



Admittedly, such a fine is much less than the amounts levied against other conspirators. But each corporate Defendant in this case is a unique entity and should be judged and evaluated solely on the facts related to its own financial strength or lack thereof, and other relevant factors. The facts that support a fine of no greater than \$50,000.00 are as follows:

1. Historical Financial Performance.

Audited financial statements prepared by Blue and Co. for the years prior to the commencement of this case shows that for the years 2001 to 2004 Hughey was regularly losing money. Net income losses for those years were:

2001	<\$159,606.00>
2002	<\$593,000.00>
2003	<\$400,277.00>
2004	<\$78,660.00>

As noted in the Probation Department's Pre-Sentence Investigation, substantial tax losses were also reported in each of these years except 2001. The taxable gain in 2001 was attributable to a sale of assets, not operations. As the audited financials show, Hughey Inc.'s operations for 2004 booked a loss.

The government's memorandum suggests that the 2001 write-off of a note receivable, and the 2002 write-off of goodwill, may have unfairly distorted the company's true operating condition in those years. This comment ignores the fact that the note receivable was created by the sale of an asset (stock in the manufacturer of cement mixer trucks) in 1999 in a transaction in which Hughey reported as income the entire sales price (part of which was paid by the note) and paid tax on it. When the purchaser was unable to pay the note, Hughey was entitled to reverse that transaction on its books.

The 2002 write-off of goodwill was at the suggestion of the Defendant's independent auditors. It represented goodwill carried on the company's books as a result of its purchase of McCreary Block which, as the government pointed out in its memorandum, is the only profitable operation of Hughey. It is unfair to suggest the goodwill write-off distorts the company's financial history where, as here, it was intertwined with a transaction that has resulted in the only positive cash flow from operations for the Defendant. Without McCreary, the annual operating numbers would be considerably worse.

Finally, the government's memo suggests the accounting reclassification of Hughey's deferred compensation plan to retired officers also distorts the company's true financial condition, or the timing is suspect. (Government memorandum, page 4, note 3). This restatement also was made by the company's independent auditors, using general accepted accounting principles based upon the nature of the obligation. It was not a decision directed by company management.

2. Recent Financial Performance.

The trend of losses reported by the Probation Department has continued. As noted in the PSI, the net income loss for last year (2005) was <\$565,817.00>. At the time of the report, the 2005 tax return was not available but has since been filed. It reports a tax loss of <\$700,131.00>. The government correctly notes that in 2005 Hughey ceased using Blue & Co. and thus its numbers are unaudited. This fact, however, is the result of management's efforts to cut costs to cope with the company's financial crisis. Other steps have included reduction in salaries, a moratorium on purchasing new trucks and similar capital investment, and similar measures.

Unfortunately, the company continues to show extremely large losses. For the first six months of 2006, Hughey's financial statement shows a loss of <\$774,896.00>. While it is true that the first few months of any year are historically poor for redi-mix companies due to the lack of demand during the winter, the six month numbers suggest to management that the loss for 2006

will approach or exceed \$1,000,000.00. The company is experiencing price increases for materials, fuel, and other matters that may total \$1,000,000.00 alone, and the market is competitive and the price of the product not elastic enough to allow the Defendant to recover these increases.

3. Credit Relationships.

As a result of the foregoing financial record, Irwin Union, Hughey's business lender, wrote to management on August 25, 2005 to indicate it would not renew either the \$1,250,000.00 line of credit for working capital or the \$1,750,000.00 line for equipment. Irwin Union has not foreclosed and has been cooperative by extending these lines from month to month as Hughey searches for a lender, but its basic position remains unchanged. Hughey has applied to seventeen (17) other lenders, two of which were brokers, seeking to refinance all or a part of the Irwin Union debt but has been rejected by each of them. Its current, and possibly last, option is an asset based lender who will take as security an assignment of receivables.

4. Discussion.

18 U.S.C. § 3572 specifically governs the imposition of a fine.<sup>1</sup> The statute lists multiple factors the Court shall consider. These include the Defendant's financial resources; the burden imposed by the fine upon the Defendant and persons financially dependent on the Defendant; pecuniary loss to others as a result of the offense; the status of restitution; the need to deprive the Defendant of illegally obtained gains; costs to the government; whether the fine can be passed on to consumers; and, the size of an organization and its response to the offense. Consideration of each of these statutory factors is generally favorable to the Defendant's proposal of a modest fine.

1. The Defendant's Financial Resources. As noted, revenue from Hughey's operations are insufficient to fund current operations. It continues in business by stretching the

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<sup>1</sup> Defendant recognizes that the Court must also consider the factors in 18 U.S.C. §3553(a).

terms of payments to its creditors and depleting its balance sheet. It does not possess liquid assets with which to pay a fine and its existing assets are pledged as security to Irwin Union.

2. Burden Upon the Defendant or Persons Financially Dependant Upon the Defendant. This is the analog to §8C3.3(b) of the Guidelines, which suggests that a fine should not be in an amount that would substantially jeopardize the continued viability of the organization. Payment of a significant fine would impose a burden on Hughey that it could not meet, thus threatening the jobs of Hughey's employees.

3.,4. Pecuniary Loss to Victims and Restitution. The parties have agreed that this issue is adequately addressed by the civil action brought by the class of customers, and representation of their counsel.

5. Deprivation of Illegally Obtained Gains. Hughey's financial condition demonstrates it has not retained gains, if any, from the concrete pricing that is the subject of the prosecution. At the most, those prices served to reduce Hughey's losses.

6. Cost to the Government. The Probation Department's report estimates supervision costs to be \$287.73 per month.

7. Whether the Fine Can Be Passed On to Others. Due to the competitive nature of redi-mix pricing, Hughey has no ability to do this.

8. Size of the Organization and Preventative Measures. Hughey is a small, family-owned corporation. Its president, Scott Hughey, has been individually charged and faces incarceration.

The government, citing the sentencing factors in §3553, indicates it believes Hughey should pay \$500,000.00, but offers no rationale for how Hughey could pay such a sum. Simply put, there is nothing in the company's five-year performance, or any projection, to suggest the company could pay \$100,000.00 four years from now, or \$350,000.00 the year after that. This


position is a positive move in the right direction from where the government was in its position expressed during the May, 2006 plea hearing, but it is based on nothing more than hope or speculation.

Moreover, the defense disagrees with the government's position that Hughey could ask the Court to modify the fine pursuant to §3573(d)(3) should Hughey prove to be unable to pay either of these large sums when due. We read that statute to permit the Court to modify only the payment schedule, not reduce the amount. And, what would be the "material change in the Defendant's economic circumstances" that the statute requires such a motion to be based upon? The conditions in existence now don't suggest such a fine could be paid. Subpart (d) presupposes that at the time the fine was imposed, circumstances indicated the fine could be paid but subsequently changed. That is not the case in this prosecution.

A large fine, even if payment is deferred, nevertheless creates a judgment lien. A \$500,000.00 judgment lien would have the likely effect of driving off even the most risk-tolerant lender, particularly if the lien is perfected pursuant to 18 U.S.C. § 3613 by filing a notice of the lien. This would give the government priority over any lender secured by Hughey's regular business receivables and make the company's only viable financing option disappear. It would also leave Hughey's materials suppliers and vendors insecure, probably causing them to deny credit to the company. It would substantially jeopardize the continued viability of the company. Whatever the fine is determined to be, the government should agree to refrain from filing a Notice of Lien until and unless Hughey becomes delinquent in its payment schedule.

Nothing in this presentation is intended to minimize the significance or seriousness of the offense or the company's role in it.<sup>2</sup> The government's position with regard to those factors is well-taken, but nevertheless the economic reality of this Defendant's financial condition makes anything other than a modest fine something that the Defendant cannot pay, and which will jeopardize the only potential lending relationship that might be available. For these reasons, Defendant Hughey, Inc. respectfully requests the Court enter its judgment of a fine at the level of \$50,000.00, payable in six equal installments of \$8,333.33, interest free, over the next five (5) years.

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<sup>2</sup> Defendant does deem it important to note that the government's statement that Mr. Hughey attempted to expand the conspiracy to include other "suppliers" (plural) (memorandum, p. 11) is an overstatement. Mr. Hughey indicated he contacted one other competitor, not already a part of the conspiracy, to urge participation.

**CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing document was mailed by regular United States Mail on the 8<sup>th</sup> day of August, 2006 to:

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