IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 03-632
	)	
v.	)	Hon. Eduardo C. Robreno
	)	
IAN P. NORRIS,	)	Violations: 18 U.S.C. § 371;
	)	18 U.S.C. § 1512(b)(1);
Defendant.	)	18 U.S.C. § 1512(b)(2)(B)

GOVERNMENT'S SENTENCING MEMORANDUM

The Government respectfully submits this memorandum to assist the Court in sentencing the defendant, Ian P. Norris (Norris).

I

INTRODUCTION

On September 28, 2004, Norris, a British national, was charged in a second superseding indictment with one count of price fixing in violation of Title 15 U.S.C. § 1 (Count 1), one count of conspiracy to obstruct justice in violation of Title 18 U.S.C. § 371 (Count 2), one count of witness tampering in violation of Title 18 U.S.C. § 1512(b)(1) (Count 3), and one count of corruptly endeavoring to influence another to destroy or conceal documents to prevent their use by a grand jury in violation of Title 18 U.S.C. § 1512(b)(2)(B) (Count 4). Because Norris did not voluntarily submit to the jurisdiction of the United States, the United States instituted extradition proceedings against him in January 2005. Norris spent five years in an unsuccessful

effort to challenge his extradition, and on March 23, 2010, he was extradited to the United States to stand trial for the obstruction of justice counts (Counts 2 through 4) only.[1]

Norris made his initial appearance on March 23, 2010 and was released on bail with conditions. Trial began on July 12, 2010, and on July 27, 2010, the jury convicted Norris of one count of conspiracy to obstruct justice in violation of 18 U.S.C. § 371 (Count 2) and acquitted him of the two substantive counts of obstruction of justice (Counts 3 and 4). After a post-conviction hearing, the Court revoked the defendant's bail and ordered him detained pending sentencing.

II

THE IMPORTANCE OF THE SENTENCE IMPOSED

The importance of the sentence the Court will impose on this defendant cannot be overstated. Obstructing a federal grand jury or, as the crime is referred to in British law, perverting the course of justice, is a serious offense for which the defendant must be punished. Moreover, other corporate executives who might consider obstructing justice must believe that the potential benefit in doing so is not worth the potential cost.

As Global Chairman of the Carbon Division of Morgan Crucible plc (Morgan), the defendant directed a long-term international conspiracy to fix the price of carbon products. When Norris learned that a federal grand jury sitting in Philadelphia had started to investigate

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[1] On March 12, 2008, the House of Lords ruled that Norris was not extraditable on the price-fixing charge contained in the indictment, but remanded the matter to the lower courts to determine whether extradition on the obstruction counts only would violate Norris's human rights. On February 24, 2010, the Supreme Court of the United Kingdom affirmed the Secretary of State's order of extradition on the obstruction of justice counts and ordered him extradited to the United States. Under the principle of specialty, the Government could not try Norris on the price-fixing charge, which remains open.

that crime, the defendant, having been promoted to Chief Executive Officer of Morgan, orchestrated an extensive, sophisticated conspiracy involving document destruction, witness tampering, false statements, the recruitment of more than a dozen subordinates and co-conspirators to cover up the price-fixing conspiracy, and shut down the grand jury investigation.

Because of the prominence of his position at a large, international, publicly-traded company, and the high level of his participation in both the price-fixing conspiracy and the effort to obstruct the investigation of that crime, the sentence imposed on Norris will be heard not only in a quiet courtroom in Philadelphia, but it will also resonate in corporate offices around the globe. It must announce to other Chief Executive Officers and participants in price-fixing conspiracies alike, the serious and personal consequences of engaging in criminal conduct that affects the integrity of the United States criminal justice system.

The message the Court sends must be unmistakable: That it is impermissible and unlawful for executives to attempt to cover up price-fixing conspiracies; that it is unconscionable to use their subordinates to help execute their crimes, and that there will be serious consequences for those who would engage in such criminal conduct.

A lengthy sentence of imprisonment in this case not only will punish this defendant appropriately for his egregious, unlawful acts, it also will deter others from engaging in similar illegal conduct. It is not merely the threat of a severe sanction that will deter obstructive conduct by this defendant and others, but it is the actual imposition of a severe sentence that will deter similar criminal behavior.

To be an effective deterrent against obstruction of justice, the sentence imposed should approximate, as closely as legally permissible, the penalty for the substantive conduct under investigation. If not, the incentive for a subject or target of a federal criminal investigation will tip in favor of obstructing the investigation because there will be little to lose and much to gain by choosing to obstruct.

In this case, only a lengthy sentence of incarceration will punish and incapacitate the defendant and provide essential deterrence to others. The Government, therefore, recommends a sentence of not less than 33 months imprisonment.

III

SENTENCING GUIDELINES CALCULATIONS

The Supreme Court has declared: "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark," when sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). Thus, the Sentencing Guidelines remain an indispensable resource for assuring appropriate and uniform punishment for federal offenses.

A. The November 2000 Guidelines Apply

Although as a general rule the sentencing court must apply the Sentencing Guidelines in effect at the time of sentencing, where, as here, application of the current guidelines would result in a harsher penalty than application of the Guidelines in effect at the time of the crime, under Third Circuit caselaw, the Court must apply the earlier version. *United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007). Because the defendant's criminal conduct occurred not later than

August 2001, Norris's sentence is governed by *United States Sentencing Commission Guidelines Manual* (November 2000) ("U.S.S.G.").[2]

B. U.S.S.G. § 2J1.2(a) Applies

Section 2X1.1(a) of the U. S. Sentencing Commission Guidelines is the basis for the calculation of a conspiracy offense in violation of Title 18 U.S.C. § 371. Because the conspiracy for which the defendant was convicted was a conspiracy to obstruct justice, U.S.S.G. § 2J1.2(a) (obstruction of justice) applies. The base offense level for a violation of conspiracy to obstruct justice is 12.

C. Consideration of Conduct for which Defendant was Acquitted

The appropriate standard for finding a sentencing fact is preponderance of the evidence. *United States v Ali,* 508 F.3d 136, 145 (3d Cir. 2007). Because the evidence at trial proved by at least a preponderance of the evidence that the defendant engaged in the obstructive conduct that was alleged in Counts III and IV of the Indictment, the Court should consider that relevant conduct when applying the Sentencing Guidelines despite his acquittal on those counts. *See United States v. Perry,* 560 F.3d 246, 258-59 (4th Cir. 2009) (consideration of acquitted conduct is appropriate).

D. The Base Offense Level Should be Adjusted to Reflect the Defendant's Aggravating Role in the Offense

Section 3B1.1(a) of the Sentencing Guidelines provides a four-level upward adjustment "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more

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[2] Reflecting the need "to ensure that the base offense level and existing enhancements in § 2J1.2 are sufficient to deter and punish obstruction of justice offenses generally," the base offense level for obstruction of justice was increased from 12 to 14 effective January 25, 2003. U.S.S.G. App. C Amendment 647.

participants or was otherwise extensive . . . ." "According to the Guidelines, the phrase 'organizer or leader' does not necessarily mean that the defendant must be the sole or primary leader of the activity; a person who exercises management responsibility, is involved in recruiting for the activity, or oversees some or all of the participants in the crime can receive the four-level adjustment set forth in § 3B1.1(a)." *United States v. Fake*, 269 F. App'x 208, 216 (3d Cir. 2008) (internal citations omitted). "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." U.S.S.G. § 3B1.1(a), application note 3.

In determining whether to apply the aggravating role enhancement, courts in this Circuit consider, among others, the following factors: "the exercise of decision making authority, the nature of participation in the offense, . . . the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. *United States v. Surine*, 375 F. App'x 164, 170 (3d Cir. 2010) (*citing United States v. Gricco*, 277 F.3d 339, 358 (3d Cir.2002) (internal citations omitted)).

Clearly, Norris was the primary leader in this conspiracy to obstruct, and his role warrants the four-level upward adjustment in the defendant's Guidelines calculation. It was Norris, the CEO, who gathered his subordinates Macfarlane, Kroef, Perkins, and Emerson in response to the grand jury's investigation and directed them to compile a list of price-fixing meetings with competitors and fabricate explanations for those meetings. It was Norris who directed his subordinates to draft and redraft written summaries containing their false story to use as a script for what they would say happened. It was also Norris who instructed his subordinates Muller and Cox to tell the false story contained in the scripts. It was Norris who

authorized Morgan's counsel to submit the false summaries to the Justice Department for use by the grand jury. It was Norris who directed Kroef to arrange meetings with Weidlich and Kotzur of Schunk to enlist that company's assistance in obstructing the grand jury's investigation, and who sought to convince them to direct four of their own Schunk/Hoffmann employees who had attended price-fixing meetings with Morgan to lie about them. And it was Norris who directed Kroef to assemble the task force of three lower-level Morgan employees to spend weeks reviewing Morgan files throughout Europe to remove anything incriminating contained in them. Thus, Norris led criminal activity that not only involved at least five individuals, it also was extensive, and his adjusted Guidelines offense level should be increased by four levels.

E. The Offense Level Should Be Adjusted To Reflect Defendant's Abuse of Trust

Pursuant to U.S.S.G. § 3B1.3, the Court may impose a two-level enhancement to the defendant's offense level "[i]f the defendant abused a position of . . . private trust . . . in a manner that significantly facilitated the commission or concealment of the offense . . . ." To qualify, "the position abused must substantially facilitate the crime and not merely provide an opportunity that could have as easily been afforded to other persons." *United States v. Lombardo*, 281 F. App'x 78, 82 (3d Cir 2008) (citing U.S.S.G. § 3B1.3, cmt. n. 1). *See also United States v. Iannone*, 184 F.3d 214, 222 (3d Cir. 1999). A "defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim," *United States v. Hichman*, 991 F.2d 1110, 1112 (3d Cir. 1993), but U.S.S.G. § 3B1.3 does not limit victims only to victims of the crime for which the defendant was convicted. *See United States v. Cianci*, 154 F.3d 106, 112 (3d Cir. 1998).

The Third Circuit has set forth three factors to be considered when determining a position

of trust: "(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in the defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position." *United States v. Thomas*, 315 F.3d 190, 204 (3d Cir. 2002) (internal quotation marks and citations omitted). "These factors should be considered in light of the guiding rationale of the section - to punish 'insiders' who abuse their position rather than those who take advantage of an available opportunity. [T]he primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." *United States v. Atlantic States Cast Iron Pipe Co.*, 627 F. Supp. 2d 180, 261 (D.N.J. 2009) (internal citations omitted).

Evaluating the defendant's conduct under this three-part test establishes that Norris abused his position as Morgan's CEO to facilitate the commission of his crime, warranting application of the two-level abuse of trust enhancement to Norris's sentencing guideline calculation. First, Norris's position allowed him to carry out his sophisticated scheme to obstruct. Because no one else was supervising Norris's acts, his position not only allowed him to commit his wrongful conduct to obstruct, but also made his crime hard to detect. Specifically, his position as CEO allowed him to construct and direct the conspiracy to obstruct the grand jury's investigation into the carbon products price-fixing conspiracy without interference from supervisors, without oversight, and without detection. As CEO, Norris was in a unique position to make decisions for the company and decide how Morgan would comply with the grand jury's subpoena and cooperate with or obstruct the grand jury's investigation. As CEO, Norris had some control over the evidence produced in response to the grand jury investigation. Norris

used his authority as CEO to authorize Morgan's voluntary production of the fabricated meeting summaries to the grand jury, and he used his position to direct his subordinate, Jack Kroef, to create the task force whose job it was to destroy Morgan records that reflected price-fixing conduct which were called for by the subpoena, evidence that Morgan otherwise may have provided voluntarily to the grand jury or which may have been produced to the grand jury through other methods of international cooperation.

Second, as CEO, Norris had sufficient authority over his subordinates to induce them to join him in his scheme to obstruct the grand jury investigation, to stick to the script and to insist, to all who inquired, that Morgan's meetings with its competitors were either joint venture meetings or acquisition or general business meetings rather than meetings at which prices were discussed. By abusing his position to authorize production of the false summaries to the grand jury, Norris locked his subordinates into repeating that false story in the future, whether in interviews or testimony. Without that authority, Norris would not have been able to plan and execute his difficult-to-detect scheme to obstruct the grand jury's investigation. Norris used his position as CEO to persuade his subordinates to join him in his conspiracy and to follow his directions to help him plan, implement, and execute his elaborate scheme to obstruct justice. As Morgan's CEO, Norris ultimately controlled their employment with Morgan, the promotions they might receive, the compensation they were paid, and, by extension, the quality of life they and their families enjoyed outside the walls of Morgan. And when Norris became concerned with Robin Emerson's ability to stick to the script, it was Norris's position as CEO that provided him with the power and means to obtain a £150,000 payoff from Morgan's funds to convince Emerson to retire early so as not to jeopardize the success of the conspiracy to obstruct.

Moreover, by exercising his authority as CEO and approving or authorizing such a large payoff to Emerson (a man five years from full retirement), Norris sent a subtle but clear message to Kroef, Perkins and other subordinate co-conspirators (who were further away from retirement than Emerson) that they, too, might be released from the company if they failed to stick to the script. Clearly, Norris abused his position of authority over his subordinates in such a way that it contributed significantly to the commission and concealment of the scheme to obstruct the grand jury's investigation. "It was [defendant's] supervisory role (and his concomitant power to fire uncooperative employees) that allowed him to convince workers to state falsely in response to questions asked of them in the . . . investigation." *United States v. Atlantic States Cast Iron Pipe Company*, 627 F. Supp. 2d 180, 274 (D.N.J. 2009) (internal quotation marks and citation omitted). *See also United States v. Nathan*, 188 F.3d 190, 207 (3d Cir. 1999) (affirming abuse of position of trust enhancement for company president convicted of violating Arms Export Control Act where defendant required subordinates to mark over foreign labels and add "Made in USA" labels); *United States v. Turner*, 102 F.3d 1350, 1360 (4th Cir. 1996) (finding mine owners and operators who falsified forms abused positions of trust because they exercised managerial discretion, employees trusted them and deferred to their judgment regarding mine safety, and the public trusted them to follow mine safety laws); *United States v. Sokolow*, 91 F.3d 396, 413 (3d Cir. 1996) (upholding enhancement because president and owner of company "was able to commit difficult-to-detect wrongs, as he had sole control over [the company's] accounts without oversight or supervision"); *United States v. Bennett*, 161 F.3d 171, 195 (3d Cir. 1998) (holding that the enhancement for abuse of position of trust was fully justified because defendant's position as president and sole director of several organizations greatly reduced the probability

that the fraudulent offenses would be detected and allowed him to conceal his crimes from detection for approximately six years).

Finally, Morgan's counsel, Sutton Keany, relied on Norris's integrity as CEO at Morgan in dealing with him with respect to his legal representation of Morgan in the grand jury investigation. Norris repeatedly lied to Keany, telling him that only lawful discussions took place at Morgan's meetings with competitors at which U.S. sales were discussed, and that Morgan did not participate in cartel activities regarding European sales. Norris also used his position as CEO to dupe Keany to provide false information about what had occurred at price-fixing meetings to the Antitrust Division. Keany had every reason to expect that Norris, the CEO of Morgan, would deal with him honestly and be truthful to him about Morgan's role in the price-fixing conspiracy. Rather than deal honestly with Keany, however, Norris lied to Keany and used him as a conduit through whom Norris passed false information to the Antitrust Division. Norris's actions not only threatened Keany's standing with the Department, but also put Morgan's shareholders at great financial risk. By taking advantage of his position as CEO to engage in obstructive conduct, not complying with his obligation to cooperate honestly in Morgan's internal investigation, and causing his subordinates to lie as well, Norris caused Morgan to plead guilty to two felony counts of obstruction of justice and to pay a criminal fine of $1 million. Morgan also lost its opportunity for favorable treatment with regard to its antitrust violation due to Norris's obstruction. As a result of Norris's scheme to obstruct, Morgan lost its opportunity to apply for leniency, pled guilty to price fixing, and paid the statutory maximum

$10 million fine.[3] Had Norris been forthcoming, or at least not directed his subordinates to lie to Morgan counsel, Morgan may have been able to obtain leniency from prosecution in return for cooperation, as Schunk later did, or to negotiate a lesser fine.

When, as here, a defendant's position of trust was integral to and facilitated the conspiracy to obstruct justice and constituted conduct relevant to the offense of conviction, the Court may properly apply an enhancement under U.S.S.G. § 3B1.3. Thus, the two level sentencing guideline enhancement for an abuse of position or trust should be applied to Norris's sentencing guideline calculation.[4]

F. Defendant Does Not Qualify for a U.S.S.G. § 2X1.1(b)(2) Adjustment

Defendant claims that he is entitled to a three-level downward adjustment pursuant to U.S.S.G. § 2X1.1(b)(2) for "an incomplete offense." *See* October 15, 2010 letter from Cole/Delelle to Hassinger, Senior Probation Officer at 26-27. However, none of the reasons set forth in the October 15 letter to Mr. Hassinger supports defendant's claim that he did not complete all the acts he believed necessary to attempt to persuade others to influence testimony or to tamper with documents, as required to apply the adjustment. *See* U.S.S.G. § 2X1.1(b)(2). Rather, all the reasons given either assert that Norris was innocent of conspiring or note, as to

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[3] *See United States v. Morganite, Inc and Morgan Crucible Company plc*, No 02-00733 (E.D. Pa. 2002).

[4] Should the Court find that the enhancement for abuse of trust does not apply, the manner and extent to which Norris abused his position as CEO to facilitate the commission of his crime and to direct others to assist him in his extensive acts of obstruction is the type of conduct that is not adequately taken into consideration in the obstruction guidelines and warrants an upward departure to offense level 18. *See* U.S.S.G. Ch. 1, Pt. A(4)(b).

persuasion to influence testimony, that no testimony ever was given. But the jury found Norris guilty, and the completion of his efforts to influence testimony did not rely on whether or not his targets later gave testimony. Because the trial evidence shows that Norris took all the acts he believed necessary both to influence witnesses' testimony and to tamper with documents, he is not entitled to this adjustment.

G. Defendant Does Not Qualify For Acceptance of Responsibility

Pursuant to U.S.S.G. § 3E1.1, a district court may decrease the offense level "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." The September 28, 2010 Presentence Investigation Report as revised on November 30, 2010 (PSR) indicates that Norris will argue for such an adjustment. PSR ¶¶ 104-05. Norris's claim that he has accepted responsibility for his offense not only lacks merit, but it borders on the offensive, especially when his conduct is contrasted with that of his subordinates Robin Emerson and Jack Kroef. Years ago, Emerson and Kroef voluntarily submitted to the jurisdiction of the United States, admitted their guilt, and served time in a U.S. jail, while at the same time Norris has steadfastly refused to accept responsibility for his own conduct or for being responsible for causing his subordinates to serve time in jail. Clearly, Norris has not, and indeed can not, make the showing required to receive the benefit of a § 3E1.1 adjustment.[5]

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[5] According to the PSR, Norris does not claim acceptance of responsibility based on a pre-conviction admission of factual guilt, or even a post-conviction admission of guilt. Rather, he claims acceptance of responsibility based on his "willingness to participate in the process" as reflected in his voluntary surrender to U.K. authorities when a warrant was issued in connection with the extradition request, his compliance with bail conditions while in the United Kingdom, and his willingness to surrender voluntarily on the date of his extradition. PSR at ¶ 105. If such conduct demonstrates acceptance of responsibility, then defendants convicted at trial would receive the adjustment routinely.

An adjustment for acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* Only in rare situations may a defendant clearly demonstrate acceptance of responsibility after exercising his right to trial, for example, "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt . . . ." *Id.* In such instances, "a determination that a defendant has accepted responsibility [is] based primarily upon pre-trial statements and conduct." U.S.S.G. § 3E1.1, cmt. n.2 (2000).

Norris, of course, put the Government to its burden of proof at trial. He did not do so "to assert and preserve issues that do not relate to factual guilt." *Id.* Rather, having fought extradition for more than five years and exhausted every avenue of appeal, Norris contested his factual guilt at trial, claiming, for example, that the false meeting summaries actually were true and that the Government tampered with and threatened its witnesses to implicate him in the crime of which he was convicted. Indeed, Norris has never once admitted the factual elements of guilt or expressed any degree of remorse. To the contrary, during the more than five years he spent fighting extradition, Norris and his legal representatives waged an aggressive publicity campaign in the British press in which he not only proclaimed his innocence, but also proclaimed persecution by the United States.[6]

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[6] *See e.g.,* Frances Gibb and Michael Herman, Briton's Long Fight Against US Extradition Reaches Lords, The Times (London), Jan 22, 2008, at Business 46 (Alistair Graham (Mr. Norris's solicitor): "The whole case is a travesty of justice, the worst I have ever seen."); Christopher Hope, Norris Talks of His Nightmare at Last, The Daily Telegraph (London), Mar. 17, 2008, at City 5 (Norris: "I wanted to make sure from the beginning that this was not a bleeding heart story, but that there was a genuine potential injustice for quite a number of people. That was picked up extremely well by the Telegraph and I am enormously grateful to all

The defendant plans to seek the downward adjustment based on his pretrial conduct "through his willingness to participate in the process." PSR at ¶ 105. However, it is impossible to imagine how the defendant's five-year battle against extradition to the United States constitutes a "willingness to participate in the process," especially when he and his counsel engaged in an aggressive, long-term, public campaign to proclaim the injustice of his extradition.

In the context of the defendant's extradition, Norris's appearance before this Court has been anything but voluntary. He appeared before this Court only after prolonged litigation in the UK courts and an unsuccessful effort to seek redress from the European Court of Human Rights. Norris vigorously fought his extradition from the UK for more than five years, and he is here only because, after exhausting all of his appeals, he surrendered pursuant to a warrant issued and

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those who supported the campaign."); *id.* ("Norris, 64, has never sought sympathy – but he certainly received it when thousands of readers backed a Telegraph campaign to try to force a rethink on the 'one-way' treaty."); Russell Hotten, Norris QC accuses Clarke, Telegraph.co.uk, Jan 13, 2006 ("But yesterday Mr. Norris, who denies any wrongdoing, began his appeal for a judicial review of the decision based on grounds that Mr. Clarke's [the Home Secretary] interpretation of the 2003 Extradition Act was 'fundamentally flawed.'"); Russel Hotten, Norris tells of relief as Lords halts extradition, Telegraph.co.uk, Mar 13, 2008 (Norris: "The ruling has at last given some light at the end of the tunnel, in what has been a very unfair and difficult situation for my family and me . . . . I remain deeply concerned about the one-sided extradition arrangements we have struck up with the USA. It's a deeply frightening situation to be in."); Norris Talks of His Nightmare at Last, The Daily Telegraph (London), Mar. 17, 2008 at City 5 ("Norris is adamant about his innocence: 'I am quite happy to reaffirm to you that I vigorously dispute those allegations and look forward to what I trust will be the final chapter in this matter.'"); *id.* (Norris: "It is one of the sad things to me that nobody from the US Department of Justice has ever spoken to me, let alone interviewed me."); Dearbail Jordan, Ian Norris, Timesonline (London), May 28, 2007 ("Mr. Norris has always maintained his innocence and has spent the past five years wending his way through the British legal system to avoid being tried in the US courts."); Russel Hotten, This is not just about me, Telegraph.co.uk, Apr 28, 2006 (Norris: "To me the much more important thing is that the Department of Justice has said that they believe [my case] is a blockbuster case; it's the first one and it's quite clear that they are extremely single-minded in their determination to extend their reach to other countries . . . . I guess I've just been very unlucky to be a test case for the new arrangements.").

executed by the United Kingdom that authorized his delivery to the United States authorities.

While a challenge to extradition may be viewed as nothing more than a respectful assertion of lawful due process rights, it is respectfully submitted that in this case Norris's challenge to his extradition is indicative of his failure to accept responsibility for his offense. Norris, and his lawyers on his behalf, carried out a long-term and aggressive publicity campaign in the British press throughout the extradition process. In statements made to the British press, Norris and his counsel made very clear assertions that Norris was wrongfully accused.

Thus, Norris's attempts to characterize the Division's prosecution of his case as a grave injustice is compelling evidence that he has refused to accept personal responsibility for his offense. Clearly, Norris was not merely a defendant who was exercising his due process rights. Rather, he was a defendant who waged a calculated public campaign to establish himself as a victim of this Government's criminal justice system and blame the United States Government rather than himself for his illegal conduct.[7]

Finally, as further evidence of his failure to accept responsibility for his offense, it appears that Norris took steps to diminish his assets upon realizing the likelihood of his prosecution. Norris was a highly compensated executive with Morgan. He received a significant severance payment when he retired. (*See* PSR ¶ 74.) His monthly income far

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[7] The Court also should not give any weight to the fact that Norris complied with the conditions of bail in the United Kingdom while he was contesting extradition. Norris had no incentive to jeopardize his status in the United Kingdom while he was asking the British government to deny the extradition request of the United States. Similarly, Norris can find no support in the fact that he abided by the conditions of bail set by the court at the time of his initial appearance. Had he violated those conditions of release, he would have faced severe financial consequences and, most likely, an order of pretrial detention. Abiding by the conditions of release is not evidence of acceptance of responsibility; it is evidence of protecting personal and financial self-interests.

exceeds his expenses (despite his paying all of his household's expenses). (*See* ¶ 76; September 17, 2010 Cole/DeLelle letter to Mark Hassinger, Senior Probation Officer at 7.) Yet at the time of trial, Norris approximated his personal assets at just $52,000. (*See* Tr. 7/27/10 p.m. at 30:19-22) (McClain) ("presentence report . . . says that his estimated net worth is $52,000").) Apparently, that is because Norris transferred much of his assets to his wife and son, including a significant cash transfer to his son within days of learning in March 2010 that the European Court of Human Rights had denied his final appeal of the Order of Extradition, and purchased additional assets in his wife's name. (*See* PSR ¶¶ 76 n.7 (identifying ownership of securities), 78 (identifying cash transfers), and 76 n.9 (identifying ownership and transfers of real estate); *see also id.* ¶ 76 n.8; October 15, 2010 Cole/DeLelle letter to Mark Hassinger, Senior Probation Officer at 42 (identifying ownership of vehicles)). Defendant's actions to deplete his assets evidence his continued and deliberate efforts to thwart the U.S. criminal justice system, to protect his personal interests, and to prevent this Court from holding him fully accountable for his criminal conduct.

H. Defendant's Medical Condition is not Severe Enough to Qualify for a Downward Departure

Norris also seeks a downward departure based on his medical condition. Under the November 2010 Amendments to the Guidelines, U.S.S.G. § 5H1.4 now explicitly permits such a departure, but only in extraordinary circumstances, stating:

> Physical condition . . . may be relevant in determining whether a departure is warranted, if the condition or appearance, . . . is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment. (emphasis added).

This is essentially the same standard courts used prior to the Guidelines' amendment, when they found implicit authority to depart due to medical conditions. Such departures are "highly infrequent," *Koon v. United States,* 518 U.S. 81, 95-96 (1996), and the defendant bears a "heavy burden" of establishing it as a basis for departure. *United States v. Higgins,* 967 F.2d 841, 846 & n.2 (3d Cir. 1992). A departure is allowed only where the circumstances are "extraordinary." *Id.* at 845; *United States v. Gaskill,* 991 F.2d 82, 85 (3d Cir. 1993).

Norris's physical condition is neither so extraordinary nor present to such an unusual degree that it can be distinguished from the typical case covered by the Guidelines. While the Government does not dispute that Norris has certain medical conditions that require treatment, his condition is not "extraordinary" given his age and physique, and all of the conditions about which he complains can be cared for adequately by the Bureau of Prisons while he is incarcerated. Moreover, although the defendant claims a shortened life expectancy due to his parents' deaths at ages in their mid-70s, his argument ignores both the advances in medicine and the current increase in life expectancies since his parents died. He also offers no conclusive medical opinion to support that argument. In fact, there is no evidence here that defendant has any serious medical conditions that would diminish his life expectancy significantly below the average life expectancy. Thus, a downward departure is not warranted for this defendant based on his age or his physical or mental condition.

The Bureau of Prisons' ability to address the defendant's needs is the major factor in determining whether a departure is warranted, regardless of the severity of the impairment. *United States v. Hernandez,* 218 F.3d 272, 281 (3d Cir. 2000). *See also United States v. Sherman,* 53 F.3d 782, 787-88 (7th Cir. 1995) (requiring lower court to make finding that prison

system unable to care for asthma suffering defendant before finding the impairment was extraordinary); *United States v. Martinez-Guerrero*, 987 F.2d 618, 620-21 (9th Cir. 1993) (defendant's legal blindness not extraordinary enough to allow court discretion to depart downward where prison could accommodate); *United States v. Hernandez*, 89 F. Supp. 2d 612, 616-17 (E.D. Pa. 2000) (defendant with diabetes, asthma, and high blood pressure was found to not have a sufficiently extraordinary physical impairment to allow the court to depart because the prison could adequately care for him); *United States v. Giovinetti*, 91 F. Supp. 2d 814, 816-17 (E.D. Pa. 2000) (defendant suffering from coronary artery disease and hepatitis C did not receive a downward departure because the court found that the Bureau of Prisons could adequately address his conditions); *United States v. Anderson*, 260 F.Supp. 2d 310, 314-15 (D. Mass. 2003) (Bureau of Prisons could adequately care for diabetic).

Although Norris argues that his age (67 years old) and his past and present mental and physical health conditions warrant a downward departure, and suggests that his life expectancy may not exceed that of his parents (both of whom died in their mid-seventies) (PSR ¶ 95), Norris's medical condition is hardly extraordinary, and surely not so extraordinary as to warrant a downward departure. Moreover, the issue is not Norris's life expectancy. Rather, it is whether his condition is so severe that incarceration should be spared. Clearly, Norris's physical and mental conditions are not so severe they would preclude him from serving a period of incarceration. As noted in the PSR, it has been many years since Norris was last treated for his most serious ailments. (PSR ¶¶ 58-60). His one untreated ailment was diagnosed in September 2006, four years ago, but he has not had it treated despite the apparent opportunity to

do so. (PSR ¶ 62).[8] Indeed, the fact that Norris, who has been incarcerated since July 27, 2010, has had no major physical or mental problems that required serious medical attention or were not properly addressed by the Bureau of Prisons, is evidence that whatever the extent of his physical and mental health may be, the Bureau of Prisons can effectively treat and deal with them.

Notably, the Bureau of Prisons has reviewed all of the medical reports Norris submitted in connection with his presentence report, as well as its own medical records prepared during his current period of confinement. As explained in a letter from Barbara Cadogan, Regional Health Administrator for the U.S. Bureau of Prisons, Norris's medical needs are not exceptional and can be addressed adequately in prison. *See* Exhibit A, Letter from BOP dated October 26, 2010. In her letter, Ms. Cadogan explains the process utilized by BOP to designate patients to appropriate facilities where their medical needs can be addressed, and to establish a personal "medical plan of action" for each inmate. Ms. Cadogan confirms in her letter that the BOP can provide the defendant with all the medications that he is currently taking. Finally, Ms. Cadogan concludes that, "[b]ased on the information provided to [her] and [her] knowledge of the Bureau's medical resources, the Bureau will be able to provide appropriate care for Mr. Norris."

Even if the Court were to find Norris's physical condition to be extraordinary, it need not depart downward, *see United States v. McQuilkin,* 97 F.3d 723, 730 (3d Cir. 1996) (district court did not clearly err in denying departure request despite claim that, as a result of motorcycle injuries and a congenital eye defect, the defendant would be "at risk of improper medical

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[8] The PSR notes that treatment was "postponed" because of surgeries, but Norris has not explained why he did not seek treatment during the two years between the last of those surgeries in February 2008 and his extradition.

treatment in prison and [be] a target of other prison inmates"), and his condition still would not warrant such a departure. In very few reported cases have courts departed due to medical conditions, and they typically involved much more serious conditions than Norris's. Typical among them is *United States v. Moy*, No. 90 CR 760, 1995 WL 311441 (N.D. Ill. May 18, 1995), involving a 78-year-old who had undergone a coronary artery bypass graft and coronary angioplasty. He was taking at least six different drugs to keep his coronary artery disease under control and had a history of depression for which he was being treated with antidepressant medication and psychotherapy. *Id.* at *27. Despite that, the court found "that a departure downward from the guideline range of 78 to 97 months to mere home confinement would be inappropriate in the present case, even given Defendant's advanced age, aggravated health problems and severe depressive state . . . . As long as the Bureau of Prisons limits Defendant's physical activities, provides protection from attack, ensures Defendant receives proper medication, and provides Defendant with regular, periodic evaluation by a cardiologist, Defendant's physical condition may not prevent him from living long enough to serve out a reduced sentence of incarceration." *Id.* at *29. Also taking into account the condition of the defendant's wife, "whose physical condition [was] fragile because she suffer[ed] from severe hypertension and high blood pressure which produced a dissecting aortic aneurysm," the court reduced the sentence to 30 months. *Id.* at *31.

In *United States v. LiButti*, Crim. No. 92-611 (JBS), 1994 WL 774647 (D.N.J. Dec. 23, 1994), the 62-year-old defendant, convicted at trial of fraud and tax evasion, had a 100% blockage in one artery and a 60% blockage of another requiring further heart surgery. In addition, the defendant's heart condition was complicated by "his personality disorder of

excitability and his psychiatric conditions of panic disorder, claustrophobia, and some obsessive-compulsive symptoms . . . . If the angioplasty failed and open heart surgery were required, his claustrophobic condition might cause him to literally tear at the metal staples in the closure of his thoracic cavity . . . ." *Id.* at *8. The court concluded that "[the defendant's] combination of anxiety and an occlusion of one heart vessel is insufficient reason to avoid the incarceration that his criminal conduct warrants," *id.* at *10, and departed from a range of 51-63 months to 36 months on the tax counts, but also imposed a consecutive 24-month sentence for the pre-Guidelines bank fraud counts.

More typical are cases in which courts have denied departures for defendants with very serious ailments. In *United States v. Pinkett*, 181 F. App'x 255, 257 (3d Cir. 2006), the court denied a paraplegic defendant's motion for a downward departure, noting that while defendant's physical impairment was serious, it was not "so far out of the heartland as to warrant departure"). *See also United States v. Guajardo*, 950 F.2d 203, 208 (5th Cir. 1991) (defendant who had cancer in remission, high blood pressure, a fused right ankle, an amputated left leg, and drug dependency did not qualify for a departure); *United States v. Rabins*, 63 F.3d 721, 728-29 (8th Cir. 1995) (affirming denial of departure for defendant who had AIDS who was not yet ill because defendant's condition must be judged at the time of sentencing).

Here, there is no indication that Norris's health will in any way be jeopardized by incarceration, or that his life will in any way be shortened if returned to prison. In short, there is nothing exceptional about his physical condition or sufficiently extraordinary to warrant a downward departure. Therefore, a downward departure based on the defendant's medical condition should be denied.

I. Sentencing Guidelines Range

Based on the Sentencing Guidelines calculations discussed above, the applicable adjusted offense level for Norris's offense of conviction is 18, with an advisory guidelines range of 27 to 33 months imprisonment.[9]

IV

DISCUSSION OF SENTENCING FACTORS

Once the Court has properly calculated the guidelines range, it must next consider all of the sentencing factors set forth in 18 U.S.C. § 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.[10]

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[9] As noted above, the defendant's base offense level is 12 under U.S.S.G. § 251.2(a), 4 levels are added under U.S.S.G. § 3B1.1(a) for his leading role in the offense, and 2 levels are added for abuse of trust under U.S.S.G. § 3B1.3.

[10] Further, the "parsimony provision" of Section 3553(a) states that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." The Third Circuit has held that "district judges are not required by the parsimony provision to routinely state that the sentence imposed is the minimum

The obstructive conduct Norris personally directed was particularly egregious and of a kind and duration that went far beyond the typical offense conduct. Thus, in the interests of justice and in order to adequately take into consideration the full measure of his extraordinarily obstructive conduct, this Court should impose a sentence at the top of the guidelines range, that is 33 months imprisonment.

1. Nature and Circumstances of the Offense and The History and Characteristics of the Defendant

(a) The Nature and Circumstances of the Offense

While convictions for conspiracy to obstruct justice may not be rare, the conspiracy Norris orchestrated and for which he was convicted was unique in the history of the Antitrust Division. Never before has the Division uncovered a conspiracy to obstruct justice that was as egregious or sophisticated in nature or as pervasive in scope or as premeditated in its execution or that was devised or organized by the CEO of a major international, publicly-traded company. Norris's scheme to obstruct was not a one-time event or even a brief endeavor executed through a single act of panic. Rather, the criminal conduct in which Norris engaged was a determined effort that was elaborate and sophisticated and continued for years.

Norris executed his scheme to obstruct out of the office of the Chief Executive Officer, which enabled him to use the power of his position to exploit numerous subordinates and Morgan's U.S. counsel to further his goal, even though doing so put them at great personal risk of

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sentence necessary to achieve the purposes set forth in § 3553(a)(2) . . . . [W]e do not think that the 'not greater than necessary' language requires as a general matter that a judge, having explained why a sentence has been chosen, also explain why some lighter sentence is inadequate." *United States v. Dragon*, 471 F.3d 501, 506 (3d Cir. 2006) (quoting *United States v. Navedo-Concepcion*, 450 F.3d 54, 58 (1st Cir. 2006)).

federal prosecution and imprisonment. Norris used the power of his position to cause numerous witnesses over whom he had authority to devote extensive time and effort to concoct false evidence. He caused them to draft and redraft that evidence in written form to use as a script when questioned in connection with the investigation. He caused them to rehearse the false story he wanted them to tell to authorities if questioned. He authored his own extensive false scripts for price-fixing meetings he had attended. *(See* GX-02, 03, and 04.) He authorized Morgan counsel to give some of the fabricated scripts to investigators for use by the Grand Jury. He directed subordinates to contact competitors to gain their support in obstructing the investigation, and he personally participated in such contacts. He directed subordinates to destroy evidence. And even while he was doing all that, Morgan's participation in the price-fixing conspiracy that the Grand Jury was investigating continued. It is hard to imagine a more systematic and sophisticated effort to obstruct justice. In a word, Norris's efforts to obstruct the Grand Jury's investigation were shocking.

During the course of the creation of the scripts, Norris personally reviewed and in some cases edited them to more strongly implicate Morgan's competitor Le Carbone Lorraine in wrongdoing while emphasizing Morgan's feigned innocence in the illegal conduct. According to the testimony at trial, the creation of the scripts took months to complete because they were constantly being edited and because of the need to make sure that the scripts submitted by each subordinate co-conspirator for a particular meeting with a competitor were consistent. Norris himself personally created false meeting notes for the three meetings he attended with Morgan competitors.

In an effort to make the scripts appear as legitimate as possible, Norris also directed Perkins to contact other Morgan employees who had attended price discussion meetings with competitors and get them to agree to the false meeting notes that they created. Those employees included Bruce Muller and Michael Cox, two U.S. based Morgan employees who attended at least one meeting at which prices for carbon products were discussed with competitors.

To make sure that all of the subordinate co-conspirators stuck to the false cover story, Norris instructed his subordinates to follow the scripts throughout the investigation whenever they were asked questions about Morgan's role in the international conspiracy to fix the price of carbon products. Norris even arranged for a rehearsal of his subordinates with outside counsel to test their memory and their ability to stick with the script. Although Norris did not attend the rehearsals of the subordinate co-conspirators, when their rehearsals were over he was briefed by counsel on the performance of each of his subordinate co-conspirators.

Norris took great pains to keep evidence of the price-fixing conspiracy from company counsel, whose job it was to assist Morgan in its subpoena compliance, conduct due diligence in investigating the Grand Jury's allegations, and assess and deal with Morgan's potential criminal liability, if any. Before Jack Kroef participated in his rehearsal with company counsel, Norris reminded Kroef to stick to the script, and he told Kroef that the lawyers knew nothing about the price-fixing conspiracy or the scripts.

Later during the course of the conspiracy to obstruct justice, when Kroef reported back to Norris about how his meeting with Weidlich went, Kroef told Norris that he did not think that Weidlich was taking the investigation seriously enough. Norris told Kroef that it was time for Norris to meet personally with Weidlich's boss, and asked Kroef to arrange a meeting between

Norris and Dr. Dagobert Kotzur, the CEO of Schunk. Kroef arranged that meeting, and Norris and Kotzur did meet as arranged. Norris met with Kotzur in December 2000. On the restaurant receipt for his meeting with Kotzur, Norris stuck to the cover story and jotted a false exculpatory explanation for his meeting with Kotzur; namely, that the meeting was an acquisition meeting held at Macfarlane's request.

A month later, in February 2001, there was a follow-up meeting attended by Norris, Kroef, Kotzur and Weidlich, where the grand jury investigation was again discussed. After Weidlich and Kotzur acknowledged that they had a copy of the Morgan script and knew the Morgan story, Norris personally attempted to persuade Weidlich and Kotzur to go along with the Morgan story. Norris told the Schunk representatives that they needed to make sure that when their employees were questioned by investigators about the price-fixing conspiracy, they told the same story as Morgan. Norris told them that by doing so they would both escape criminal prosecution. To further persuade the Schunk representatives to go along with the Morgan story, Norris told them that if the U.S. investigation wasn't stopped, it would spread to Europe where Schunk was a bigger player and where Schunk would have more to lose. Norris told the Schunk representatives that if they could convince the U.S. investigators that their story was true, there was a good chance that the European investigation would never happen. Norris also told the Schunk representatives that they should dismiss or make consultants of any employees who would not be able to stand by the script, so that investigators would not be able to question them. Norris also advised the Schunk representatives to cleanse their files of any incriminating documents just as Morgan had done. And before leaving the meeting, Norris told Weidlich that "this meeting never happened." Clearly, the conspiracy to obstruct justice that Norris

orchestrated did not involve a simple, isolated act carried out alone without careful thought that he later looked upon with regret. Rather, the sophisticated scheme that he designed, orchestrated and implemented, was deliberately and carefully planned, well thought out, involved the recruitment of his subordinates and the deception of corporate counsel, and even in retrospect, after his conviction, engenders no personal remorse in this defendant.

(b) The History and Characteristics of the Defendant

An examination of the personal history and characteristics of the defendant is particularly relevant here and further demonstrates why a significant period of incarceration is both necessary and just. Norris grew up in a stable and somewhat affluent home environment, which afforded him a number of opportunities often not available to many defendants sentenced by this Court. He attended college, joined Morgan shortly thereafter, and worked his way up to Chief Executive Officer, earning an annual salary of more than £300,000 in addition to generous stock options and bonuses. His children are apparently healthy and successful, and while his wife may suffer a degree of depression as a result of decisions Norris has made, she apparently suffers from no significant physical ailment.

Contrast Norris's history with that of Robin Emerson, the pricing clerk at Morgan who only earned approximately £30,000 annually with, as far as the Government knows, no stock options and no bonuses. Yet, it was Emerson, an employee who had no independent pricing authority, who Norris exploited to serve as Morgan's point person in the carbon products price-fixing conspiracy, and it was Emerson who Norris counseled to take an early retirement (at a significant reduction in his pension benefit) to prevent the exposure of both the price-fixing conspiracy and the conspiracy to obstruct the grand jury investigation. More importantly, it was

Emerson, the lowly pricing clerk, who years ago voluntarily submitted to the jurisdiction of the United States, took responsibility for his criminal conduct, and served five months in prison here in the United States to atone for his offense.

Jack Kroef, another Norris subordinate, also voluntarily submitted to the jurisdiction of the United States years ago, despite receiving advice from Norris that his home country, the Netherlands, would not extradite him to face trial for obstruction. Like Emerson, Kroef also took responsibility for his role in the conspiracy to obstruct justice, and served four months in a U.S. prison to pay for his offense. Both Kroef and Emerson left family and friends to travel to the United States to answer for their crimes. While those men were serving time in prison, Norris was at home, free to enjoy the company and comfort of his family and friends. While those men came to the United States and admitted their wrongdoing, Norris was at home in the UK giving interviews to the British press announcing to the world how unjust the United States criminal justice system was to pursue him, an innocent man.

Norris complains that imposing a sentence of incarceration will adversely impact his family in a significant way, and seeks leniency as a result. Norris, however, showed little regard for the impact his crimes would have on his family when he chose to lead Morgan in an extensive price-fixing conspiracy and then to obstruct the grand jury investigation of his crime. While Norris was entitled to wage his five-year battle to avoid extradition until he had exhausted every avenue of appeal, he should have calculated the impact on his family when choosing to do so and not criticized the Government for its efforts to prosecute him.[11] The Court should not reward

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[11] Norris blames all of his family's woes on the Government, accepting no responsibility himself, and accepting no blame for his decisions to commit the crime, fight extradition, and go

Norris for choosing to put his effort to avoid a trial above his family's needs and concerns. The delay caused in bringing Norris to justice may well have affected his family adversely, but he made the choice to risk his family's well-being for a chance to avoid trial. It is utterly unconscionable for Norris to shift the consequences of his choice and the burden of this personal responsibility to the Court.[12]

Norris has yet to express any concern for his subordinate co-conspirators and how his criminal conduct affected them or Morgan's shareholders. Both Kroef and Emerson stepped forward, admitted their guilt, and served their terms of imprisonment years ago, hoping to put this matter behind them. But Norris did not let that happen. He prevented them from getting on with their lives. While Norris complains that the long extradition process took its toll on him and his wife, it also took its toll on Kroef and Emerson, as well as on his other subordinate co-conspirators and the executives from Schunk who testified at trial.

2. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for The Law, and to Provide Just Punishment for the Offense

In fashioning an appropriate sentence, the Court should consider the particularly egregious nature of Norris's conduct. Norris's crime occurred over a period of years. It involved numerous

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to trial. *See* Sept. 17, 2010 Cole/DeLelle letter to Hassinger at 16 ("Mr. Norris is . . . acutely aware of the emotional anguish and despair his indictment, extradition, and ultimate trial and conviction has caused his family . . . .").

[12] Norris cites *United States v. Monaco*, 23 F.3d 793, 799-800 (3d Cir. 1994), in support of his request for a downward departure because he is bothered by his family's anguish, but the circumstances there were far different. In *Monaco*, the court found the defendant, who had admitted his crime, had suffered "greater moral anguish and remorse than is typical" because he had "unwittingly ma[de] a criminal of his child." *Id.* at 801 (emphasis added).

individuals who participated only because Norris, as their boss, directed them to do so. It involved extreme efforts to convince witnesses, both subordinates and competitors, to provide false evidence and to destroy documentary evidence of long-term, criminal conduct. It involved a deliberate and directed effort to deceive corporate counsel to accept his version of the facts in an effort to protect his personal interests over the interests of the company, its stockholders, and the grand jury process. Finally, it involved an effort to try to destroy a company that made the right decision – to cooperate in the investigation and not to obstruct the investigation as Norris did.

The defendant's scheme began in 1999, when he learned that a federal grand jury had served Morganite Industries, Inc., a U.S. subsidiary of Morgan, with a subpoena *duces tecum* requiring the production of documents relevant to its investigation of an international conspiracy to fix the price of various carbon products sold worldwide. At the time he learned of the Grand Jury's investigation, Norris was aware of the crime the Grand Jury was investigating because he was a participant.

Aware that Carbone was cooperating in the Grand Jury's investigation and that he was at personal risk of prosecution in the United States for price-fixing, Norris hatched his scheme to provide false evidence to the grand jury and to discredit the truthful evidence Carbone had provided. The extent of Norris's extraordinary efforts to provide the grand jury with false exculpatory evidence and to prevent the grand jury from obtaining incriminating evidence is set forth in the Government's Response in Opposition to Defendant's Motion for Acquittal or, in the Alternative, for a New Trial. (Doc. No. 189, §§ II A and B).

While Norris's efforts ultimately were unsuccessful, they caused considerable delay in the Grand Jury's investigation. Only in September 2001, two and a half years after it learned it was

under investigation, did Morgan's counsel Sutton Keany learn Morgan was guilty of criminal price-fixing in the United States – not from Norris himself, but from an outside source and only after Keany defied Norris's instructions not to contact Schunk. Only then did Morgan begin the process of negotiating a plea agreement, and only then did the Government gain the cooperation of Morgan witnesses. Norris's ability to convince others to lie about their price-fixing was so successful that even after Morganite pled guilty to price-fixing, two of Norris's former subordinates (Muller and Cox) continued to follow the script as he had told them to do, and lied when interviewed by the Government.[13]

Norris's efforts to obstruct the investigation also were extraordinary in another sense – in connection with those efforts, he tried to turn the tables on Carbone, whom he believed was the cause of his predicament. Norris sought to punish Carbone for cooperating in the investigation. He thought that by obtaining Schunk's support, he could convince the Government that Carbone had lied to investigators and had provided false evidence to the grand jury. He thought the Government would punish Carbone as a result, and that Morgan could profit from Carbone's prosecution. When Norris met with Weidlich and Kotzur of Schunk in February 2001, he explained his plan to them. Norris told them:

> [H]e saw a good chance to turn the table around on Carbone, in case that the Schunk people and the Morgan people would give the same testimony with respect to the carbon brush investigation, then he would see good chances to prove to the United States authorities and the Canadian authorities that the Morgan story was right and the Carbone story was right [sic].

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[13] Perkins also lied to the Government, but did so during negotiations that preceded Morganite's plea.

> And he expressed his expectation that this would result in such a high fine that Carbone would not be able to pay it, and then Carbone would have to sell most of its assets, and we could grab it, let's say. On the one hand, Morgan could buy those assets, and Schunk could buy those assets. So his battle plan was mainly to use that investigation in order to really slaughter . . . Le Carbone.

Tr. 7/20/10 p.m. at 19-20 (Weidlich).

The Court also should consider the seriousness of the underlying crime whose prosecution Norris sought to prevent, *i.e.*, Morgan's and Norris's own participation in an extensive price-fixing conspiracy. The more serious the underlying crime, the stronger is society's interest in prosecuting it, and the more harmful the cover up. Because the Government was limited as to the evidence of price-fixing it was permitted to introduce at trial, the trial evidence does not reflect the full scope of the crime whose discovery Norris sought to prevent, which was much more extensive.[14] When Morgan's counsel learned the truth about Norris's activities, Morgan's subsidiary Morganite pled guilty to price-fixing that began at least as early as January 1990 and continued until at least May 2000, a period lasting well beyond the date on which Norris learned of the Grand Jury's investigation. More specifically, Morganite pled guilty to price-fixing in the United States for the sale of current collectors during the period January 1990 through at least May 2000, for the sale of carbon brushes sold to original equipment manufacturers for automotive applications from December 1993 through at least September 1998, for the sale of carbon brushes sold to original equipment manufacturers for battery electric vehicle applications during the period February 1995 through at least September 1998, and for the sale of carbon brushes sold to

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[14] Trial evidence focused only on Morgan's conspiratorial activity during the period February 1995 through September 1998, and was limited only to show that the contents of the Morgan meeting summaries were false.

transit authorities during the period February 1995 through at least September 1998.[15] Norris's own notes regarding Morgan's relationship with Carbone show not only Norris's personal engagement in the price-fixing, but also his commitment to its success. *See* GX-01 ("Absolute commitment to talk before we quote, Losing opportunity every month to increase prices" and "Principal of Toronto was - 'How do we Increase Prices!'").[16]

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[15] Copies of the charges to which Morganite pled guilty and the Judgment and Commitment Order are attached as Exhibits B and C.

[16] The scope of the criminal conduct whose discovery Norris sought to obstruct is relevant conduct. *See* U.S.S.G. §1B1.3. The United Kingdom's refusal to extradite Norris to face the price-fixing charge does not preclude consideration of that evidence under the principle of specialty. *See* Letter of Transmittal of Extradition Order to Alistair Graham, White & Case, counsel for Ian P. Norris, from the Home Office of the United Kingdom Re: Extradition of Ian Norris to the United States of America, 23 September 2008. (Exhibit D). To the contrary, the Home Secretary expected the Court to consider the underlying offense when sentencing. In an effort to avoid extradition, Norris claimed his prosecution for obstruction would violate the principle of specialty because "any sentence for the obstruction of justice allegations will inevitably reflect, on account of the Federal Sentencing Guidelines, the 'underlying offense' to which that obstruction related, namely the price-fixing allegations." *Id.* at ¶18a. The Home Secretary agreed that Norris's sentence for obstruction would take into account his price-fixing, but said that would not violate specialty, responding:

> 25. The Secretary of State must reach her own view as to whether the sentencing practice of the United States violates the speciality rule. In her view, it does not. Mr. Norris will not, it seems to her, be sentenced or otherwise 'dealt with', if convicted on any of the obstruction of justice charges, in respect of the price-fixing allegations. He will only be sentenced for the obstruction of justice charges, even if such a sentence may have regard to other conduct relevant to those charges.
>
> 26. She considers that this practice, far from violating the principles of speciality, respects such principles. That was also the clear conclusion reached by the High Court in *Welsh* (paragraphs 145 to 149), in which the High Court concluded that the US practice of regarding conduct underpinning offences for which extradition has been refused . . . as capable of aggravating the sentence for the extradited offence did not breach the rule of speciality . . . .

Id. (emphasis added).

Norris's efforts to conceal a crime that is so difficult to detect and prosecute, a crime that lasted more than 10 years and continued even after Norris learned he and the company he led were the subjects of an investigation, make his conduct all the more serious. To consider that evidence, the Court need only find it has been established by a preponderance of evidence. *See United States v. Perry*, 560 F.3d 246, 258-59 (4th Cir. 2009).

The Court should consider the potential impact of Norris's effort to obstruct the investigation. Concealing and destroying documents to prevent their availability to the Grand Jury may have seriously impacted the Government's ability to discover the full extent of the price-fixing conspiracy and may have seriously limited its ability to negotiate a fair and just fine with the corporate price-fixing conspirators. The document destruction also may have adversely impacted the victims' ability to be justly compensated for the underlying price-fixing conduct. The sentence that is imposed in this case also must punish Norris for the sheer disregard he has demonstrated toward his employees whom he exploited to carry out his obstruction scheme.

The Court must send a strong signal that such obstructive conduct will not be tolerated. The sentence it imposes must promote respect for the law, which is one of the most important sentencing principles established by Congress. *See Gall v. United States*, 552 U.S. 38, 54 (2007) (recognizing "[t]he Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law . . . .") Indeed, in a House Committee Report on one of the competing bills that led to the passage of the 1994 Crime Bill, which was codified as Title 18, United States Code, Section 3553, the House Judiciary Committee provided:

> [This] paragraph . . . provides that a criminal sentence must not cause disrespect for the law. This purpose is avoided when excessively lenient sentences are avoided.

H.Rep. 98-1017, 98th Cong. 2d Sess., Judiciary Committee Report on Sentencing Revision Act of 1984, at 39.

More importantly, because two of Norris's far less culpable subordinates voluntarily submitted to the jurisdiction of the United States, admitted guilt, and served terms of imprisonment here in the United States for their roles in the scheme to obstruct the grand jury investigation, sentencing Norris to a significant term of imprisonment is not only appropriate, it is just.

The alternative proposed by Norris is unthinkable. If he does not receive appropriate punishment for his crimes, the future is easy to predict. Not only will Norris return home as a cause célèbre to enjoy a comfortable lifestyle, but also other executives may be emboldened to engage in cartel activity, believing they can later act to obstruct any investigation by destroying evidence or encouraging perjury without significant risk because the crime of obstruction is not treated as a serious offense here in the United States. So, too, will it adversely impact the efforts of scores of international anti-cartel enforcers who are attempting to emulate the successful enforcement efforts of the Antitrust Division.

If Norris does not receive an appropriate punishment for his crime, he will thumb his nose at the Court and at the United States Government, standing for years as an example of how to commit a serious offense and get away without paying any serious consequences.

3. The Need to Afford Adequate Deterrence to Criminal Conduct, and to Protect the Public From Further Crimes of the Defendant

Deterrence of white collar crime is an important goal of sentencing. When it passed the Sentencing Reform Act, Congress explained:

> [It is our] view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures . . . and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of [a white collar criminal] may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact.

S. Rep. No. 98-225, at 91-92 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3274-75.

As numerous courts have recognized, the Guidelines serve a particularly important purpose in the area of white-collar crime. For instance, the Supreme Court in *Mistretta v. United States*, 448 U.S. 361, 375 n.9 (1989), noted that the Senate Report on the Sentencing Reform Act "gave specific examples of areas in which prevailing sentences might be too lenient, including the treatment of major white-collar criminals." *Accord United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) ("[T]he Guidelines reflect Congress' judgment as to the appropriate national policy for [white collar] crimes . . . ."); *United States v. Mueffelman*, 470 F.3d 33, 40-41 (1st Cir. 2006) (noting the importance of "the minimization of discrepancies between white-and blue-collar offenses"). In *United States v. Martin*, the Court of Appeals for the Eleventh Circuit provided the following explanation:

> Our assessment is consistent with the views of the drafters of § 3553. As the legislative history of the adoption of § 3553 demonstrates, Congress viewed deterrence as "particularly important in the area of white collar crime." Congress was especially concerned that prior to the Sentencing Guidelines, "[m]ajor white collar criminals often [were] sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.

455 F.3d 1227, 1240 (11th Cir. 2006) (internal citations omitted).

Moreover, prosecuting international cartels presents challenges because much of the conduct occurs outside of the borders beyond the United States. Similarly, documents, other evidence, and witnesses are often located outside of the United States. Nevertheless, the Antitrust Division is successful in prosecuting such cases in part because of cooperation from foreign nationals willing to cooperate, surrender, and serve time in prison. Since 1999, approximately 50 cooperating foreign nationals from 10 different countries have voluntarily submitted to the jurisdiction of the United States, admitted their guilt, and been sentenced to periods of incarceration in connection with international cartel investigations. The alternative to cooperating with a grand jury investigation is to remain an international fugitive or to return to the United States and stand trial. Norris not only fought his return to the United States to answer the Grand Jury's charges, but he also fought his charges at trial. That was his choice. However, if there is not a sufficient distinction between a defendant like Norris who fights his prosecution every step of the way and a foreign national who chooses to cooperate and voluntarily surrender, then the Division's international anti-cartel program will be turned upside down.

Moreover, this defendant should not gain an advantage over U.S. citizens who engaged in similar conduct and faced similar punishment under the Guidelines solely because he is not a citizen of this country. That excuse, too, is not only unfair and unjust, but it would do nothing to advance the goals of sentencing – punishment and deterrence. This is not a case where the defendant can argue that he was unaware that his conduct was criminal here in the United States. He was not convicted of an obscure statute unique to United States law. He was convicted of obstruction of justice, an offense that has long been recognized as criminal in the United Kingdom. *See Norris v. Government of the United States of America*, [2008] UKHL 16 at ¶ 101, http:/www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080312/norris-1.htm.

A sentence of at least 33 months imprisonment imposed on a Chief Executive Officer who orchestrated an extensive, sophisticated, and long-term scheme to obstruct an investigation into a price-fixing conspiracy in which he personally participated, will send a critically important message of deterrence – that the punishment will be so severe that it is not worth committing the crime. It is a message that would be sent to the very types of individuals who are most apt to be swayed by it. *See, e.g.*, *Stephanos Bibas, White-Collar Plea Bargaining and Sentencing After Booker*, 47 Wm. & Mary L. Rev. 721, 724 (2005) ("[W]hite-collar crime is more rational, cool, and calculated than sudden crimes of passion or opportunity, so it should be a prime candidate for general deterrence. An economist would argue that if one increased the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease."); *Martin*, 455 F.3d at

1240 ("Defendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crimes therefore can be affected and reduced with serious punishment.")

This is a case in which deterrence is perhaps the most important of all the Section 3553(a) factors. There is a huge temptation for corporate executives engaged in criminal activity to tamper with evidence and to engage in witness tampering. This is especially true as to crimes that are difficult to detect and prosecute such as price-fixing, where insider testimony is critical to uncover the workings of the crime, and corroborative evidence is necessary to prove guilt. Without documentary evidence and the truthful, candid, and uninfluenced account of those involved, such crimes may go undetected and unpunished.

Corporate executives who have committed white-collar crimes must fear not only detection and prosecution of obstructive acts, but also the consequences of conviction. Such individuals, whose job it is to weigh risks against benefits before making important decisions, must believe the likely penalty for obstruction is sufficiently great compared to that for price-fixing that they will choose not to obstruct, even if they believe their chances of success are good. Were Norris to be sentenced to serve only a brief period of incarceration, other similarly situated executives weighing which path to take may consider his sentence sufficiently lenient that they will risk the consequences of destroying evidence and encouraging witnesses to lie. Moreover, the imposition of a large criminal fine does little to deter white collar crime, especially crimes that are carried out by high-level corporate executives like this defendant. Like attorney's fees, often criminal fines incurred by a corporate defendant are indemnified by corporate employment or separation agreements. Thus, a criminal fine that does not impact the personal assets of a defendant will do little, if anything, to deter similar criminal conduct.

4. The Need to Provide the Defendant with Educational Or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

There is no need in this case to adjust the sentence in order "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment . . . .," § 3553(a)(2)(D), as the defendant is well educated and retired from his profession.

Norris has, however, raised his health conditions as a reason this Court should impose a lenient sentence. While it may be true that Norris has some medical conditions that require treatment and medication, none of those conditions is extraordinary enough to warrant a downward departure or variance from the guidelines. As explained in Section III. H. above, the defendant's medical needs can be addressed adequately in prison.

It also bears noting that Norris has lived with his ailments for many years and that he has been incarcerated at the Federal Detention Center for approximately four months without a deterioration in his medical condition. Most notable, however, is the fact that Norris committed his crime after he was diagnosed with his most serious ailments, *i.e.*, while he was allegedly infirm and in his later years. To now ask this Court not to sentence him to a term of imprisonment because he is too elderly and too infirm to be subjected to such harsh punishment is an audacious position to take and should not be entertained or rewarded.

5. The Guidelines and Policy Statements Issued by the Sentencing Commission

"Perhaps the most significant harms associated with obstruction-of-justice type offenses . . . are those caused to our system of justice and to society generally." 42 AMCRLR

9, 29 *Uncovering the Cover-Up Crimes (2005).* A criminal defendant who destroys evidence or tampers with witnesses has caused a serious harm and has seriously undermined the integrity of the criminal justice system. In fact, effective January 2003, the Sentencing Commission increased the Base Offense Level for Obstruction of Justice under U.S.S.G. § 2J1.2(a) two levels, from a level 12 to a level 14 U.S.S.G. App. C Amendment 647. At the same time, the Sentencing Commission added § 2J.12(b)(3), which allows for a two-level enhancement if the offense "(A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible documents; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter, or (C) was otherwise extensive in scope, planning or preparation, increase by 2 levels." While this enhancement does not apply to Norris given the date of his offense and the Third Circuit's decision in *United States v. Wood,* 486 F.3d 781, 790 (3d Cir. 2007), it nevertheless is a clear signal from the Sentencing Commission of how seriously it views the defendant's criminal conduct.

6. The Need to Avoid Unwarranted Sentence Disparities

Norris argues that the Court should impose a sentence similar to those imposed on three of his subordinates who pled guilty to related charges – Kroef and Emerson, who were each charged with a substantive obstruction offense, and F. Scott Brown, who was charged with aiding and abetting obstruction. They were sentenced to terms of imprisonment of four months, five months, and six months respectively. None of these individuals could reasonably be considered to be similarly situated to Norris.

Because of his much greater culpability and his failure to accept responsibility for his conduct, Norris's Adjusted Guidelines Offense Level is 18 with an advisory sentencing range of 27 to 33 months. Kroef, Emerson, and Brown all accepted responsibility by pleading guilty, which Norris did not do. None of the three had a leadership role in the offense, as Norris did. None of the three abused a position of trust, as Norris did. Consequently, each had an Adjusted Guidelines Offense Level of 10 (6 to 12 months incarceration), nearly half of the offense level calculated for Norris. Brown received a Guidelines sentence, albeit at the low end of the range. Kroef and Emerson, each a foreign national who voluntarily surrendered to the jurisdiction of the United States, were rewarded with § 5K1.1 downward departures because they provided substantial assistance to the investigation, and ultimately testified several years later at Norris's trial. Even with their substantial assistance, Emerson and Kroef received downward departures of just one and two months, respectively.

Norris does not seek comparable treatment in arguing for a sentence comparable to those imposed on Kroef, Emerson, and Brown; he seeks more lenient treatment. Norris seeks a downward departure far greater than either Kroef or Emerson received and a departure Brown did not receive at all. Because Norris was far more culpable than his subordinates, and even today fails to acknowledge any responsibility for his offense, a period of incarceration significantly greater than those imposed on Kroef, Emerson, and Brown is appropriate.

V

CONCLUSION

For all of the foregoing reasons, the Government respectfully recommends that the defendant be sentenced to a term of imprisonment of not less than 33 months. The recommended sentence is essential to punish Norris for his egregious conduct, to assure respect for the law, and to deter others from committing similar offenses.

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Respectfully submitted,

/s/

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