in Case No. 1:03-CR-050, violation of 18 U.S.C. §1344. The Sentencing Guideline applicable to this offense is Section 2B1.1. Defendant's base offense level under that section is six.

Amount of Loss (U.S.S.G. §2B1.1(b)(1)).

The base level is increased depending upon the amount of loss involved. The presentence investigation report concludes that the "intended loss" was $26,287,476.98, the face amount of construction loans held by eight lenders at the time Defendant disclosed his involvement in the fraudulent scheme to the Government. (See PSR ¶¶ 69-70.) The Government argues that the intended loss is over $33 million, because Defendant should not get credit for the $7 million payment to the lenders at the time Defendant turned himself in to the authorities. The Court rejects the Government's argument on this question. There is no dispute that Defendant paid the $7 million, and no dispute that the fraudulent scheme had not been uncovered by the Government before Defendant's disclosure. Under Application Note 2(E)(i), money returned by a defendant before the offense was detected is a credit against loss. While there are suggestions that some lenders (particularly Provident Bank) had growing suspicions about EDC's business practices, this is not sufficient to conclude, based on a preponderance of the evidence, that the fraudulent scheme had been discovered by either a lending

institution or the government. Therefore, the $7 million is not included as "intended loss."

Defendant argues that $26 million is neither the "actual loss" nor the "intended loss" as those terms are defined in the Guidelines. Application Note 2(A) to Section 2B1.1 states that loss is generally the greater of actual or intended loss. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense. "Intended loss" means the pecuniary harm that was intended to result from the offense. Defendant argues that the actual loss must be calculated by crediting to the loan balances the value of the collateral the eight lenders recovered by the time of Defendant's prior sentencing in April 2004. Those collateral recoveries reduce the actual loss suffered by the eight lenders to $6.9 million, according to Defendant. The collateral in question was pledged by EDC at the time the construction loans were obtained, primarily land and building developments. The recoveries were obtained either through foreclosures or market dispositions of the properties in question.

To determine the amount of loss, the Guidelines provide both exclusions from and credits against loss. Excluded items are interest of any kind, finance charges, late fees, penalties and other similar costs. See Application Note 2(D)(i). In a case involving collateral pledged by the defendant, a credit against

loss is the amount recovered from disposition of that collateral at the time of sentencing. See Application Note 2(E)(ii).

PSR Attachment B entitled "Victim Restitution," listed certain amounts for each of the eight lenders, described as "Total Not Yet Paid." These amounts totaled $26,287,476.98, the amount the PSR concludes is the "intended loss." At the time of Defendant's original sentencing, Defendant submitted evidence directly from those construction lenders concerning the extent of their actual loss on the construction loans. Defendant's Exhibit A through F, submitted at the sentencing hearing on February 13, 2004, are letters from the lenders or their counsel stating the value of outstanding loans to EDC in March 2002, and the recoveries the lenders had made through the date of their letters. These letters state the extent of the actual loss to the lenders at amounts far less than those shown on Attachment B.

Bank One: Attachment B lists the loss as $3,703,381.40. Bank One's letter (Defendant's Exhibit A) states that Bank One recovered $3,500,00 in foreclosures, and $2,156,202.07 from the Mitchell settlement, against the original loan to Oakmont Village Builders of $6,894,000. The actual loss to Bank One from the Oakmont Village loan is $1,237,798. (The amount reported by Bank One as the remaining balance on the Oakmont Village loan, $1,740,000, includes interest. See PSR ¶77. Interest is

specifically excluded from loss calculation, as noted above.)[1]

Citizens Bank: Attachment B lists the loss as $83,934. Defendant's Exhibit B, a letter from Citizens' counsel, states that Citizens foreclosed on the properties covered by the loan, paying the loan in full. Citizens also states that it was holding title to some of the properties, and having some difficulty selling them in the fall of 2003. However, there is no evidence that the properties were worthless or significantly damaged, nor is there any evidence on the fair market value of the properties that could be used as an alternate basis for loss calculation. Therefore, Citizens Bank's actual loss was zero.

Firstar Bank: Attachment B lists the loss as $14,309,502.24. Defendant's Exhibit E from US Bank (formerly called Firstar or Star Bank) states that the net remaining balance on the Firstar loans is $1,859,752.60 (exclusive of contract damages such as interest, fees and other expenses). $10,796,759.94 of the balance reduction was due to Erpenbeck's conveyance of undeveloped land and unsold units to the bank, an amount the Bank states was "at least equal to the market value of the conveyed property." Therefore, Firstar's Bank actual loss was

[1] Bank One's letter also describes two additional outstanding EDC loans (Mt. Zion Real Estate Development and Steeplechase Builders), noting that those properties were in foreclosure as of September 30, 2003. The PSR does not address these loans, which Bank One states had remaining balances of $1,892,000 and $1,179,000 respectively.

$1,859.752.60.

Guardian Bank: Attachment B lists the loss as $287,652.47. The PSR (¶76) states the Bank advised the Probation Department that it had recovered the full principal balance on its EDC loans through foreclosure of collateral. Therefore, Guardian Bank's actual loss was zero.

Kenwood Savings: Attachment B lists the loss as $423,401.31. Defendant's Exhibit C states that the Bank's recoveries exceeded the original principal balance of the EDC loans. Therefore, Kenwood Savings Bank's actual loss is zero.

Peoples Community Bank: Attachment B lists the loss as $263,604.79. Defendant's Exhibit C states that the Bank's recoveries exceeded the original principal balance of the EDC loans. Therefore, Peoples Community Bank's actual loss is zero.

Provident Bank: Attachment B states the loss as $2,325,743.54. Defendant's Exhibit D states that the principal balance of Provident loans as of September 8, 2003 was zero, and that the bank has disposed of the collateral it previously held securing those loans. Therefore, Provident Bank's actual loss is zero.

People's Bank of Northern Kentucky: Attachment B lists the loss as $4,890,257.23, the face amount of outstanding EDC loans in March 2002. The PSR (¶62) states that PBNK's "loss" is $7,800,00, the net amount paid to settle the Mitchell litigation,

and $4,582,000 paid to several "participating banks" as part of the sale of PBNK's assets to The Bank of Kentucky. The participating banks were solicited by John Finnan and Mark Menne to buy part of PBNK's loans to EDC. (See PSR ¶40) The Mitchell litigation was a class action filed in Kentucky state court by individual home owners who used lenders to buy property from EDC. The total amount PBNK paid to settle Mitchell, $16.8 million, was paid in part by PBNK's fidelity insurer ($5 million) and in part by various title companies, agents and title insurers ($4 million).

The Guidelines require this Court to make a reasonable estimate of the pecuniary loss to PBNK that Defendant could reasonably foresee as a result of his criminal behavior. While the net amount paid to settle Mitchell, and amounts paid to participating banks when PBNK was sold **may** be relevant to calculating restitution, the Court finds that these amounts are not properly included in the "actual loss" calculation for Guidelines purposes. PBNK's chief officers, Finnan and Menne, were willing and active participants in Defendant's larger fraudulent scheme. They extended undocumented loans to Defendant and his companies, as well as his family members. The Court is unable to conclude, based on a preponderance of the evidence in the record, that the Mitchell settlement should be included as an "actual loss" for purposes of calculating **this** Defendant's

advisory Guideline sentence range.

The record contains no statement from PBNK concerning any collateral recovery it may have made to offset the $4.8 million loan balance reflected on Attachment B. PSR ¶71 states that counsel for PBNK, Inc. (the successor entity to PBNK) reported that the new entity was owed $5,431,963 on EDC loans, but had $570,000 of collateral to sell, assuming titles were cleared. The Bank also reported it was litigating rights to additional collateral worth $1.5 million. In the absence of any reliable evidence that persuades the Court that the actual loss from the EDC loans had been reduced from the March 2002 amount, the Court finds that the actual loss for Guidelines purposes to PBNK is $4,890,257.23.

The Court finds, by a preponderance of the evidence, that the total **actual** loss to the eight lenders, based on the facts in the record at the time of Defendant's original sentencing, is $7,987,807.83.[2]

The Government argues that, irrespective of actual loss, Defendant's Guideline sentence should be calculated based on the

[2] Defendant repeatedly asserts this figure to be $6.9 million. The Court is unable to replicate the calculation. Moreover, the Court's calculation of $7.9 million does not include the two additional loans described in Bank One's September 30, 2003 letter (Def. Exhibit A to February 13, 2004 Sentencing Hearing) that were not included in the PSR. Since the Court's calculation is above Level K of §2B1.1(b), the exclusion or addition of those loans will not affect the offense level increase under that section.

intended loss. The PSR concludes the intended loss is $26,287,476 (face amount of outstanding loans), and the Government argues it is at least $33 million. Unlike "actual" loss, the Guidelines' definition of "intended" loss requires the Court to consider the Defendant's subjective intent.

> We hereby part company with those circuits that have held that 'intended loss' for the purposes of U.S.S.G. § 2F1.1 should be equated with the gross amount of a fraudulently obtained loan. Rather, we find most persuasive and, therefore, join the ranks of those circuits which have defined intended loss as the loss the defendant subjectively intended to inflict on the victim, e.g., the amount the defendant intended not to repay.

United States v. Moored, 38 F.3d 1419, 1427 (6th Cir. 1994). As Moored also noted, it is a rare case indeed where a Defendant admits that he or she intended to steal, embezzle, or fraudulently procure other peoples' money. Nevertheless, this Court must evaluate the evidence to determine the pecuniary harm Defendant **intended** to result from his conduct, the amount he intended not to repay.

The essential act underlying the fraudulent scheme was the failure to pay off a construction loan after a closing. The construction loans, at least for the larger of the eight lenders listed on Attachment B to the PSR, were "blanket" loans or open-ended mortgages that covered many properties and developments. There is also evidence from U.S. Bank (the largest of those

lenders) that it had Erpenbeck-related loans secured by properties that were not involved in the fraudulent scheme. There is no evidence of any valuations of any of the collateral properties held by the eight lenders that might indicate the collateral had been undervalued by Erpenbeck or EDC at the time the loans were made.

It cannot be overlooked, however, that an innocent buyer became involved at the point of closing. Irrespective of whether or not the ultimate buyers of these properties were "victims" for purposes of §2B1.1(b)(2) (addressed below), the loss calculation requires an evaluation of Defendant's subjective intent to cause pecuniary loss to those individuals. The evidence before the Court on that question is equivocal. The Statement of Facts attached to Defendant's Plea Agreement states that Defendant's scheme affected approximately 260 individuals who ultimately bought the properties from EDC that were subject to the unpaid construction loans. This would cause that buyer's mortgage lender to take a second lien position, rather than a first lien as would typically be expected and required by a mortgage lender, and would subject that lender to additional risk in the event of the buyer's default. For a cash buyer, the result would be an unpaid lien existing against the title. But this situation does not establish, by a preponderance of the evidence, that Defendant **subjectively intended** to cause pecuniary harm to these individual

buyers, as the Guidelines require. Given the open-ended nature of EDC's construction loans with its major lenders, and given the fact that some of those lenders stated they recovered more than their loan balances after disposition of the collateral property, the evidence of Defendant's subjective intent to not repay any of the loan proceeds is not sufficiently weighty to support a conclusion that the intended loss was significantly more than the actual loss that was sustained.

Number of Victims. Defendant objects to any increase under §2B1.1(b)(2), contending that the "victims" of his fraudulent scheme are the eight lending institutions identified on Attachment B of the PSR. The Government argues that the number of victims substantially exceeds 50, which includes the eight lending institutions, at least 32 other banks that loaned money to individual buyers, and the 260 individual buyers who are also described as victims in the Statement of Facts.

Application Note 3(A)(ii) defines "victim" **for Guidelines purposes** as any person who sustained any part of the actual loss determined under subsection (b)(1). The Court has determined that the **actual** loss under the Guidelines is approximately $7.9 million. Intended loss is **specifically excluded** from the definition of "victim" for Guidelines purposes. While the sentencing statute requires the Court to consider many factors in imposing a sentence that is "sufficient, but not greater than

necessary" (18 U.S.C. §3553(a)), a proper and objective calculation of the advisory Guideline range is a primary factor to consider. The Court concludes, based on a preponderance of the evidence and the clear mandate of the Guidelines, that no increase in the base offense level for the number of victims, pursuant to Section 2B1.1(b)(2), is appropriate.

Sophisticated Means Enhancement. The PSR concluded that no enhancement for sophisticated means was justified in this case. The Government objects to this conclusion, and Defendant's previously imposed sentence included a two-level increase under §2B1.1(b)(8)(C).

Application Note 6(B) define "sophisticated means" as especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Examples include use of fictitious entities, corporate shells, or offshore accounts, or locating a business in one jurisdiction but operating out of another, to avoid detection and/or prosecution. Cases addressing the imposition of this enhancement typically involve schemes like those described in the Application Notes. See, e.g., United States v. Lewis, 76 Fed. Appx. 47, 2003 U.S. App. LEXIS 19034 (6th Cir., September 11, 2003), where defendant's scheme involved the use of several fictitious companies; false purchase orders on phony letterhead; false business references with telephone numbers that, when called by a

potential vendor, referred the call to one of Defendant's own telephone lines, so the ostensible "reference" was given by Defendant's own employees based on a script Defendant prepared. And see, United States v. Erwin, 67 Fed. Appx. 876, 2003 U.S. App. LEXIS 11853 (6th Cir., June 12, 2003), where the branch manager of a securities firm manipulated the accounts of many of his own customers to steal money from them, including creating false account statements and IRS forms, calculating phony interest and capital gains amounts that appeared on those false statements as though the customers' original securities investments were still being held - - a scheme sophisticated enough that the Defendant's own accountant was fooled by it for many years. The Sixth Circuit affirmed the district court's two-level enhancement for use of sophisticated means.

Here, Defendant's scheme, when stripped to its essentials, was the refusal to pay a construction lender with proceeds from a closing, and keeping the money. It is true that Defendant and his agents or employees kept a list of these loans, and had to calculate interest due on those loans. Neither of these acts are particular complex or intricate; interest calculations can be made easily and quickly with readily available software. These activities are not, in this Court's view, the kinds of "especially complex or especially intricate offense conduct" that the Guidelines intend to warrant the imposition of the

sophisticated means enhancement. Therefore the Court sustains the Defendant's objection, and overrules the Government's motion to impose a two-level enhancement pursuant to §2B1.1(b)(8)(C).

Enhancement for Jeopardizing A Financial Institution. The PSR recommended a four-level increase pursuant to 2B1.1(b)(12)(B), because Defendant's scheme substantially jeopardized the safety and soundness of a financial institution. Defendant's prior sentence included this enhancement. Defendant argues that it is inappropriate here, because the conduct of Finnan and Menne, not Defendant, was the cause of any jeopardy faced by Peoples Bank of Northern Kentucky. Defendant relies on the FDIC Report of June 17, 2002, which concluded that PBNK was jeopardized by "reputational harm" caused by Finnan and Menne, and that the economic risks were modest in comparison.

This Court disagrees. There is no dispute that, following the FDIC investigation and audit, that the PBNK Board agreed to sell to The Bank of Kentucky, in order to avoid an FDIC closure of PBNK. Application Note 10 defines jeopardizing a financial institution as including the situation when the institution, as a consequence of the offense, "was so depleted of its assets as to be forced to merge with another institution in order to continue active operations." While Finnan and Menne did some of the acts involved in the scheme on their own (such as submitting false or incomplete statements to their own Board of Directors, or

backdating loans to avoid capital requirement shortfalls), it cannot be disputed that Erpenbeck knew that the bank (through Finnan and Menne) was allowing him to deposit checks made out to lenders. He also knew that the bank was extending additional loans to him that did not meet bank standards, and could jeopardize the institution. The Court, based on a preponderance of the evidence, finds that a four-level enhancement under §2B1.1(b)(12) is proper in this case.

Abuse of Position of Trust Enhancement. The PSR did not recommend imposition of this enhancement pursuant to §3B1.3. The Government objected and the sentence previously imposed upon Defendant included a two-level enhancement under this Section. Defendant objects to this enhancement.

Application Note 1 describes a position of "public or private trust" as a position with professional or managerial discretion. Examples include embezzlement of a client's funds by an attorney serving as a guardian, or a bank executive's fraudulent loan scheme, or a patient's sexual abuse by her physician under the guise of an examination. Thefts or embezzlement by "ordinary" employees (such as a bank teller or a hotel clerk) do not fall within the scope of this section. Embezzlement by a fiduciary of a pension or welfare benefit plan, or theft by a union officer from a labor union, fully qualify for the enhancement. It is plain that "position of trust" refers to

and requires more than a showing that the Defendant was "trusted" by someone to do what was expected of him. The Sixth Circuit has specifically held that the phrase "position of public or private trust" is a term of art, "appropriating some of the aspects of the legal concept of a trustee or fiduciary," and not an approximation of "the ordinary dictionary concept of reliance or confidence." United States v. Ragland, 72 F.3d 500, 502-03 (6th Cir. 1996).

Defendant ran a home building company. The fraudulent scheme was the failure to pay off contractual obligations to his construction lenders. While it is certainly the case that the various closing agents must have "trusted" Defendant and his employees to properly credit the funds received at the closings, this "trust" is no more than that which arises in any business or contractual relationship, the expectation that people will do what they have committed themselves to do. There is no evidence in the record to show that a fiduciary-like relationship existed between Defendant and his company's lenders, nor between Defendant and the people who ultimately bought the homes built by Defendant's company.

The Court therefore determines, based on a preponderance of the evidence in the record, that the enhancement under §3B1.3 shall not be applied to determine Defendant's advisory sentence.

Enhancement for Defendant's Role in the Offense. The PSR

recommends a four-level enhancement, pursuant to §3B1.1, for Defendant's role in the offense because Defendant was an organizer or leader of a criminal activity that involved five or more participants. Defendant argues there were not five people involved in his scheme, because John Finnan and Mark Menne were not part of the "single, coherent scheme organized and/or led by Erpenbeck." (See Doc. 122, p. 28.) Defendant also contends that it was Lori Erpenbeck and Michelle Marksberry who actually held the construction loan payoffs and directed others to do the same.

Defendant's arguments founder on the Statement of Facts attached to the Plea Agreement, which expressly admits: "The deposits of diverted checks to the company's operating checking accounts were made by the defendant, the company's closing representative, the company employee in charge of accounting, and at least two other persons." Defendant admitted to the participation of at least five people, and his arguments concerning the propriety of the enhancement are rejected. The Court therefore determines, based on Defendant's admissions and a preponderance of the evidence, that the enhancement under Section 3B1.1(a) is properly applied to determine Defendant's advisory sentence.

Acceptance of Responsibility and Obstruction of Justice. The PSR initially recommended a three-level decrease based on Defendant's acceptance of responsibility for, and his timely plea

of guilty to, the bank fraud offense. However, in February 2004, the day before the hearing on Defendant's objections to the Final Presentence Report, Defendant was arrested on charges that he attempted to unlawfully influence the testimony of Lori Erpenbeck, who was scheduled to testify at that hearing. According to the Plea Agreement in the subsequently filed criminal case stemming from that arrest, Defendant tried to convince Lori Erpenbeck to testify in a way that would reduce Defendant's sentence, and without regard for the "truth" of her testimony. The Government contends that this conduct negates any downward adjustment for Defendant's acceptance of responsibility, and merits a two-level increase for obstruction of justice.

Defendant argues that he is entitled to the three-level acceptance of responsibility reduction pursuant to §3E1.1, based on the facts that he was the first person to voluntarily reveal the fraud scheme to the authorities, he twice pled guilty to the charges in the two cases, and he twice refrained from putting the Government to the expense and effort of a trial.

Application Note 4 to Section 3E1.1 states that conduct resulting in an obstruction of justice enhancement (§3C1.1) "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both 3C1.1 and 3E1.1 may apply."

The "extraordinary case" standard is discussed in United States v. Gregory, 315 F.3d 637 (6th Cir. 2003). After being seen on a prison surveillance tape, defendant Gregory admitted receiving contraband while in prison, and agreed to cooperate with the investigation. After he admitted the conduct but before he was formally charged, he wrote a letter to his sister (who apparently brought him the contraband) advising her not to cooperate with the federal officers, and offering her alternate explanations for the events seen on the prison surveillance tape. Gregory was later charged, entered a plea, and the Government agreed to recommend an acceptance of responsibility reduction. The district court rejected that, and instead enhanced Gregory's sentence for obstruction of justice, based on the letter he wrote to his sister.

The Sixth Circuit concluded that Gregory **was** entitled to the reduction because all of Gregory's obstructive conduct predated his indictment. Moreover, he had never denied his own responsibility for the criminal offense, but consistently told authorities that he did not want his sister to get into any trouble, or receive any prison time. The Sixth Circuit held that the court must evaluate the relationship between the obstructive conduct and the acceptance of responsibility. Gregory cited United States v. Harper, 246 F.3d 520, 528 (6th Cir. 2001), which posed a hypothetical example of a situation falling within

Application Note 4: "[I]f a defendant awaiting trial escapes from custody but then immediately turns himself into authorities, this could constitute an 'extraordinary' case in which a defendant accepts responsibility subsequent to an attempt to obstruct justice." And in United States v. Williams, 176 F.3d 301, 311 (6th Cir. 1999), a defendant "recanted his trial testimony and moved to withdraw his plea agreement, subjecting the court to a hearing on the issue, before restating his original position and accepting responsibility." Nevertheless, the defendant was entitled to a reduction for acceptance of responsibility, along with an enhancement for obstruction of justice.

Here, Defendant's obstruction conduct occurred substantially after his initial acceptance of responsibility. Defendant first approached the authorities in March 2002, and his plea agreement was signed on April 9, 2003. The obstruction conduct took place in February 2004, just prior to sentencing. Moreover, the specific conduct - conspiring with Defendant's father to put considerable financial and emotional pressure on his sister to testify falsely about Defendant's role in and responsibility for the fraudulent scheme - specifically negates any reasonable argument that Defendant had in fact accepted responsibility for his conduct. Rather, this Court can only conclude that Defendant's conduct reflects an unwillingness to accept the reality of Defendant's previously admitted fraudulent conduct,

and a stubborn refusal to accept the consequences of his conduct.

The Court concludes that Defendant's situation is not one within the contemplation of the Sentencing Commission's description of "extraordinary cases" such that Defendant is entitled to a reduction for acceptance of responsibility for the bank fraud charge.

The Court also concludes that a two-level enhancement for obstruction of justice, pursuant to §3C1.1, which occurred during the sentencing phase of Defendant's bank fraud case is more than justified by the facts described above.

Substantial Assistance to the Government. The first addendum to the PSR states that the Defendant assisted the Government, and that the AUSA intended to request a downward departure under §5K1.1. The Probation Officer concluded that a downward departure under §5K2.16 was not appropriate, because the Defendant's motivation to disclose his scheme was based on the fact that the scheme was about to unravel, as lenders were increasingly confronting him about non-payment of liens.

However, before the Government filed a formal §5K1.1 motion, Defendant committed the offense concerning his sister's testimony in his case. The Government therefore did not file a §5K1.1 motion, arguing that Defendant's assistance terminated with his criminal conduct. Defendant's plea agreement on the bank fraud charges specifically states his understanding that a §5K1.1

motion was within the **sole** discretion of the United States Attorney. The Plea Agreement also specifically stated that the United States reserved the right to object to any motion made by the Defendant under Section 5K2.16.

Defendant now requests that this Court require the Government to file a motion for downward departure in accordance with the Plea Agreement. The Court denies this request, because the Plea Agreement does not require the Government to file such a motion, and this Court may not review the government's refusal unless it is premised upon unconstitutional considerations such as the defendant's race. See United States v. Benjamin, 138 F.3d 1069, 1073 (6th Cir. 1998). Defendant makes no such allegation here. The discretionary decision by the United States to withhold a §5K1.1 recommendation will not be revisited by this Court.

Defendant alternately suggests that this Court should downwardly depart under 18 U.S.C. §3553(b). That question, as with other questions and issues relevant to the statute's mandate to impose a sentence that is "sufficient, but not greater than necessary" will be addressed in the Court's sentencing judgment and statement of reasons.

CONCLUSION

For all of the foregoing reasons, the Court calculates Defendant's Offense Level under the advisory 2001 Guidelines to

be 36. With a Criminal History Category of I, the Guideline range for the sentence is 188 to 235 months. The statutory maximum on the count carrying the highest statutory maximum penalty (18 U.S.C. §1344) is 30 years. Therefore, Guideline §5G1.2(d) concerning imposition of consecutive sentences, does not apply in this case.

DATED: August 29, 2006

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court