UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 05 CR 727
	)	
CONRAD M. BLACK, et al.	)	Hon. Amy J. St. Eve

GOVERNMENT'S EVIDENTIARY PROFFER SUPPORTING THE ADMISSIBILITY OF CO-SCHEMER AND AGENT STATEMENTS

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The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this written proffer, pursuant to the provisions of Federal Rule of Evidence 801, including Federal Rules of Evidence 801(d)(2)(D) and 801(d)(2)(E), and *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1987), of the government's evidence supporting the admission of co-schemers' and agents' statements at trial. This proffer sets forth a summary of the evidence that the government will offer at trial relating to a scheme among defendants Conrad Black, John Boultbee, Peter Atkinson, and Mark Kipnis, as well as co-schemer David Radler, who acted together and with others to commit offenses against the United States, namely mail and wire fraud, tax evasion, and in Black's case, money laundering, racketeering, and obstruction of justice. This proffer also summarizes the defendants' and their co-schemers' statements that furthered the defendants' criminal scheme.

This proffer sets forth the agency principles under which the statements of these additional actors are admissible pursuant to Rule 801(d)(2)(D) and 801(d)(2)(E) as statements of co-schemers and agents. The legal principles governing admissibility of co-conspirator statements apply to the joint mail fraud scheme in this case, even though the scheme was not formally charged as a conspiracy. *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997)(government need not charge conspiracy in order for a co-conspirator statement to be admitted); *Santiago*, 582 F.2d at 1130 (establishing law concerning *Santiago* proffers in a one-count case with no conspiracy charge).

This proffer begins by discussing the scheme charged in this case. It then discusses the law governing the admissibility of co-schemer statements under Federal Rule of Evidence 801(d)(2)(E), and the agency provisions of Rule 801(d)(2)(D). Next, this proffer summarizes some of the evidence supporting the admission of co-schemers' statements and agents' statements.

The government is not detailing all of its evidence showing the existence of the scheme charged in the third superseding indictment (the "indictment"), all of the statements that were made in furtherance of the scheme, or all statements made by agents within the scope of their agency. Instead, this proffer outlines the law governing the admissibility of such statements, provides background to the Court for evaluating the admissibility of these statements, and highlights examples of its evidence. *United States v. McClellan*, 165 F.3d 535, 553-54 (7th Cir. 1999)(government not required to include in *Santiago* proffer each and every statement it intends to elicit at trial). In this manner, the government will establish to the Court the evidence available to complete the necessary foundation at trial and the roles of various witnesses, as well as the bases for admission. *United States v. Salah*, 03 CR 978-2 (N.D. Ill. Sept. 18, 2006) (St. Eve, J. Minute Order)(describing this Circuit's *Santiago* proffer requirements).

I. OVERVIEW OF THE CHARGED SCHEME.

As described further in the indictment, the key entities involved in the scheme were U.S. public company Hollinger International, Inc. ("International"), Canadian public company Hollinger Inc. ("Inc."), and privately held Canadian company The Ravelston Corporation, Ltd. ("Ravelston"). Indictment, Count One, ¶ 1(a)-(c). Defendants Conrad Black and John Boultbee, and co-schemer David Radler, were officers of all three companies. As to International and Inc., Black was the CEO, Radler was the COO, and Boultbee was the CFO. *Id.* at ¶¶ 1(d), (e), (h). Each also had ownership interests in Ravelston, Black's being the largest at over 65%. *Id.* Atkinson and Kipnis were attorneys and officers of International. *Id.* at ¶¶ 1(f), (g). Atkinson, too, had a stake in Ravelston. *Id.* at ¶ 1(f). Black, Radler, Boultbee, Atkinson, and Kipnis participated in schemes to

obtain money and property from International, and to deprive International and its shareholders of their honest services as officers and, in some cases, directors of the corporation.

In the first scheme, the defendants and Radler fraudulently funneled money from International to Inc. and to certain of the defendants by characterizing such money as "non-compete payments," made by companies who were buying International's U.S. community newspaper assets. The first scheme involved seven transactions:

- American Trucker and Mine and Quarry Trader: In May 1998, these publications were purchased by Intertec Publishing Corporation for approximately $75 million; a $2 million non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 4-7).

- CNHI (I): In February 1999, Community Newspaper Holdings, Inc. ("CNHI") purchased multiple U.S. community newspapers from International for approximately $472 million; $12 million of a $50 million non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 8-12).

- Horizon: In March 1999, Horizon, owned in substantial part by Black and Radler, purchased multiple U.S. community newspapers from International for approximately $43.7 million; $1.2 million of a $5 million non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 14-15).

- Forum: In September 2000, Forum bought U.S. newspapers from International for approximately $14 million; $100,000 of a $500,000 non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 17-18). Black, Radler, Boultbee, and Atkinson also diverted money from the transactions, labeled "supplemental non-competition payments" (*id.* at ¶¶ 19-21).

- CNHI (II): In September 2000, in a second round, CNHI purchased U.S. community newspapers from International for approximately $90 million; $750,000 of a $3 million non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 22). Black, Radler, Boultbee, and Atkinson also diverted approximately $9.5 million from the transactions, labeled as non-compete payments (*id.* at ¶¶ 23-27).

- Paxton: In October 2000, Paxton bought U.S. newspapers from International for approximately $59 million; $500,000 of a $2 million non-compete payment to International was diverted to Inc. (*id.* at ¶¶ 17-18). Black, Radler, Boultbee, and Atkinson also diverted money from the transactions, labeled "supplemental non-competition payments" (*id.* at ¶¶ 19-21).

- *American Publishing Company*: In February 2001, Black, Radler, Boultbee, and Atkinson diverted $5.5 million from American Publishing Company ("APC"), a subsidiary through which International had owned its U.S. community newspapers outside the Chicago area, in the form of purported non-compete payments (*id.* at ¶¶ 28-30).

The second scheme arose out of International's November 2000 sale of its Canadian newspaper assets to CanWest Global Communications Corp. ("CanWest") for $2.1 billion. Indictment, Count Eight, ¶¶ 2-18. As part of this transaction, the defendants and Radler fraudulently diverted close to $52 million from International to Ravelston and to certain of the defendants, disguised as "non-compete payments." *Id.*

In addition to these two non-compete schemes, Black and Boultbee participated in schemes to defraud International of money and property, and the company's and shareholders' right to their honest services, in connection with certain payments that they caused the company to make for Black's personal expenses. These expenses included a vacation to Bora Bora, a birthday party for Black's wife, and Black's purchase of a New York apartment from International for millions of dollars less than its actual value.

II. THE LAW GOVERNING THE ADMISSIBILITY OF CO-SCHEMER AND AGENTS' STATEMENTS.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that a "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The admission of a co-conspirator statement against a defendant is proper where the government establishes by a preponderance of evidence that: (1) a conspiracy or scheme existed; (2) the defendant and the declarant were members of that particular conspiracy or scheme; and (3) the statement was made during the course and in furtherance of the

conspiracy or scheme. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Westmoreland*, 312 F.3d 302, 309 (7th Cir. 2002).

A. The *Santiago* Proffer Is the Approved Method of Proffering Co-Schemer Statements.

In this Circuit, the preferred way for the government to makes its preliminary factual showing as to the admissibility of such statements is by filing a pretrial written proffer of the government's evidence. *United States v. Hoover*, 246 F.3d 1054, 1060 (7th Cir. 2001); *United States v. Irorere,* 228 F.3d 816, 824 (7th Cir. 2000).[1/] In making its preliminary factual determinations, the court must consider the statements themselves as evidence of a joint scheme and whether the statements the government seeks to admit were made in furtherance of that scheme. *United States v. Brookins*, 52 F.3d 615, 623 (7th Cir. 1995); *United States v. Maholias*, 985 F.2d 869, 877 (7th Cir. 1993). The court may consider all non-privileged evidence. *United States v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996).

B. Co-Schemer Statements Are Admissible as Nonhearsay Despite the Absence of a Formal Conspiracy Charge, and Regardless of the Criminal Intent of Each Co-Schemer.

Statements may be admitted under Rule 801(d)(2)(E) notwithstanding the lack of any formal conspiracy charge. *Godinez*, 110 F.3d at 454; *Santiago*, 582 F.2d at 1130.[2/] In addition, there is no requirement that each member of the venture share a criminal intent for the co-schemer rule to apply to statements that members made in furtherance of the scheme. These two rules are based on the very nature of the co-conspirator doctrine:

[1/] *Accord United States v. Haynie,* 179 F.3d 1048, 1050 (7th Cir.1999); *United States v. Rodriguez*, 975 F.2d 404, 406 (7th Cir. 1992).

[2/] *See also United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1991)(conspiracy charge not a condition for admitting statements under Rule 801(d)(2)(E)). *Accord United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990); *United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989); *United States v. LeFevour*, 798 F.2d 977, 983 (7th Cir. 1986).

> The distinction should be noted between "conspiracy" as a crime and the co-conspirator exception to the hearsay rule. Conspiracy as a crime comprehends more than mere joint enterprise. It also includes other elements, such as a meeting of the minds, criminal intent and, where required by statute, an overt act. . . . The co-conspirator exception to the hearsay rule, on the other hand, is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases. . . . Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.
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> * * *
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> The substantive criminal law of conspiracy, though it obviously overlaps in many areas, simply has no application to this evidentiary principle. Thus, once the existence of a joint venture for an illegal purpose, or for a legal purpose using illegal means, and a statement made in the course of and in furtherance of that venture have been demonstrated by a preponderance of the evidence, it makes no difference whether the declarant or any other "partner in crime" could actually be tried, convicted and punished for the crime of conspiracy.

United States v. Gil, 604 F.2d 546, 549-550 (7th Cir. 1979)(citations omitted)(emphasis added).

This distinction was also explored in *United States v. Coe*, 718 F.2d 830 (7th Cir. 1983). In *Coe*, the court explained that a so-called co-conspirator statement's admissibility does not depend on the substantive law of conspiracy:

> Conspiracy as an evidentiary rule differs from conspiracy as a crime. The crime of conspiracy comprehends much more than just a joint venture or concerted action, whereas the evidentiary rule of conspiracy is founded on concepts of agency law. . . . Recognizing this, some courts refer to the coconspirator exception as the "joint venture" or "concert of action" exception. . . . A charge of criminal conspiracy is not a prerequisite for the invocation of this evidentiary rule. . . . Indeed, it may be invoked in civil as well as criminal cases. . . .
>
> The proposition that the government did have to establish by a preponderance of independent evidence was that [the individuals] . . . were engaged in a joint venture--that there was a "combination between them . . . ."

Coe, 718 F.2d at 835 (citations omitted).[3/]

[3/] *See also Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917)(explaining origin of the co-conspirator rule in the law of partnership)("the act or declaration of one, in furtherance

C. The Supreme Court's *Crawford* Decision Has Not Changed the Admissibility of Co-Schemer Statements.

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), changed much of the law concerning out-of-court testimonial statements, but it did not affect the admissibility of co-schemer statements. In *Crawford*, the prosecution introduced a tape-recorded statement made before trial by the defendant's wife to law enforcement. *Id.* at 38. At trial, however, the wife was unavailable as a witness due to the state's spousal privilege law, and thus the defendant did not have an opportunity to cross-examine her. *Id.* at 40. The Court ruled that admission of the statement violated the Confrontation Clause, holding that where the government offers an unavailable declarant's hearsay that is "testimonial" in nature, the Confrontation Clause requires actual confrontation, that is, cross-examination, regardless of how reliable the statement may be. *Id.* at 51-52. As examples of "testimonial" statements, the Court listed prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. *Id.* at 68.

The rule in *Crawford* does not apply, however, to statements that are not hearsay.[4/] Thus, the Seventh Circuit has squarely held that *Crawford* does not apply to – and did not change the law relating to – co-schemer statements. In *United States v. Jenkins*, 419 F.3d 614 (7th Cir.), *cert. denied*, 126 S. Ct. 782 (2005), the court noted:

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of the common object, is the act of all, and is admissible as primary and original evidence against them").

[4/]The rule in *Crawford* also does not apply where: (1) a statement, though testimonial in nature, is not offered for the truth of the matter asserted, 541 U.S. at 59 n.9; (2) the declarant testifies at trial and is subject to cross-examination regarding the prior statement, *id.* at 59 n.9; (3) the statement is non-testimonial, *id.* at 60; or (4) the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination, *id.* at 59. Another exception to the confrontation requirement applies where the defendant procured the declarant's unavailability, that is, "forfeiture by wrong-doing," *see id.* at 62; Fed. R. Evid. 804(b)(6).

> As to the Confrontation Clause argument, *Crawford* does not apply. The recordings featured the statements of co-conspirators. These statements, by definition, are not hearsay. *Crawford* did not change the rules as to the admissibility of co-conspirator statements.

419 F.3d at 618. *Accord, United States v. Bailey*, No. 05 CR 8, 2005 U.S. Dist. LEXIS 28070 at *5 (N.D. Ill. Nov. 14, 2005)(Shadur, J.)(following *Jenkins*). Because co-schemer statements are not "testimonial" hearsay statements, *Crawford* is not implicated, and those statements may be admitted without offending the Sixth Amendment.

D. The Proper Standard for Admissibility Is Preponderance of the Evidence.

A district court's preliminary determination of admissibility for purposes of Rule 801(d)(2)(E) is distinct from the standard on appeal in determining whether sufficient evidence exists to uphold a jury verdict. The standard to be applied in the context of admissibility under Rule 801(d)(2)(E) is a preponderance-of-the-evidence standard. *Lindemann*, 85 F.3d at 1238 (citing *Bourjaily*, 438 U.S. at 175-76).

E. Principles for Determining Membership in and Existence of the Criminal Scheme.

1. The court may consider the proffered statements themselves.

A district court may consider the proffered statements themselves in determining the existence of a scheme, and a defendant's participation in it. *Bourjaily,* 483 U.S. at 180; *United States v. de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990); *United States v. Kapp*, 02 CR 418-1, 2003 U.S. Dist. LEXIS 3989 (N.D. Ill. March 17, 2003)(Manning, J.). However, the government typically must present some evidence, independent of the statements. *Lindemann*, 85 F.3d at 1238.

2. Both direct and circumstantial evidence can be considered.

Once the scheme is established, the evidence may be either direct or circumstantial. *Irorere*, 228 F.3d at 823; *United States v. Patterson*, 213 F. Supp. 2d 900, 910-11 (N.D. Ill. 2002)(Bucklo,

J.), *aff'd*, 348 F.3d 218, 225-26 (7th Cir. 2003).[5/] Indeed, "[b]ecause of the secretive character of conspiracies, direct evidence is elusive, and hence the existence and the defendants' participation can usually be established only by circumstantial evidence." *United States v. Redwine*, 715 F.2d 315, 319 (7th Cir. 1983). *See also Lindemann*, 85 F.3d at 1238 (secretive nature of conspiracies one reason for conspirator exception to hearsay rule).

3. Requirements for determining if a person has joined the scheme.

A defendant joins a criminal scheme if he agrees with another person to one or more of the common objectives of the scheme; it is immaterial whether the defendant knows, has met or has agreed with every co-schemer. *United States v. Boucher*, 796 F.2d 972, 975 (7th Cir. 1986); *United States v. Balistrieri*, 779 F.2d 1191, 1225 (7th Cir. 1985); *see also Rodriguez*, 975 F.2d at 411 (defendant must have intended to join and associate himself with the conspiracy's criminal design and purpose). The government need not prove, however, that a defendant knew each and every detail of the scheme or played more than a minor role in the scheme. *United States v. Sims*, 808 F. Supp. 620, 623 (N.D. Ill. 1992)(Alesia, J.). As the Supreme Court has said:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. . . . The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. . . . If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas v. United States, 522 U.S. 52, 63-4 (1997)(citations omitted).[6/]

[5/]Even though the government need not prove the crime of conspiracy for the co-conspirator doctrine to apply, criminal conspiracy cases are helpful in stating the types of evidence that are sufficient to show conspiracy. If the government meets the higher standard for criminal conspiracy, the evidentiary standard is met.

[6/]*See also United States v. Liefer*, 778 F.2d 1236, 1247 n.9 (7th Cir. 1985); *United States v. Towers*, 775 F.2d 184, 189 (7th Cir. 1985); *United States v. Morrow*, 971 F. Supp. 1254, 1256-57

A defendant may be found to have participated in a scheme even if he joined or terminated his relationship with others at a different time than another defendant or co-schemer. *United States v. Ramirez*, 796 F.2d 212, 215 (7th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1329 (7th Cir.1985).[7] A district court may consider the conduct, knowledge, and statements of the defendant and others in establishing participation in a scheme. A single act or conversation, for example, can suffice to connect the defendant to the scheme if that act leads to the reasonable inference of intent to participate in an unlawful enterprise. *Sims*, 808 F. Supp. at 623.[8] Statements made during the course of and in furtherance of a scheme, even in its embryonic stages, are admissible against those who arrive late to join a going concern. *United States v. Potts*, 840 F.2d 368, 372 (7th Cir. 1987). A schemer who has become inactive in the scheme nevertheless is liable for his co-schemers' further statements unless he openly disavows the scheme or reports it to the police. *United States v. Feldman*, 825 F.2d 124, 129 (7th Cir. 1987); *United States v. Andrus*, 775 F.2d 825, 850 (7th Cir. 1985).

F. Statements Made in Furtherance of the Scheme.

In determining whether a statement was made "in furtherance" of the scheme, courts look for a reasonable basis upon which to conclude that the statement furthered the scheme's goals.

(N.D. Ill. 1997)(Alesia, J.).

[7] A defendant, even if not an "agreeing" member of a conspiracy, may nonetheless be found guilty of conspiracy if he knew of the conspiracy's existence at the time of his acts, and his acts knowingly aided and abetted the business of the conspiracy, *see United States v. Scroggins*, 939 F.2d 416, 421 (7th Cir. 1991); *Sims*, 808 F. Supp. at 623 n.1, even if the defendant was not charged with aiding and abetting, *see United States v. Kasvin*, 757 F.2d 887, 890-91 (7th Cir.1985).

[8] Similarly, efforts by an alleged co-schemer to conceal a scheme may support an inference that he joined the scheme while it was still in operation. *See Redwine;* 715 F.2d at 321; *United States v. Robertson*, 659 F.2d 652, 657 (5th Cir. 1981).

United States v. Johnson, 200 F.3d 529, 533 (7th Cir. 2000). Under the reasonable-basis standard, a statement may be susceptible to alternative interpretations and still be "in furtherance" of the scheme; the statement need not have been exclusively, or even primarily, made to further the scheme in order to be admissible under the co-schemer exception. *Johnson*, 200 F.3d at 533 (citing *United States v. Stephenson,* 53 F.3d 836, 845 (7th Cir. 1995)).

The Seventh Circuit has found a wide range of statements to satisfy the "in furtherance" requirement. *United States v. Cozzo*, No. 02 CR 400, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. April 16, 2004)(Zagel, J.)(collecting cases). In general, a statement that is "part of the information flow between conspirators intended to help each perform his role" is admissible under Rule 801(d)(2)(E). *United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994), *quoting United States v. Johnson*, 927 F.2d 999, 1001 (7th Cir. 1991); *accord United States v. Gajo*, 290 F.3d 922, 929 (7th Cir. 2002). These include statements made to: (1) identify other members of the scheme and their roles, *United States v. Roldan-Zapata,* 916 F.2d 795, 803 (2d Cir. 1990); *United States v. Magee*, 821 F.2d 234, 244 (5th Cir. 1987); (2) recruit potential co-schemers, *United States v. Curry*, 187 F.3d 762, 766 (7th Cir. 1999); (3) control damage to an ongoing scheme, *United States v. Van Daal Wyk,* 840 F.2d 494, 499 (7th Cir. 1988); *Kapp*, 2003 U.S. Dist. LEXIS 3989, at *3; (4) keep co-schemers advised as to the progress of the scheme, *Potts*, 840 F.2d at 371; *Kapp*, 2003 U.S. Dist. LEXIS 3989, at *3; (5) conceal the criminal objectives of the scheme, *United States v. Kaden*, 819 F.2d 813, 820 (7th Cir. 1987); (6) plan or to review a co-schemer's exploits, *United States v. Molt*, 772 F.2d 366, 368-69 (7th Cir. 1985); or (7) as an assurance that a co-schemer can be trusted to perform his role. *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990); *Van Daal Wyck*, 840 F.2d at 499. The Seventh Circuit has also said that "[s]tatements made to keep coconspirators informed about the progress of

the conspiracy, to recruit others, or to control damage to the conspiracy are made in furtherance of the conspiracy." *Stephenson,* 53 F.3d at 845. *Accord United States v. Curtis*, 37 F.3d 301, 307 (7th Cir. 1994); *United States v. McCarroll*, No. 95 CR 48, 1996 U.S. Dist. LEXIS 2540 (N.D. Ill. Jan. 22, 1996)(Coar, J.).

1. Statements made to execute the scheme.

Statements made by co-schemers to conduct the business of the scheme and to accomplish its goals are "classic examples of statements made to conduct and further" a scheme. *Cox*, 923 F.2d at 527. Statements such as these, which are "intended to promote the conspiratorial objectives," should be admitted pursuant to Rule 801(D)(2)(E).[9/] Statements that prompt the listener to act in a manner that facilitates the carrying out of the scheme are also made "in furtherance" of the scheme.[10/] Whether a particular statement tends to advance the objectives of the scheme or to induce the listener's assistance is determined by an examination of the context in which it is made. *Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989).

2. Statements regarding the scheme's activities.

Statements "describing the purpose, method, or criminality of the conspiracy," are made in furtherance of the scheme because co-schemers make such statements to guide each other toward achievement of the objectives of the scheme. *United States v. Ashman*, 979 F.2d 469, 489 (7th Cir. 1992). Similarly, statements that are part of the information flow between co-schemers made in order to help each co-schemer perform his role are "in furtherance" of the scheme. *Godinez,* 110

[9/] *United States v. Sinclair*, 109 F.3d 1527, 1534 (10th Cir. 1997); *accord United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994).

[10/] *United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997); *United States v. Simmons*, 923 F.2d 934, 945 (2d Cir. 1991); *United States v. Smith*, 833 F.2d 213, 219 (10th Cir. 1987).

F.3d at 454; *Garlington*, 879 F.2d at 283-84; *Van Daal Wyk,* 840 F.2d at 499. Statements to assure that a co-schemer can be trusted to perform his role also satisfy the "in furtherance" requirement. *United States v. Romo*, 914 F.2d 889, 897 (7th Cir. 1990); *de Ortiz*, 907 F.2d at 635-36.

3. Statements to recruit co-schemers.

Statements made to recruit potential members of the scheme are made "in furtherance" of the scheme. *Curry*, 187 F.3d at 766; *Godinez*, 110 F.3d at 454.[11/]

4. Statements regarding the activities of other co-schemers designed to inform or reassure the listener.

Statements made by schemers to other individuals who participate in, or interact with, the scheme contribute to the scheme. *Van Daal Wyk*, 840 F.2d at 499 (wholesaler instructed his courier not to deliver any additional quantities of cocaine to the defendant, a dealer).

> The exchange of information is the lifeblood of a conspiracy, as it is of any cooperative activity, legal or illegal. Even commenting on a failed operation is in furtherance of the conspiracy, because people learn from their mistakes. Even identification of a coconspirator by an informative nickname. . . is in furtherance of the conspiracy, because it helps to establish, communicate, and thus confirm the lines of command in the organization. Such statements are "part of the information flow between conspirators intended to help each perform his role," and no more is required to make them admissible.

Pallais, 921 F.2d at 688. The same logic dictates that discussions concerning a scheme's successes are admissible as statements in furtherance of the scheme. *See id.*; *Van Daal Wyk*, 840 F.2d at 499.

Statements intended to reassure the listener regarding the progress or stability of the scheme also further the scheme. *United States v. Sophie*, 900 F.2d 1064, 1073 (7th Cir. 1990) (description of past drug deals). Likewise, statements made to reassure and calm the listener may further the

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[11/] *See also United States v. Doerr*, 886 F.2d 944, 951 (7th Cir. 1989); *Garlington*, 879 F.2d at 283.

scheme, *see Garlington*, 879 F.2d at 284; *United States v. Molinaro*, 877 F.2d 1341, 1343-44 (7th Cir. 1989)(upholding admission of statements designed to iron out disputed details of the conspiracy and to control the damage apparently done to the conspiracy).

5. Statements relating to the progress and past accomplishments of the scheme.

Statements made by co-schemers concerning past exploits by members of the scheme are in furtherance of the scheme when made to assist in managing and updating other members of the scheme. *Potts*, 840 F.2d at 371; *Molt*, 772 F.2d at 368-69. Similarly, statements regarding a co-schemer's failure to fully accomplish the objective of the scheme are admissible "as updates on the status of the conspiracy" and how that status affected the future of the scheme. *United States v. Doyle*, 771 F.2d 250, 256 (7th Cir. 1985).

6. Statements to conceal the criminal objectives of the scheme.

Finally, statements made to conceal the criminal objectives of the scheme are made "in furtherance" of the scheme where, as here, ongoing concealment is one of its purposes. *United States v. Maloney*, 71 F.3d 645, 660 (7th Cir. 1995); *Kaden*, 819 F.2d at 820; *United States v. Bouzanis,* No. 00 CR 1065, 2003 U.S. Dist. LEXIS 16218, at *21 n.5 (N.D. Ill. Sept. 15, 2003)(Lefkow, J.). "Avoiding detection by law enforcement officials clearly furthers the aims of a conspiracy." *United States v. Troop*, 890 F.2d 1393, 1404 (7th Cir. 1989). Statements made to control damage to an ongoing scheme have also been found to have been made in furtherance of the scheme. *See Stephenson*, 53 F.3d at 845; *Van Daal Wyk*, 840 F.2d at 499.

G. Alternative Bases for Admissibility of Statements.

The government believes that the statements of co-schemers set forth in this proffer should be admitted as non-hearsay under the co-schemer doctrine. There are alternative bases, however, for admission of many of the statements. These bases do not require a Rule 801(d)(2)(E) analysis.

1. Agency admissions pursuant to Rule 801(d)(2)(D).

Many of the participants in the scheme were acting as agents for the defendants. Federal Rule of Evidence 801(d)(2)(D) sets forth the evidentiary foundation for admission of statements by agents against their principals – including criminal defendants. *See Feldman*, 825 F.2d at 127-29.[12] Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."[13] Thus, out-of-court statements by agents of a defendant may come into evidence as non-hearsay admissions against the defendant principal when the principal is an individual who directs the conduct of the entity and is otherwise directing and supervising the conduct of his employee subordinates. *See Wilkinson*, 920 F.2d at 1565; *United States v. Ramsey*, 785 F.2d 184, 191 (7th Cir. 1986)(statements by "executive

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[12] This is different than the substantive principles applicable to criminal liability for an entity. For purposes of corporate criminal liability, it is not necessary to show that the particular act was itself authorized or directed by the entity, *see Seventh Circuit Federal Jury Instr. Section 5.03,* but is necessary to show that the agent was motivated, at least in part, by an intent to benefit the corporation. *United States v. One Parcel Of Land Located At 7326 Highway 45 North, Three Lakes, Wisconsin,* 965 F.2d 311, 316 (7th Cir. 1992); *United States v. Automated Med. Labs.*, 770 F.2d 399, 407 (4th Cir. 1985).

[13] A strict agency analysis is not contemplated by the terms of Rule 801(d)(2)(D). *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1565-66 (11th Cir. 1991). The Rule broadened the traditional view so that it is no longer necessary to show that an employee or agency declarant possesses "speaking authority" – tested by the usual statements of agency law – before a statement can be admitted against the principal. *Wilkinson*, 920 F.2d at 1565. *Cf. Aliotta v. National R.R. Pass. Corp.*, 315 F.3d 756, 762-63 (7th Cir. 2003)(discussing admissibility of agent's statements).

assistants" were admissible against defendant corporation under Rule 801(d)(2)(d)). Thus, for purposes of admission under Rule 801(d)(2)(D), a statement made by an agent is admissible against the principal, provided that the agent's statement was made within the scope of the agency.[14/]

In this case, as noted below, the defendants worked through a number of agents to effectuate their criminal scheme. To the extent these agents' statements are being offered for the truth of the matters asserted, their statements should be admitted pursuant to Rule 801(d)(2)(D).

2. Defendants' own statements.

A defendant's own admissions are admissible against him pursuant to Fed. R. Evid. 801(d)(2)(A), without reliance on the co-schemer-statement rule.[15/] *Maholias*, 985 F.2d at 877. A defendant's own admissions, moreover, are relevant to establishing the factual predicates for the admission of co-schemer statements against him. *Godinez*, 110 F.3d at 455; *Potts*, 840 F.2d at 371-72.[16/]

3. Non-hearsay statements – including false statements.

The co-schemer statement analysis also is not triggered when the relevant verbal declaration is not a "statement" within the meaning of Federal Rule of Evidence 801(a) and when it is not hearsay. This rule defines "statement" as "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion."

[14/] With respect to statements made by certain cooperating witnesses, among others, another basis for admission is Rule 801(d)(2)(C), which provides for the admission of "authorized" statements within the context of an existing agency relationship. *See Feldman*, 825 F.2d at 127.

[15/] Rule 801(d)(2)(A) provides in pertinent part that a "statement" is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity."

[16/] Other sections of Rule 801(d)(2) provide alternative bases of admissibility that may apply. Rule 801(d)(2)(B), for example, provides for the admissibility of "adopted" statements.

Thus, a statement that is incapable of verification, such as an order or a mere suggestion, is not hearsay and does not invoke a Rule 801(d)(2)(E) analysis. *United States v. Tuchow*, 768 F.2d 855, 868 n.18 (7th Cir. 1985). Accordingly, statements by alleged co-schemers may be admitted into evidence without establishing the *Bourjaily* factual predicates, but with corresponding limiting instructions, when such statements are offered simply to show, for example, the existence, illegality, or nature and scope of the charged scheme.[17] In addition, when words are being introduced as a verbal act, or as background for an alleged statement, they are not admitted for the truth of the matter asserted. For that reason, they are not hearsay, and may be admitted. *United States v. Robinzine*, 80 F.3d246, 252 (7th Cir. 1996).

In this case, the government will seek to introduce certain false statements of the defendants and their co-schemers as evidence of their fraud. Because these statements are not being offered for the truth of the matters asserted, they are non-hearsay and hence admissible in light of their relevance. *Santos*, 20 F.3d at 285 (false statement properly admitted since it was not admitted for truth of matter asserted); *United States v. Hoag*, 823 F.2d 1123, 1127 (7th Cir. 1987) ("Statements introduced solely for the purpose of proving that they were made as a predicate for other proof they were false are not hearsay.").

III. THE GOVERNMENT'S PROFFER REGARDING THE EXISTENCE OF A SCHEME AND BASIS OF AGENCY ADMISSIONS.

A. *American Trucker*.

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[17] *United States v. Herrera-Medina*, 853 F.2d 564, 565-66 (7th Cir. 1988); *Van Daal Wyk*, 840 F.2d at 497-98; *Tuchow*, 768 F.2d at 867-69. In some cases, statements by an alleged co-schemer will include a combination of declarations offered for the truth of the matters asserted and declarations offered for other non-hearsay purposes.

International owned more than 300 community newspapers throughout the United States until 1998, when it began selling them. In 1998 and 1999, Black, Radler, and Boultbee discussed selling off International's community newspapers to raise capital for repaying debt, investing in Internet ventures, and retiring International stock. Additionally, Black told Radler that he had "lost faith" in the newspaper business. International divested virtually all of its U.S. community newspaper assets from 1998 through the end of 2000.

Among the first publications that International sold as part of this divestment strategy were periodicals called *American Trucker* and *Mine and Quarry Trader*. In March 1998, Intertec Publishing Corporation offered to acquire certain assets from International, including these two publications. The deal closed on or about May 11, 1998. Leading up to the closing, there were correspondence and meetings among co-schemers, including with third parties, concerning non-compete payments that would be made as part of the transaction.

On or about April 24, 1998, there was a meeting of the board of directors of Southam Inc. (the International affiliate that owned the *American Trucker* assets being sold). Black acted as Chairman at the meeting, and made statements to the board concerning the proposed sale. Among other things, Black said that the purchaser was likely to require a non-compete agreement from International, and appropriate compensation for this would have to be settled.

Approximately one week later, on or about May 1, 1998, the Executive Committee of International's board of directors approved the proposed *American Trucker* transaction, resolving that International would receive $2 million in non-compete consideration from Intertec as part of the deal. Each of the members of the Executive Committee – Black, Radler, and director Richard

Perle – signed the resolution. There was no actual meeting or discussion among the Executive Committee members concerning this or any other transaction for which a resolution was passed.

The transaction was then discussed at a May 6, 1998 International board meeting, held at International's New York City office. Participants in the discussion included various board members and corporate officers. Among other things, Radler discussed Southam's pending sale of *American Trucker*. There was no mention of non-compete consideration being paid to Inc. Moreover, the Executive Committee's resolution was never presented to or approved by the Audit Committee or the board.

When the deal closed on May 11, Intertec agreed to wire $2 million as a non-compete payment to International. A "flow of funds" memo identified the International bank account where the money should be sent, to the attention of International's Manager of Corporate Finance (the "Manager of Corporate Finance" or the "Manager").

The Inc. board of directors met in Toronto, Ontario on May 27, 1998, along with various International executives. At that meeting, Radler described Southam's sale of *American Trucker*, but made no statements concerning non-compete payments. Both Black and Radler again commented generally on the *American Trucker* disposition at the September 14, 1998 meeting of International's board of directors, in New York, without making any statements about the non-compete payments.

In late January 1999, an Executive Vice President in International's Community Newspaper Group met with the Manager. The Executive Vice President told the Manager to wire $2 million from International to Inc. because it was part of an agreement that had been struck relating to *American Trucker* in May 1998, and the funds needed to be moved. Shortly thereafter, on or about

January 27, 1999, at the Manager's request, the Executive Vice President sent the Manager a memo, copying Radler, directing the Manager to process a $2 million check from International to Inc. for the *American Trucker* non-compete agreement. Several days later, the Manager and Kipnis signed a $2 million check from International to Inc. The International board of directors and Audit Committee were not told about, and did not approve, the transfer.

B. CNHI (I).

On or about November 30, 1998, the International board of directors, and certain International officers, convened for a meeting in New York City. At that meeting, Black told the board about major initiatives being considered by senior management, including sale of a substantial portion of the Community Newspaper Group. Radler, who had reviewed his presentation with Black before the meeting, then presented the board with an offer from CNHI to acquire many of International's U.S. community newspapers. Radler stated that the offer's terms included International's execution of a three-year non-compete agreement covering the counties in which the newspapers were located. Black asked the board to approve and authorize the CNHI transaction, including International's execution of a non-compete agreement.

Following the board's approval of entering a deal with CNHI, International and CNHI exchanged drafts of agreements. At International's request, CNHI agreed to allocate $50 million of the $456 million purchase price to a non-compete agreement. In the initial drafts, all the non-compete money was directed to the seller, International.

In January 1999, Radler received a telephone call from Black and/or Boultbee. During that phone call, Radler was told to have Inc. inserted as a covenantor to the CNHI non-compete agreement, and to allocate $12 million of the $50 million non-compete fee from International to Inc.

Radler was told that the parent company (*i.e.*, Inc.) deserved a piece of this fee. Radler then told Kipnis to insert Inc. as a non-compete covenantor, and to allocate $12 million of the $50 million non-compete fee to Inc.

After the discussion with Radler, Kipnis told CNHI's attorney that International wanted to add Inc. as a party to the non-compete agreement. CNHI had not requested Inc.'s inclusion, and did not believe it was important for Inc. to agree not to compete with CNHI as part of the deal. At Kipnis's request, however, and because adding Inc. did not affect CNHI's purchase price, CNHI's attorney agreed to Inc.'s inclusion in the agreement.

On or about January 27, 1999, the Executive Vice President of the Community Newspaper Group sent Kipnis a memo with wire-transfer instructions for the transaction, including directing $12 million of the non-compete money to be sent to Inc., as a supposed non-compete payment. Kipnis told the Manager of Corporate Finance that Inc. was going to receive $12 million of the $50 million non-compete agreement in the CNHI transaction. The Manager then sent an e-mail to International executives, including Kipnis, recounting that the latest revision to the CNHI sale had an estimated $12 million of non-compete proceeds funneling to Inc. The Manager stated that because the money was going from International to Inc., it could not be used to pay down International's bank debt.

The CNHI deal closed on February 1, 1999, and $12 million was wired to Inc. On February 11, 1999 and February 22, 1999, Kipnis circulated memos stating that Inc. would pay down a multi-million dollar debt it owed to International. At a February 26, 1999 meeting of International's board of directors in New York City, Black told the board that the *American Trucker* and CNHI deals concluded successfully. There was no mention of non-compete payments for either transaction

being sent to Inc., and the International board of directors and Audit Committee did not know about or approve non-compete payments to Inc. Nor was the International board or Audit Committee informed that the non-compete payments to Inc. would be used to repay Inc.'s debt to International.

C. The Template.

In early 1999, around the time that the decision was made to include Inc. in the CNHI non-compete agreement, Kipnis told Radler that, at a meeting Kipnis attended in Toronto, it had been decided by "Toronto" that Inc. would be inserted as a non-compete covenantor in all future deals involving the sale of International's U.S. community newspapers, and that Inc. would receive 25% of any non-compete payments. Either at that time or soon thereafter, Kipnis told Radler that Black and Boultbee made this decision. In other conversations with Radler, Black and Boultbee confirmed that this 75% International/25% Inc. split would be the template for future deals.[18]

D. Horizon.

At the same November 30, 1998 International board meeting discussed in Section B, above, Radler told the board of directors that CNHI's proposal was to purchase 45 of International's community newspaper properties, leaving 18 properties with International. Radler said that because of the overhead expenses associated with those 18 properties, senior management approached two managers in International's Community Newspaper Group, to determine if they would be interested in a management buyout of the 18 properties. Radler told the board that the managers said they would be interested, but needed assistance in financing the transaction. Radler stated to the board

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[18] Through later conversations with Black, Boultbee, Atkinson, International's Investor Relations Officer, and possibly other International executives, Radler came to understand that International's bank loan, which was secured by International's assets, contained covenants that restricted its ability to use the proceeds of asset sales as it saw fit. By sending the money to Inc. as non-compete payments, these restrictions were avoided.

that Black and Radler tentatively agreed to assist in the financing and take equity positions subject to the board's approval, and to the board's obtaining a "fairness opinion" for International. Black asked the board to approve and authorize the Horizon transaction, subject to obtaining the fairness opinion.

A fairness opinion was obtained in early March 1999, and the Horizon transaction closed on March 31, 1999. As part of that transaction, Kipnis and Radler signed covenants not to compete with Horizon on behalf of International and Inc., respectively. Of the $5 million earmarked for the non-compete agreement, $1.2 million was sent by wire transfer to Inc. The International board and Audit Committee were never told that part of the non-compete money would go to Inc., and did not approve the payment.

Shortly before the Horizon deal closed, Kipnis told the Manager that International was selling some community newspapers to a new corporation, Horizon, formed by current and former International executives. The Manager asked Kipnis who the executives were that had formed Horizon. Kipnis said he was not at liberty to tell, and that he was not personally involved. The person who left to run Horizon later told the Manager that the Horizon deal was a very good one for the Horizon purchasers because the Horizon properties had been undervalued, and that Horizon would make a huge profit on the newspapers. The Manager told Kipnis about the conversation with the new Horizon executive.[19/]

[19/]In May 2003, Black proposed selling some of the International-turned-Horizon community newspaper assets to a third party. In pitching the transaction, Black described how valuable the assets were: "We have bought and sold hundreds of these little American newspapers in public companies and have never failed to make handsome profits on them. We sold them a few years ago to clear the debt out of our public company and are buying them back now for our own account, knowing their profit potential intimately."

Meetings of the Inc. board of directors were held on May 19, 1999, September 14, 1999, and December 7, 1999. At these meetings (each of which Black, Radler, and Atkinson also attended), Boultbee gave presentations to the Inc. board, reviewing Inc.'s financial statements. In certain cases, Boultbee specifically referred to "unusual items" on the statements, consisting primarily of gain on sale of community newspapers involving non-compete payments to Inc.

E. CanWest.

In May and June 2000, Black corresponded with Israel Asper of CanWest concerning International's proposed multi-billion-dollar sale of the bulk of its Canadian assets to CanWest. Thereafter, the two companies exchanged draft transaction and non-compete agreements. The Torys law firm represented International in the deal, and Torys attorneys were among the attorneys corresponding with International and CanWest executives and lawyers about the transaction's terms.

In a July 7, 2000 memo describing some of the business issues arising out of the draft documents, one of the Torys attorneys commented that CanWest was requesting that Black and Radler execute a non-competition covenant "as individuals." Black and Atkinson discussed the memo, and Atkinson asked the Torys attorney to prepare drafts so that he could discuss the concept with Black and Radler. Subsequent e-mails and other correspondence fleshed out the proposed non-compete terms.

For example, on July 20, 2000, Atkinson sent a fax to Radler, stating that there were two elements to the consideration that CanWest should pay to Ravelston: "1. compensation for the reduced management fee consequent upon the CanWest deal; 2. compensation for entering into the non-competes which in effect take us out of business in Canada." Atkinson said that he would

contact Kipnis concerning the non-competes, and that these matters should be brought before International's Audit Committee.

The next day, Radler and Kipnis (along with International's Assistant Secretary) had a conference call with the Chairman of International's Audit Committee (the "Chairman"). During the call, Radler and Kipnis told the Chairman that the CanWest transaction would involve certain related-party issues, including non-competes, which would require independent reviews and fairness determinations by the Audit Committee.[20/] The Chairman said he would confer with the other Audit Committee members about the type and extent of information the Audit Committee would need to evaluate the proposed related-party transactions.

On July 25, 2000, the Assistant Secretary circulated a memorandum to International's board of directors in anticipation of the directors' meeting to discuss CanWest. With respect to the non-competes, the memo stated that CanWest was requiring non-compete agreements from Ravelston, Inc., Black, and Radler. The memo further stated, "Prior to closing, such parties and the Audit Committee will negotiate, consistent with prior transactions, what portion of the Purchase Price should be allocated to the Non-Competition Agreements."

The same day, Atkinson circulated a virtually identical memo to Inc.'s board of directors, but omitted the section concerning the non-competes. Atkinson discussed the issue with a Torys attorney, and told her that the Audit Committee had dealt with non-compete payments before. Atkinson gave the Torys attorney the impression that the Audit Committee had some protocol in

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[20/] One of the Audit Committee's roles was to review related-party transactions presented to the Committee by management. From International's perspective, a related-party transaction is one in which International is on one side of the transaction, and a person or entity with an interest in International – including Inc., Ravelston, Black, Boultbee, and Atkinson – is on the other side of the transaction, or has some personal interest in the transaction.

place to analyze the non-compete payments. The Torys attorney understood from her conversation with Atkinson that he was referring to individual non-compete payments.

On July 26, 2000, International's board of directors met by conference call, along with certain company executives and the Torys attorney. Black summarized the proposed CanWest transaction for the board, including the terms anticipated to be included in the non-compete agreement. Black stated that certain monetary allocations would be made to Ravelston and the parties required to sign non-competes. He further stated that related-party issues would be resolved by the Audit Committee before the deal's closing. The proposed transaction documents that Black presented to the board at the meeting included non-compete agreements only for Ravelston, Inc., Black, and Radler.[21/]

After the board meetings, there was further discussion about the CanWest non-compete agreements, including payments associated with the agreements. The morning of July 27, 2000, Atkinson telephoned a Torys lawyer, and told him to add Boultbee and Atkinson to the CanWest non-compete agreement, in addition to Black and Radler. Atkinson also instructed the Torys lawyer about allocating the non-compete money to the individuals and Ravelston. Atkinson gave the Torys lawyer the impression that CanWest had been involved in making these determinations. The Torys lawyer then wrote an e-mail to Atkinson and Boultbee about how to handle non-compete payments to individual executives. The Torys lawyer stated that an alternative to CanWest's directly paying the executives would be to "deal with this internally," *i.e.*, to have International's Audit Committee approve the payments "and act as the discipline with regards to the Hollinger International minority

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[21/]Following the International board meeting, there was a meeting by conference call of Inc.'s board of directors. Black again described the proposed CanWest transaction, although he did not highlight anything about the non-competes.

interest." The next day, the Torys lawyer added Boultbee and Atkinson as non-compete covenantors in the CanWest deal documents, incorrectly believing that CanWest had requested their inclusion. The transaction agreement, which contained no allocation of non-compete moneys, was signed on July 30, 2000.

About a week later, on August 8, 2000, Atkinson wrote a memo to Black, discussing in part the allocation of CanWest non-compete money. Atkinson stated:

> David [Radler] and Mark [Kipnis] plan to begin meetings with [the Chairman] soon to try to reach agreement regarding the restrictive covenant payments together with a sharing of the increased purchase price resulting from Ravelston's reduced management fee in the CanWest deal. I have discussed these matters with Jack [Boultbee] and Mark. We recommend that a payment totaling Can. $80m be sought; $50m for the restrictive covenants and $30m for the management fee reduction.
>
> Restrictive covenants will be signed by you, David, Jack, me, Ravelston, Hollinger Inc. and Hollinger International. David has consistently suggested $19m for you and $19m for him in regard to these covenants. Jack and I suggest $2m for each of us in regard to these covenants with the balance to the companies.
>
> With respect to the loss of management fee, we believe Ravelston should be paid $30m.
>
> Please let me know if you agree with this approach. We put a higher weighting on the restrictive covenants due to our hope that these payments can be free of tax.

The next day, Atkinson sent another memo to Boultbee, memorializing his discussion with Black about the non-compete items in the August 8 memo. Atkinson stated that Black "agreed with our proposal and with $19m each to he and David and $2m each to you and me. Mark and David will progress this with [the Chairman]." Radler and Kipnis met with the Chairman in Chicago at the Four Seasons Hotel on August 17, 2000. Radler summarized issues relating to the CanWest non-competes, among other issues.

On September 1, 2000, Kipnis sent a memo to International's Audit Committee, seeking approval of the CanWest non-compete payments. In the memo, Kipnis stated that Black, Radler,

Atkinson, Boultbee, Ravelston, and International "have each been requested to execute noncompetition agreements." Kipnis stated that Cdn$50 million in non-compete payments would be allocated $19 million each to Black and Radler, $2 million each to Atkinson and Boultbee, and $4 million each to International and Ravelston. Kipnis also referred in the memo to a "Ravelston management agreement break-up fee," stating that in consideration for Ravelston's reducing the management fees it received from International as a result of the CanWest deal, Ravelston should receive a "purchase price allocation" of Cdn$30 million.

There was an International Audit Committee meeting, held by conference call, on September 11, 2000. In addition to the committee members, Radler and other corporate officers also were present. At the meeting, Radler and Kipnis updated the Committee on the status of the CanWest transaction, and reviewed Kipnis's September 1, 2000 memo and a Kipnis-titled "Noncompetition Agreement Valuation Analysis," the body of which had been provided by International's lead auditor, KPMG.[22] Kipnis stated to the Committee that CanWest required Black and Radler to execute individual non-compete agreements as part of the transaction, and said that CanWest originally insisted that Black and Radler each receive Cdn$26 million to justify their exclusion from competing in Canada. Kipnis said that Black and Radler negotiated Cdn$12 million be reallocated to cover bonuses for senior management, which reallocation would save the Company additional

[22]In fall 2000, Kipnis called a KPMG representative who specialized in valuation of intangible assets, and requested a memo summarizing principles used in valuing non-compete agreements. Kipnis did not request, and the KPMG representative did not perform, an actual valuation of any particular non-compete agreement, and Kipnis did not specify any particular transaction in describing the assignment. KPMG provided Kipnis with a general memo describing non-compete valuation principles. The memo was not titled "Noncompetition Agreement Valuation Analysis," and in fact contained no such analysis.

bonus costs. Kipnis said that the entire non-compete allocation compared very favorably with non-compete allocations in recent arms-length sale negotiations.

At the September 11, 2000 Audit Committee meeting, Kipnis also discussed a "Ravelston Management Agreement Early Termination Fee," which he had described in the September 1 memorandum as a "break-up fee." Kipnis stated to the Committee that the CanWest purchase price would be based on the EBITDA figure reached by the group of Canadian assets by the end of the year. Kipnis said that Ravelston would be willing to reduce the management fee it customarily received from International, which would have the effect of increasing the Canadian group's EBITDA figure. Ravelston would also be willing to waive the notice requirement in its agreement with International. Kipnis stated that in exchange for these concessions, Ravelston was requesting an early termination fee of Cdn$30 million. The Audit Committee approved the non-compete and early termination fee proposals.

Following the Audit Committee meeting, also on September 11, 2000, there was a meeting of International's board of directors, held by conference call. Boultbee, Atkinson, and Kipnis participated in the meeting, along with most board members. Black did not participate. The Chairman summarized the related-party aspects of the CanWest transaction, as they had been presented earlier to the Audit Committee. He informed the board that upon consideration of the allocation percentages for similar transactions, and the requirements of CanWest, the Audit Committee had approved the allocation of Cdn$50 million of the CanWest proceeds to be paid as non-compete payments to interested parties. The Chairman also reported the Audit Committee's approval of a Cdn$30 million early termination fee to Ravelston. After the Chairman's report, the board of directors approved the non-compete allocation and the Ravelston early termination fee.

During the various meetings and discussions leading up to the board's vote on the CanWest transaction, Black, Radler, and Kipnis repeatedly told Audit Committee and board members that CanWest insisted on individual non-compete agreements, including payments to executives. Black and Radler said this was a "deal breaker" for CanWest – "the price of the deal" – and that CanWest would not enter the transaction without the individual non-competes and payments.

On and around September 20, 2000, a Torys lawyer corresponded with Boultbee and Atkinson about the final non-compete paperwork. CanWest's counsel had asked which executives' names should be included, and the Torys lawyer asked Boultbee and Atkinson to confirm that information. Boultbee and Atkinson sent separate e-mails to the Torys lawyer, confirming that Black, Radler, Boultbee, and Atkinson would each sign non-competes in the CanWest transaction.

On or about October 23, 2000, the Torys lawyer sent Atkinson a spreadsheet breaking down the CanWest purchase price. Atkinson responded,

> In your schedule re. calc. of purchase price you refer to the non-comps at $80m. In fact, the non-comps are $50m and Ravelston Mgt. break fee is $30m. I am sure you know this. I am just worried about the appearance of all of this and would prefer to see the $80m referred to as non-comps and Ravelston break fee. . . . Also, in view of the importance to the recipients of the non-comp payments, those cheques to each indiv and Ravelston should, I believe, be issued directly by CanWest.

At the beginning of November 2000, Boultbee provided wire instructions to another International executive for distribution of the Cdn$80 million to Ravelston, Black, Radler, Boultbee, and Atkinson. Boultbee stated that the distribution information was confidential. The CanWest transaction closed on November 15, 2000, and the purported non-compete and "break-fee" money (now approximately Cdn$81.7 million, because interest was added) was sent to International, then wired from International to Ravelston and the individuals the next day.

On the day the CanWest transaction closed, International's Investor Relations Officer (the "Investor Relations Officer" or the "Officer") called Boultbee and questioned him about why the non-competition fees were being paid from International to the four executives. Boultbee replied that the non-competition money moving through International was done merely as an accommodation and that the $53 million paid by CanWest in non-competition fees was paid in addition to the purchase price.[23/]

International's Investor Relations Officer also spoke with Atkinson after seeing that payments were going to the four executives. The Officer stated to Atkinson words to the effect of, "You had a good day." Atkinson became defensive in response to this comment and asked the Officer how he knew about the non-competition payments. After the Officer informed Atkinson that he had seen the flow-of-funds document, showing wire transfers of the non-compete payments, Atkinson told the Officer that this payment was Atkinson's bonus for completing the CanWest deal, which had been promised to him by Black.[24/]

The Officer had a conversation with Kipnis in early 2001 about the issue of disclosing the non-competition payments to the four executives from the CanWest deal in International's public disclosures. The Officer told Kipnis that the CanWest non-competition payments were compensation to the executives that should be disclosed in public filings. During this conversation,

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[23/] International's controller also asked Boultbee about the CanWest non-compete payments to individuals. Boultbee said that it had nothing to do with International, as it was to be paid by CanWest to the designated individuals.

[24/] As it became clear that International was going to sell all of its newspapers, Black, Radler, Boultbee, and Atkinson often discussed how they felt that they deserved to get some money out of the company that they all had worked so hard to build up, which was now disappearing.

Kipnis remarked that the executives who received the payments (meaning Black, Radler, Atkinson, and Boultbee) started becoming "pigs" in 1998.

In April 2001, attorneys from New York law firm Cravath, Swaine & Moore performed due diligence at International in connection with a pending transaction. As part of that due diligence, one of the Cravath attorneys noticed references in Compensation Committee minutes to senior executives' receiving non-compete payments as part of the CanWest deal. The attorney questioned Kipnis about the payments, and Kipnis responded that these were very sensitive payments, and a lot of discussion had occurred concerning whether they should be disclosed. Kipnis implied to the Cravath attorney that the payment recipients wanted to keep the payments quiet for tax reasons.

On or about April 19, 2001, a Torys attorney sent an e-mail to Atkinson and Kipnis, among others, concerning the CanWest disclosure issue. The Torys attorney stated that Cravath had raised an issue about whether the amounts allocated to the CanWest non-compete payments had to be disclosed. He stated that another Torys lawyer discussed the issue with Cravath, advancing Torys' view that disclosure was unnecessary, and Cravath "accepted (and agreed) with that view." The same day, Atkinson explained to Torys the disclosure issue regarding Cravath and the CanWest non-compete payments.

In an April 23, 2001 memo, a Cravath attorney informed Atkinson and Kipnis that Torys was incorrect in its statement that Cravath accepted and agreed with the view that the CanWest payments did not need to be disclosed. The same day, a Torys attorney spoke with Atkinson about Cravath's concerns. Atkinson told the Torys lawyer that he wanted her to continue looking at the issue, but he did not want to change course and disclose the CanWest payment allocations.

On April 24, 2001, Atkinson left a voicemail message for the Torys lawyer, stating that he had spoken with the Cravath lawyer, and later with Black and Boultbee, about the disclosure issue. Atkinson requested that Torys prepare a written opinion about whether disclosure was necessary. He stated, among other things, that time was of the essence "since if, perish the thought, we do have to deal with this and put out an amended proxy supplement, we should do that as quickly as possible. I don't for a minute suggest that we want to go there at all because of course we don't."

On April 25, 2001, as Atkinson and the Torys lawyer met in Atkinson's office and reviewed the September 11, 2000 International board meeting minutes, Atkinson told the Torys lawyer that he had been at the board meeting but did not recall anything about the "break fee." Atkinson agreed with the Torys lawyer that the break-fee concept didn't make any sense and stated that he was mad at himself because he should have known this. After reading the minutes and the memo, Atkinson and the Torys lawyer called Boultbee, and Boultbee came to Atkinson's office to meet with them. Boultbee said that the non-compete payments should never have been referred to as bonuses. Boultbee also agreed with the Torys lawyer that the break-fee concept did not make any sense.

The next day, Torys attorneys spoke again with Boultbee and Atkinson, particularly on the topic of the portion of the CanWest money that went to Ravelston. Atkinson stated that Kipnis had told him that the Audit Committee minutes were wrong, and that Kipnis blamed the break-fee concept on an off-hand remark by Radler. Atkinson further stated that Kipnis told him that Kipnis had wrongly elevated the break-fee concept from a "rationalization" to a "characterization." Atkinson said that the payments should have been described as non-compete payments in the Audit Committee minutes. Boultbee told Torys during the call that the payments should not have been referred to as bonuses.

In addition, Atkinson told Torys during this conference call – for the first time – that individual non-compete payments were made in certain of the U.S. community newspaper transactions, and that such payments had been approved by the Audit Committee. Atkinson told Torys that the only exception had been in *American Trucker*, where Atkinson had not received an individual non-compete payment. As to CNHI, Atkinson made no distinction between CNHI I and II. Atkinson said that he, Boultbee, and others had received non-compete payments and that the closing conditions in CNHI were similar to the closing conditions in CanWest. The conclusion from the meeting was that International's Audit Committee needed to "re-ratify" the CanWest non-compete payments for the "right reasons."

A Torys attorney then drafted a memo to the Audit Committee, based on information provided by Boultbee and Atkinson. She circulated the draft memo to Boultbee, Atkinson, and Kipnis for their comments. They, and Black, weighed in on the document before it was sent to the Audit Committee.[25/] The May 1, 2001 memorandum is described in detail at paragraph 12 of Count Eight in the indictment. In sum, the purpose of the May memorandum was purportedly to correct the record on the reasons for and allocation of the Cdn$80 million CanWest non-compete payment. On May 1, 2001, Kipnis sent the memo to Black, Radler, Boultbee, and Atkinson, for one last review before it would be forwarded to the Chairman. The memo was then faxed to the Chairman

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[25/]Meanwhile, on or about April 30, 2001, a Torys attorney received a call from Atkinson advising her that there was an "appetite" from others for making the judgment call for non-disclosure of the CanWest non-competes. Around the same time, Atkinson also told the Torys lawyer that he and the others would prefer not to disclose the payments and asked if she could draft a memo in support of this position.

in London, without changes, and to the rest of the Audit Committee.[26/]

Meanwhile, a Cravath lawyer spoke with Atkinson and Boultbee again, separately, about the importance of International's disclosing the CanWest non-compete payments to the public. The Cravath lawyer told Atkinson and Boultbee that the position International was taking – *i.e.*, non-disclosure – was indefensible. Atkinson relayed this message to Boultbee. The Cravath lawyer spoke separately with Kipnis, and told him that disclosure was a "no-brainer." During these discussions, neither Boultbee, Atkinson, nor Kipnis informed the Cravath attorney about any of the U.S. community non-compete payments to Inc. or to individual executives – the last of which payments had been made approximately a week before the discussions with the Cravath lawyer.

In preparation for the Audit Committee meeting, Kipnis sent the Chairman a memo with a "Proposed May 17 Audit Committee Report," stating that "in a number of inadvertent respects, the [CanWest] material reviewed in connection with the September 11 audit and board meetings did not accurately reflect the CanWest transaction." Kipnis copied Atkinson on the memo. The Audit Committee then met on May 14, 2001, by conference call, along with Radler, Kipnis, and others. Kipnis told the Committee that the minutes of prior meetings concerning CanWest were wrong, and asked the Committee to "review and ratify its September 11 resolutions to approve the CanWest non-compete payments based upon the analysis set forth in the [May] Memorandum . . . ." The Committee did so.

The International board of directors met in New York City on May 17, 2001. The Chairman advised the board of the Audit Committee's discussion concerning issues in the May memorandum,

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[26/] Atkinson later forwarded the May memorandum to a Cravath lawyer, telling him that it had been "developed with care and serious deliberations," and therefore not to suggest any changes to the memo.

and the May memorandum was presented to the board. The Chairman asked the board to ratify its previous approval of the CanWest non-compete payments based upon the information in the May memorandum, and the board did so.

During the May 2001 board meeting, International's Investor Relations Officer had another conversation with Atkinson about his CanWest non-competition payment's being a bonus. Atkinson told the Officer that Black had initially promised him about $1 million more than he actually received, as a bonus for completing the CanWest deal. Because the bonus was going to be tax-free, however, Black told Atkinson that the lesser amount he would be receiving had the same dollar value as the larger bonus originally discussed. During this conversation between the Officer and Atkinson, and during several subsequent conversations, they discussed the fact that describing the bonus payment as a non-compete fee meant the payment would be tax-free.

Shortly thereafter, International filed a Form 10-Q with the SEC, disclosing for the first time the individual non-compete payments to the executives and Ravelston. Boultbee prepared the disclosure language and sent it to International's controller for inclusion in the filing. The disclosure stated:

> Also, as required by CanWest as a condition to the transaction, Ravelston, Hollinger Inc. and Messrs. Black, Radler, Boultbee and Atkinson, entered into non-competition agreements with CanWest pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian businesses sold to CanWest for a five year period, subject to certain limited exceptions, for aggregate consideration received by Ravelston and the executives of Cdn. $80 million ($53 million) paid by CanWest in addition to the purchase price referred to above, consisting of Cdn. $38 million paid to Ravelston, Cdn. $19 million paid to Mr. Black, Cdn. $19 million paid to Mr. Radler, Cdn. $2 million paid to Mr. Boultbee and Cdn. $2 million paid to Mr. Atkinson.[27/]

[27/]In April 2003, Radler handed Kipnis a $50,000 check, telling him that Black and Radler decided that Kipnis deserved a bonus for his work on the CanWest transaction. In a July 2004 letter (continued...)

F. Forum.

In July 2000 – just before the CanWest documents were signed, but a few months before the CanWest transaction closed – International began negotiating another U.S. community newspaper sale with North Dakota-based Forum Communications. International's Executive Committee approved the deal in a written consent dated September 19, 2000, authorizing execution of non-compete agreements by International and certain of its officers. In the final deal, which closed on or about September 30, 2000, a $400,000 non-compete payment was allocated 75% to International, and 25% to Inc. There were no individual non-compete agreements requested or executed as part of the Forum transaction. International's Audit Committee was never presented with or asked to approve payment of non-compete money to Inc.

G. Paxton.

On or about September 18, 2000, International's Executive Committee approved the Paxton transaction, with execution of non-compete agreements by International and certain of its officers. The deal closed on or about October 2, 2000. $1.5 million was disbursed to International, and $500,000 to Inc., as non-compete payments. There were no individual non-compete agreements requested or executed as part of the Paxton transaction. International's Audit Committee was never presented with or asked to approve payment of non-compete money to Inc.

H. CNHI (II).

In or around July 2000 – again, just before the CanWest documents were signed, but before closing – CNHI began considering purchasing additional U.S. community newspaper properties

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[27](...continued)
to the Special Committee, Kipnis's counsel sought to explain the payment.

from International. Black and Boultbee told Radler that there were significant tax advantages for them and Atkinson if they received payments characterized as "non-compete" fees in connection with the U.S. community newspaper transactions, as they were doing in CanWest. Radler informed Kipnis, who had primary responsibility for drafting the documents for these deals, of this new plan.

On September 15, 2000, International's Executive Committee approved the CNHI sale, with non-compete agreements to be executed by International and Inc. Several days before the closing, Radler told Kipnis that Black, Radler, Boultbee, and Atkinson were to be included as non-compete covenantors and were to receive non-compete fees. At that time, Radler did not know how much money to set aside for such fees, and did not give Kipnis any instruction on that point. Kipnis then told CNHI's attorney that International wanted to add four individuals – Black, Radler, Boultbee, and Atkinson – to the non-compete agreement, in addition to International and Inc. Although CNHI did not require the non-competition agreement of anyone but International, it had no objection to adding covenantors (because there was no change in CNHI's purchase price), and CNHI's attorney told this to Kipnis.

The transaction closed on or about November 1, 2000. In a telephone conversation before the CNHI (II) closing, Black told Radler to allocate $9.5 million of the purchase price as non-competition payments to himself, Radler, Boultbee, and Atkinson. Also during that conversation, Black and Radler discussed how the $9.5 million would be allocated among the four executives. Radler conveyed this information to Kipnis.

On the day of the closing, Kipnis asked CNHI's lawyer to change the wiring instructions for the transaction proceeds so as to have approximately $9.5 million of the transaction proceeds wired directly to Black, Radler, Boultbee, and Atkinson. The CNHI attorney refused to do this, and told

Kipnis that he was going to wire the proceeds from the transaction to International's company account, as directed by the closing documents. Kipnis asked if the CNHI attorney would at least write on the wire instructions the names of the four individuals receiving the non-compete payments, and the amount that each was to receive. The CNHI attorney stated that he would allow Kipnis to write that information on the wire instructions if he wanted to.

In another telephone conversation between Radler and Kipnis, Kipnis told Radler that the CNHI (II) closing was being delayed because Black, Radler, Boultbee, and Atkinson had not signed the non-competition agreement. Radler told Kipnis to sign on behalf of all four. At closing, Kipnis signed the non-compete agreement on behalf of all the covenantors. As non-compete payments, International received $2.25 million, Inc. received $750,000, Black and Radler each received $4.3 million, and Boultbee and Atkinson each received $450,000. In connection with the transaction, Kipnis also received a $100,000 bonus. Kipnis described the bonus in a November 21, 2000 memo to an APC officer. Radler approved the bonus, after Kipnis told Radler that Kipnis believed he deserved a bonus.

International's Audit Committee was never presented with or asked to approve payment of non-compete money to Inc., Black, Radler, Boultbee, or Atkinson in connection with the CNHI (II) transaction.

I. APC.

Toward the end of 2000, during a telephone conversation between Black and Radler, Black told Radler that he thought that Radler deserved a bonus of $6 million because the U.S. community newspapers had increased substantially in value under Radler's management, which resulted in International's being able to sell them for a substantially higher price. Radler told Black that it had

been a group effort, and that Radler would accept a bonus only if Black, Boultbee, and Atkinson shared in it. Black agreed. These bonus payments were issued in February 2001. By then, the total amount was $5.5 million: $2,612,500 each for Black and Radler; and $137,500 each for Boultbee and Atkinson.

Boultbee suggested that the bonus payments be recharacterized as non-compete payments, because non-compete payments received favorable tax treatment in Canada. To effect the transfer of this money as "non-compete payments," Kipnis prepared non-competition agreements between International subsidiary APC, on one hand, and Black, Radler, Boultbee, and Atkinson, on the other hand. (As of February 2001, APC owned only one newspaper, a small weekly newspaper in Mammoth Lake, California. International was in the process of attempting to sell that newspaper and had no intent of re-entering the community newspaper business in the United States.) Kipnis sent the non-compete agreements to Black, Radler, Boultbee, and Atkinson for their signatures, and the $5.5 million was paid out of APC. The Audit Committee was never presented with, and never approved, the payments.

Sometime in spring 2001, Radler received a telephone call from either Black or Boultbee asking about the individual non-compete payments from the Paxton and Forum transactions. At that point, Radler assumed that the plan to provide individual non-compete payments from these deals had been implemented and that Black, Boultbee, Atkinson and Radler had been inserted as non-compete covenantors, they had each signed personal non-competition agreements, and that an APC officer had set aside 3% of the proceeds of each transaction to fund the non-compete payments to the four of them. Radler investigated with Kipnis and the APC officer, and learned that there must have been a miscommunication, because the APC officer never set aside funds for these personal

non-compete payments. Radler examined the reserves that the APC officer had established for these transactions and determined that $600,000 could be pulled out of those reserves without jeopardizing International's ability to honor its commitments in those transactions. Radler had the APC officer issue checks to Black, Radler, Boultbee, and Atkinson in the aggregate amount of $600,000, with Black and Radler receiving $285,000 each, and Boultbee and Atkinson receiving $15,000 each.

Radler later learned from Kipnis that Radler was wrong in his belief that personal non-competition agreements had been signed in connection with the Paxton and Forum transactions. Kipnis told Radler in late 2003 that he had forgotten to prepare such agreements, and that no such agreements were ever signed. According to the deal documents, the only covenantors were International and Inc. Again, International's Audit Committee was never presented with or asked to approve payment of non-compete money to Black, Radler, Boultbee, or Atkinson in connection with the Forum or Paxton transactions. None of the executives ever signed any individual non-compete agreement in connection with the Forum or Paxton transactions.

Thus, between May 1998 and April 2001, Black, Radler, Boultbee, Atkinson, and Kipnis managed to transfer approximately $26.4 million to Ravelston, $16.5 million to Inc., $19 million to Black, $19 million to Radler, $1.9 million to Boultbee, and $1.9 million to Atkinson in the form of sham "non-compete" payments. These amounts either were never presented to or approved by International's Audit Committee and board of directors, or – in the case of CanWest – were approved based on false information that the schemers presented to the Audit Committee and board.

J. Birthday Party.

On December 4, 2000, approximately two weeks after receiving close to $12 million as an alleged non-compete in the CanWest transaction and $4.3 million as an alleged non-compete in the

CNHI (II) sale, Black held a surprise birthday party for Mrs. Black at New York City restaurant La Grenouille. Before the event, a party planner sent Black a letter confirming the number of guests, cocktails, menu, birthday cake (which was to read, "Happy Birthday Barbara"), the pianist and singer for the guests' entertainment, and the types of champagne and wine that would be served. At the party, Black made a toast concerning his wife's birthday. The total invoice for the party was approximately $54,000. On the invoice, Black wrote to one of his executive assistants regarding payment, "Let's call it 1/3 personal and 2/3 corporate." Black's assistant followed this instruction, and International paid two-thirds of the party expenses.

K. Bora Bora.

In July and August 2001, Black and his wife took a vacation to Bora Bora. They then attended Wagner's Ring Cycle at The Seattle Opera, in Seattle, Washington. The Blacks used one of International's corporate jets to travel from Toronto, Canada, to Bora Bora, then to Seattle for the operas, then back to Toronto. The cost to International for use of the jet for this trip was Cdn$565,326.

On or about January 29, 2002, International's controller asked Black where the flights to Seattle and Bora Bora should be charged. Black responded that because the flights were "mainly" within the United States, "let's charge them to [Hollinger] International. I'm happy to pay, as to half, personally, if [this will] cause difficulties."

The controller then discussed Black's instruction with Boultbee. Approximately one week later, on February 8, 2002, the controller wrote a memo memorializing his discussion with Boultbee. The memo stated that based on Black's instruction, the cost of the trip would be charged 50% to International and 50% to Ravelston.

Later in 2002, Black, Boultbee, and Atkinson, among others, discussed the need for International to cut expenses, including the costs of the planes. In an August 5, 2002 e-mail to Atkinson, Black stated, "There has not been an occasion for many months when I got on our plane without wondering whether it was really affordable. But I'm not prepared to reenact the French Revolutionary renunciation of the rights of the nobility. We have to find a balance between an unfair taxation on the company and a reasonable treatment of the founder-builder-managers. We are proprietors after all, beleaguered though we may be."[28/]

Atkinson questioned Boultbee, in particular, about Black's use of the company plane for his Bora Bora vacation. In an August 22, 2002 e-mail to Boultbee, Atkinson stated, "[The controller] tells me Conrad did not pay the jet costs for his vacation to Bora Bora so he was given a T5 for about $600,000. I don't think this was disclosed. Both Conrad and David use the jets for personal travel. Shouldn't this be regarde[d] as, at the very least an employment benefit and be disclosed?"

A few days later, Black stated to Atkinson in an e-mail that Radler "just told me that there is some plan afoot to try to charge me $600,000 for my ill-starred trip to Bora Bora. Needless to say, no such outcome is acceptable, but what is the real story?" Atkinson replied, "The real story is as follows. About two weeks ago I asked [the controller] some questions about our annual aircraft

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[28/]Black repeated these sentiments in a September 4, 2002 memo to Radler, Boultbee, Atkinson, and two other senior executives, stating, "These companies have always been run in the Argus tradition of proprietary businesses where the controlling shareholders take reasonable steps to ensure their comfortable enjoyment of the position they, (we, in fact), have created for themselves. Care must be taken not to allow this to degenerate into decadence . . . . But nor should we allow the agitations of shareholders, amplified by certain of our colleagues discountenanced at the performance of their stock options, to force us into a hair shirt, the corporate equivalent of sackcloth and ashes. We do not deserve anything so demeaning . . . . We have a certain style that all these shareholders were aware of when they came in. We should fine-tune that style, not revolutionize it with a Damascene conversion to vows of poverty."

costs. He gave me the 2001 charges. I asked him if personal use had been an issue with the auditors and he said no but that in the case of Bora Bora he had asked you and Jack how to deal with it and that in the end the company paid but you received a T5 to indicate the personal benefit."

L. New York Apartments.

International owned an apartment at 635 Park Avenue, Second Floor, New York, New York ("the Second Floor Apartment"), which Black was authorized to use when he was in New York City. A subsidiary purchased the Second Floor Apartment in December 1994 for $3 million. As described in the indictment, Black was given an option to purchase the Second Floor Apartment at fair market value. Count Ten, ¶ 2.

Beginning in or about November 1995, International's Investor Relations Officer had discussions with Boultbee and Black about shareholder concerns regarding the cost of the Second Floor Apartment and its renovation. Boultbee shrugged off the suggestion that it would be "over the top" for the shareholders to pay for improvements to a $3 million apartment. Boultbee told the Officer that the Officer should be the one to make that point to Black. When the Officer informed Black that shareholders were unhappy about the cost of the apartment and would be even more unhappy about the added cost of renovations, Black agreed and said that it would be better if he paid for the renovations himself.

Sometime in late 1998 or 1999, the Officer had another conversation with Boultbee about the Second Floor Apartment. The Officer remained concerned about the appearance of International's ownership of the apartment. During the conversation, Boultbee told the Officer that Black did not have the money to buy the apartment from International. In late 2000, when the Officer became aware that Black had received a substantial amount of money for his non-

competition agreement in the CanWest transaction, the Officer asked Boultbee whether this was a good time for Black to purchase the Second Floor Apartment. Boultbee told the Officer that he thought it was and that the Officer should raise the issue with Black. The Officer raised the issue with Black a short time later during a brief meeting with Black in New York. Black stated that he agreed that it would be a good time to exercise his option to purchase the apartment.

In early December 2000, Black and Boultbee were in New York for a board of directors meeting, and during their visit, both men stated in separate conversations with the Investor Relations Officer that Black's option gave him the right to purchase the Second Floor Apartment at its cost of $3 million. Shortly after these conversations, Boultbee telephoned the Officer and told him that Black would purchase the apartment for $3 million, and that the Officer should call his friends in real estate to get support for putting a fair market value on the apartment for $3 million. Boultbee suggested that such a valuation could arguably be justified given how much money Black had put into the apartment. Boultbee told the Officer to write a memorandum memorializing the Officer's conversations with friends in real estate and emphasizing the improvements Black made to the apartment. At some point thereafter, Boultbee told the Officer that Black would pay the $3 million for the apartment by tendering $2.15 million to the company in cash and his interest in the Ground Floor Apartment, at the same address, which Boultbee stated had a fair market value of $850,000.[29]

Thus, on or about December 21, 2000, Black agreed to transfer the Ground Floor Apartment and $2.15 million in cash to International, in exchange for title to the Second Floor Apartment. That

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[29] Black had purchased the Ground Floor Apartment himself in 1998 for approximately $499,000. While Black owned the apartment, International paid more than $1.5 million for its renovation. In conversations with the Investor Relations Officer, both Black and Black's spouse referred to the Ground Floor Apartment as the "service apartment."

day, the Officer sent a memo to Kipnis, with copies to Black and Boultbee, regarding the transfer. The Officer stated that "[a]fter in-depth discussions with various New York City real estate specialists and meetings with Jack Boultbee, it has been agreed that the fair market value of [the Second Floor Apartment] is US $3,000,000. The fair market value of the Ground Floor apartment at the same address is US$850,000." The Officer further stated Black would exchange the Ground Floor Apartment and cash for the Second Floor Apartment, and the Ground Floor Apartment would thereafter be used "for the express purpose of housing visiting executives." Black signed the Instrument of Transfer and Declaration of Trust on or about January 23, 2001.

M. Disclosures to the SEC.

International made regular public filings with the SEC during the time period at issue in the indictment. These included annual reports (10-Ks), quarterly reports (10-Qs), proxy statements, and other filings.

In January 2001, Black, Radler, Boultbee, and Atkinson each signed proxy questionnaires, to be used in preparing International's 2001 proxy statement and 2000 annual report. Each was asked if he received any compensation from International in 2000, other than salary. Boultbee and Atkinson answered no. In particular, they did not disclose the moneys they received directly in connection with the CanWest and CNHI (II) transactions in 2000. Black answered yes and stated, "I also received a payment in connection with a noncompete agreement signed by me, personally, to effectuate the sale of assets of the Company. Please check the Company's audit committee meeting minutes and the Company's corporate files related to the CanWest transaction for further details." Black did not disclose his receipt of approximately $4.3 million in the CNHI (II) transaction. Radler answered the same way.

In January 2002, Black, Radler, Boultbee, and Atkinson again signed proxy questionnaires, to be used in preparing International's 2002 proxy statement and 2001 annual report. As to "other compensation" in 2001, Black answered yes, and reported three non-compete payments in connection with CNHI (II), Osprey I, and Osprey II.[30/] He did not mention receiving any other payments. In particular, he did not disclose the over $2.8 million that he received from APC in February and April 2001. Radler answered yes, and wrote, "I received payments in connection with bonus/noncompete. Please check the Company's minute book and financial records for further details." Boultbee did not answer the question about "other compensation." Instead, he handwrote on his form, "While I do not consider such payments to be compensation I received Cdn$378,094.95 representing a portion of amounts paid by Osprey Media Holdings for non-competition agreements signed by me and others." Boultbee did not refer to his receipt of other payments in 2001. Atkinson answered no to the "other compensation" question.

International addressed executive compensation during multiple SEC filings during this time period. The filings stated in part, with respect to management services:

> Ravelston's affiliates include Messrs. Black, Radler, . . . Atkinson, [and] Boultbee . . . , who are officers and/or directors of both Hollinger Inc. and the Company [International] and who . . . do not receive compensation directly from the Company in their capacities as executive officers of the Company or Hollinger Inc.

[30/] In 2001, in July and November, International subsidiaries sold certain Canadian community newspapers to Osprey Media Holdings. In connection with these sales, Black and Radler each received over $2.3 million in purported non-compete payments, and Atkinson and Boultbee each received over $230,000.

N. Inquiries Concerning the Non-Compete Payments.

In mid-October 2001, an International shareholder wrote to Black and the International directors, protesting the "large-scale" management payments to Ravelston. The shareholder requested justification for the payments and asked for a meeting with the directors to "voice our displeasure and hear your remedies for our company's underperformance." In response, Black dissuaded the directors from responding to or dealing directly with the shareholder. Black told the directors not to worry, and that he'd take care of it.

In or around February 2002, one of KPMG's representatives met with Boultbee at Boultbee's office. The KPMG representative stated that she had just learned of the CanWest non-compete payments to executives and Ravelston and was concerned because they were material related-party transactions that should have been disclosed in International's and Inc.'s 10-Ks. Boultbee stated that the payments were not related-party transactions, because International had acted only as an agent for the executives in receiving the payments from CanWest. The KPMG representative disagreed, and discussed the matter with Boultbee. Boultbee said that, in any event, the payments had already been disclosed in May 2001, in International's 10-Q. (See supra at Section E.) The KPMG representative went to the audit room, located near Boultbee's office, and confirmed that there was no such disclosure in the final draft 10-Q that had been presented to KPMG in 2001, before the filing. The KPMG representative pointed this out to Boultbee and, further, asked Boultbee why the payments were disclosed in the 10-Q if – under his interpretation, with which the KPMG representative disagreed – they were not related-party transactions. In response, Boultbee sought to distinguish between the meaning of related-party transactions under audit principles as opposed to related-party transactions under securities-law principles. The KPMG representative asked

Boultbee if there were any other related-party transactions that had not been disclosed, and Boultbee said no. The KPMG representative asked Boultbee if there were any non-compete payments involving a specific transaction and executive, and Boultbee said no.[31/]

Within a day or two after the discussion with Boultbee, the KPMG representative called Kipnis. At this point, KPMG had reviewed International's 2001 proxy statement and observed that the CanWest non-compete payments had not been disclosed in the proxy. The KPMG representative asked Kipnis why there had been no disclosure. Kipnis said the payments had been disclosed in the 10-Q for the first quarter of 2001, so they didn't need to be disclosed in the proxy. During this call, Kipnis further stated that approximately $16 million in non-compete payments had been made to executives in 2000 in the U.S. community newspaper transactions. Kipnis said that these payments had not previously been disclosed, but would be disclosed in the upcoming proxy.

On or about February 17, 2002, following up on new information from Hollinger about individual non-compete payments in the U.S. community newspaper deals, a Torys attorney informed Atkinson that Torys had reviewed International's SEC filings and found no disclosure of the non-compete payments associated with International's U.S. community newspaper sales. The Torys attorney stated that these were related-party payments that needed to be disclosed, and said it would be prudent for International and Inc. to make such disclosures in 2002 proxy materials.

The International Audit Committee met in New York on or about February 25, 2002. At that meeting, KPMG representatives told the Committee that they had only recently become aware of

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[31/]A couple of weeks later, on or about February 20, 2002, the KPMG representative had another conversation with Boultbee at Boultbee's office. This time, the KPMG representative asked Boultbee about International's opening a special account to process the CanWest non-compete payments to executives and Ravelston. Boultbee stated that he did this to avoid a foreign-exchange charge.

non-compete payments to individuals in the U.S. community and CanWest transactions. The KPMG representatives stated further that the Audit Committee meetings concerning the transactions did not reflect the Committee's approval of these related-party transactions. KPMG stated that it was looking to the Committee to confirm its approval. The Committee members did not say anything, and the KPMG representatives inferred that there had previously been approval.

The Inc. board of directors met in Toronto on or about February 27, 2002. Black, Radler, Boultbee, and Atkinson participated in the meeting, some by conference call. During the meeting, Black told the directors that regarding the non-compete payments to individuals, each of the payments had been approved by an independent committee of International's board. Black further stated that all relevant information pertaining to the payments had been accessible and conspicuous to International's auditors at all times.

On or about March 15, 2002, Black spoke with a KPMG representative and complained about KPMG's performance over the past year. Black stated that KPMG should have known about related-party transactions from reading the agreements. He referred to the auditors as having "Enronitis," in scrutinizing actions by management. With respect to Black's ownership interest in Horizon, Black told the KPMG representative that KPMG had no business digging around in who owns Horizon, and it was none of KPMG's business. After speaking with the KPMG representative, Black wrote a letter to the Inc. directors, stating that he spoke with the auditors and "pointed out how accessible to them the information about the non-competition agreements was." Black made similar statements in other correspondence with KPMG.

Boultbee and International's controller prepared drafts of the 2001 10-K, and sent portions to KPMG for its review. In addition to the financial statements, International also sent KPMG drafts

of the “Management Discussion & Analysis” (“MD&A”) section of the 10-K. In March 2002, as part of KPMG’s discussions with International about the MD&A section, a KPMG representative informed Boultbee and the controller that new SEC rules required enhanced disclosures of related-party transactions. With respect to the CanWest non-compete payments, the KPMG representative told Boultbee and the controller that they needed to provide additional information in the MD&A about the process by which the non-compete payments were allocated to individuals and Ravelston. In response, Boultbee stated that the $80 million amount was arrived at in negotiations with CanWest. Boultbee said that he didn’t want to put in information about how the individual amounts were calculated, because he was unsure of the rationale the Chairman used in determining the allocations. The KPMG representative replied that International should at least put in that the payments were approved by the independent directors, if that was the case. In discussion with Boultbee and the controller, and based on Boultbee’s statements, the KPMG representative therefore wrote additional language into the MD&A, stating that the amounts of the CanWest and U.S. community newspaper non-compete payments had been approved by International’s independent directors.

Thus, the 10-K included the following disclosure as to CanWest:

> Also, as required by CanWest as a condition to the transaction, the Company, Ravelston, Hollinger Inc., Lord Black and three senior executives entered into non-competition agreements with CanWest pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian business sold to CanWest for a five-year period, subject to certain limited exceptions, for aggregate consideration of Cdn. $80 million ($53 million) paid by CanWest in addition to the purchase price referred to above of which Cdn. $38 million ($25.2 million) was paid to Lord Black and the three senior executives. The Company’s independent directors have approved the terms of these payments.

And it contained the following disclosure concerning the U.S. community non-compete payments:

> In connection with the sales of United States newspaper properties in 2000, to satisfy a

> closing condition, the Company, Lord Black and three senior executives entered into non-competition agreements with the purchasers to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 of $0.6 million. These amounts were in addition to the aggregate consideration paid in respect of these non-competition agreements in 2000 of $15 million. Such amounts were paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

In approximately May 2002, in anticipation of the annual shareholders meeting, International shareholders and reporters began asking questions about the disclosures regarding the non-compete payments. Black conducted the meeting, on May 23, 2002, with Radler, Boultbee, Atkinson, and Kipnis attending. Black remarked upon International's sale of the U.S. community newspaper and CanWest assets, and how those sales benefitted the company. Black said that because the transactions were "complicated and occurred in a prolonged sequence, some confusion has arisen about them, which I wish to resolve." As to the non-compete agreements, Black stated, "In order to remove any possible misunderstanding, these agreements were presented to and approved by the independent directors of this company as equitable after what they considered appropriate analysis." Having entered the non-competes, Black said, "[m]y associates and I are now ineligible buyers [of Canadian newspaper assets]. The independent directors may have foreseen this. The non-compete agreements were requested by the chairman of CanWest who wanted to retain our collaboration and avoid competition with us."[32/]

After Black concluded his remarks, the floor was opened to questions. One shareholder expressed concern about the amount of payment being made to Black and Radler in the form of non-

[32/]Black also discussed management fees paid by International to Ravelston, stating that the independent directors authorized fees they believed appropriate. Black said, "We are assured by the independent advisors that the fee is at the conservative end of the range of practice."

competes, and why Black believed it was appropriate for such payments to be made to the executives instead of to International. Black stated, in response, that the non-compete payments were "not, technically speaking, a reduction of the compensation paid to this company." He continued:

> The consideration was not reduced there by the acquirer in the principal case you're referring to, the CanWest deal. Mr. Asper stipulated that he wanted, as I have said, that he wanted a non-compete agreement. It was a desirable thing for a Canadian acquirer not to have us as competitors and he wanted to pay valuable consideration for it. Now the issue of it and the extent to which it was an allocation of ultimate purchase price was factored into the overall negotiations, starting from the premise of a ten times [EBITDA] multiple. . . . And Mr. Asper demanded that there be a non-compete arrangement and effectively the independent directors of this company determined that since he wished – that it was something that he was paying valuable consideration for and some of that should come to us and not to this company. And that was not a matter negotiated directly by us. And, I suppose there's room for debate here, but in all circumstances, the independent directors did what they thought was best.

When the shareholder followed up with a question about executives' receipt of non-compete payments in U.S. transactions, Black repeated that the matter was left to the determination of disinterested directors who "do what they think is right." He stated, too, with respect to the CanWest non-compete payments, "I accept that there's a conundrum as to the division between the company's interest and our own in a thing like that, so we effectively handed it to the independent directors to determine. . . . And in all of the circumstances, the independent directors felt this was the fair thing to do, and I must say, I agree." He also stated, "You're not dealing with greed here and you're not dealing with sneakiness. You're dealing with a best efforts attempt to accommodate to industry practice and do what's equitable as determined by independent directors who as a group are quite a distinguished group."

Later, in responding to a question about International's management-fee payments to Ravelston, Black stated that he typically received only a couple million dollars from Ravelston:

"We haven't been sitting here feathering our nest. We've done things that have savaged our own income, because we thought it was in the interest of the shareholders."[33]

During the meeting, International's Investor Relations Officer was sitting next to Atkinson. While Black was answering questions raised by a shareholder relating to the CanWest non-competition payments, Atkinson told the Officer that the buyer in the CanWest transaction did not insist that the executives receive the non-competition payments, and that Black's answers to the shareholder's questions were lies. The Officer had several conversations with Atkinson after the 2002 International shareholders meeting during which Atkinson re-affirmed that Black had lied in his answers to the shareholder's questions.

After the meeting, Black met with Radler, Boultbee, and Atkinson, as well as another senior International executive. As Black later reported to the Investor Relations Officer in an e-mail, "we established a consensus of how to clean things up going forward." Black told the Officer, "The stance to take is that we agree to disagree about the non-competes but that is a thing of the past." Black further instructed the Officer, "Please do your part in stamping out among our own personnel this nonsense that we have deprived them of the value of their share options. Two years from now no one will remember any of this." When the Officer responded that some of the shareholders raised legitimate concerns, Black stated that the shareholders were unreasonable:

> We agreed [to] the 10 x EBITDA multiple with Asper. We removed the National Post, canada.com, and $31 million of central expenses, effectively ballooning the multiple to 12.5 x EBITDA. He asked for the non-competes; we said they had economic value, and we had the allocation approved by the independent directors. . . . Asper wasn't asking and paying for the non-competition of Hollinger International; he was asking for non-competition with David and me. . . . I accept that the optics are not optimal; but the substantive issue is

[33] Five days after the meeting, Boultbee sent Black a memo stating that Black's combined salary and bonus from Ravelston exceeded $6.3 million.

> eminently defensible . . . . Don't yield an inch on these points. . . . I count the meeting a victory, the more so because I said the non-competes were a non-recurring issue and undertook to improve appearances and thus remove the impediments to value recognition. We threw them a bone which is as useful to us as to them, and drew a line under the past.

The Officer also spoke with management about informing International's Audit Committee about what happened at the 2002 shareholders meeting. First, Radler and Kipnis told the Officer that they would tell the Chairman at a later point about what happened at the meeting. When the Officer learned that neither Radler nor Kipnis had informed the Chairman, he had an argument with Radler about it and told Radler he was "a fool" not to tell the Chairman about what happened at the meeting. The Officer learned that Radler then called Black in London and told Black that the Officer was "being a Boy Scout." Soon thereafter, Black left a series of voicemail messages for the Officer at his home. While he was listening to these messages, a phone call came in, and it was Black calling. During the telephone conversation, Black told the Officer in substance: "It's my company, and I'll decide when and what to tell the Board or [the Chairman]."[34/]

On June 7, 2002, one of the shareholders wrote to Black, requesting that International file a Form 8-K to provide information about some of the concerns shareholders raised at the annual meeting.[35/] Black responded that International would, indeed, file an 8-K to "reassure all reasonable people on all legitimate matters." As to the CanWest non-competes, Black stated that Asper had no interest whatsoever in non-compete agreements from International as an entity. He further stated

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[34/]Black never informed the Audit Committee of what happened at the 2002 shareholders meeting.

[35/]In addition to filing annual reports on Form 10-K and quarterly reports on Form 10-Q, public companies must report material corporate events on a more current basis. Form 8-K is the "current report" companies must file with the SEC to announce major events that shareholders should know about.

that such agreements "were a particular circumstance attaching to that transaction and that country."

International prepared a draft 8-K, and it was circulated to the executives. Commenting on the draft, Black stated to the Investor Relations Officer that the document should "explain again what I said in my last letter to [a shareholder] and make the point that the CanWest and U.S. community transactions were unique transactions in this regard, very unlikely to be repeated."

O. The Calm Before the Storm.

After the 2002 shareholder inquiries, there was a period of time where defendants believed that their answers had satisfied the shareholders' inquiries. During this period, defendants had some discussions concerning their own compensation, and disclosure matters.

One of the issues raised by shareholders, and addressed in the draft 8-K, was the fact that International executives were receiving additional fees from International for participating in board of directors meetings. Shareholders demanded an end to that practice, and at the shareholders meeting, Black agreed. The draft 8-K memorialized the agreement. On or about July 3, 2002, Atkinson told Boultbee that he had spoken to Black and Radler about the issue. Rather than giving up entirely the money they had received as directors' fees, however, Black and Radler suggested that International simply increase their compensation in the same amount. When Atkinson told them that this was not possible, Black said that the payments should be made out of Ravelston. Atkinson therefore asked Boultbee to pay Black and Radler the directors fees they lost from International, via Ravelston.[36/]

On July 9, 2002, Black wrote to Radler, primarily concerning issues with their joint holdings

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[36/]Black later elected not to file the Form 8-K, and to wait until the company's regular Form 10-Q filing in August 2002 to address issues raised by the shareholders.

in Horizon. Black referred to a "long-awaited substantial dividend from Ravelston" that he expected to receive shortly,[37/] then stated: "Given that the door has probably now closed for an indefinite period on the splendid conveyance of the non-competition agreements from which you and I profited so well (and deservedly), this [*i.e.*, the Ravelston dividend] would certainly be an appropriate gesture."[38/] In a similar vein, in a January 2003 e-mail to Atkinson, Black stated that Radler had always been skeptical of International as a public company: "[Radler] has always felt a degree of skepticism about [International] as a public company where his shareholding isn't that large, other than as a vehicle for extracting money, as in the non-competes."

In late 2002, International sought financing from Wachovia Bank. Attorneys for the bank conducted due diligence, including presenting a list of questions to Kipnis concerning the International Audit Committee's identification and review of related-party transactions, including the U.S. community newspaper and CanWest sales. After receiving the questions, Kipnis told counsel from Torys that he was opposed to presenting the questions to the Audit Committee, because the questions might be viewed as second-guessing previous decisions. Kipnis stated that he thought any discussion with the Audit Committee should be about future policy, instead of discussing past practices and decisions. At Kipnis's request, the Torys attorneys asked the bank for

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[37/] Black and Boultbee determined the amount of Ravelston salary-related dividend payments. Black, as Ravelston's majority shareholder, determined the regular, stock-based dividends.

[38/] Approximately a month later, on or about August 15, 2002, Black told Boultbee in an e-mail that Black was "about to run out of money" due to "[e]xtraordinary expenses, in construction and decoration of residences." On August 31, 2002, Black again e-mailed Boultbee, stating, "I have run out of cash" and "intend to lean on Ravelston in the meantime." In February 2003, when Black's assistant asked Boultbee where she could get more money to pay Black's bills, Boultbee stated, "What happened to the $500,000 I paid [Black] in December? There is very little available if we go through it at this rate. If the $500,000 is actually gone then you can get some from Ravelston."

a revised set of questions for the Audit Committee, and a conference call was held. In response to the bank's questions, Kipnis stated that the International Audit Committee's procedures for reviewing related-party transactions depended on the size and complexity of the transactions. Kipnis also stated that with respect to review of the non-competes, KPMG could find no comparables, and used a "fair and reasonable" standard. As to the U.S. community newspaper and CanWest transactions, Kipnis told the bank that for each of the transactions, the Audit Committee's approval was obtained, and the items disclosed.

In January 2003, Black, Boultbee, and Atkinson discussed various proposed related-party transactions, and the need to bring them to the Audit Committee's attention. One of those transactions concerned International's annual management-fee payment to Ravelston. Atkinson cautioned Black in an e-mail that if multiple related-party issues were raised with the Chairman at the same time, he might give more scrutiny to the management fee: "I think that if in their conversation [*i.e.*, between Radler and the Chairman,] David raises a possible share buy-back from Inc., a potential asset sale and Southam benefit packages proposals, the [Chairman] will feel that a number of related party packages are in the offing and the prudent course may be to retain outside counsel and a financial adviser now. He may decide to do that anyway but I think we have a better chance of obtaining approval for the management fee on a fairly expeditious basis if we treat it as a one-off matter." Black responded that he had spoken with Boultbee, and they agreed not to present the other matters to the Chairman for approval, and to present the Ravelston management fee for approval in the ordinary course ("[W]hy bother the [Chairman] at all at this point?").

In February 2003, KPMG made an inquiry concerning expenses at Black's London residence, and International's payment for those expenses. Black told another Hollinger executive

that Black wanted any questions about his London expenses referred directly to him: "I don't want the auditors, with the cooperation of senior executives, milling about running up invoices in respect of my fiscal relationship with the company without my being aware of it from the start . . . ."

On or about February 16, 2003, Atkinson told Black that in order to improve International's share price, he believed it necessary to cut costs. Atkinson reminded Black of Atkinson's earlier recommendations for cost-cutting, which included getting rid of the corporate jets and reducing spending on various perks. Black responded that although he was willing to consider cutting costs, he did not believe that reducing perks would have any effect:

> In the interests of historical accuracy, last summer your reference to planes, tables and fun investments, was to a clean-up of all the problems, . . . where they would not have had any effect. You engaged in some sharply skeptical comment about payment of chauffeurs used for general corporate purposes and partial payment of household staff in a home that contains two executive offices and receives directors and legitimate negotiation, all at demonstrable comparative saving to the company. . . . The only issue that ever audibly bothered the shareholders, apart from the obscurity of the ultimate destination of the payment to Ravelston, was the non-competition agreement. I have still not received an answer to my question of whether you thought there was something wrong with the non-competition agreements, which because of faulty legal advice, I was left to defend unassisted before that somewhat disorderly shareholders' meeting. All in a day's work, but not the sort of thing we should become self-conscious about.

P. Defendants Face Additional Inquiries.

In March 2003, KPMG told Black that it needed additional information for its 2002 International audit concerning payments made to related parties, including personal use of the company's jets and its Ground Floor Apartment in New York. Black responded, citing the company's policy concerning personal use of aircrafts. As to the apartment, Black stated, "The corporate apartment, to the best of my knowledge, is occupied by people with legitimate corporate purposes to be in New York." International's Audit Committee met in New York on March 13, 2003, and KPMG presented this information to the Committee. A proxy statement to shareholders

was issued that month as well.

On or about April 3, 2003, International released its earnings for the first quarter of 2003. The next day, an International shareholder complained in writing to the Investor Relations Officer, stating that the earnings release was the worst the shareholder had ever seen from International and failed to disclose certain critical information. The Officer told Black that these were the same sentiments he had been getting from other shareholders.

On April 8, 2003, Inc.'s Audit Committee met in Toronto. After the meeting, Black met privately with some of the Inc. directors. On April 14, 2003, Black notified Boultbee and Atkinson that Black had spoken with Izzy Asper of CanWest, who agreed to provide a note "stating that he sought a non-competition agreement with us and also stating that no one had asked him about this since. (This directly contradicts one of [the Inc. director's] mouthy assertions at our private meeting after the board meeting last week)." That day, Asper faxed Black a handwritten note, stating that as part of the CanWest deal, Asper required individual non-competition agreements. Black typed up the letter, and sent it to Boultbee and Atkinson with the comment, "This will be very useful in rebutting [the Inc. director's] unfounded comments at the post-directors' meeting we had, but should also steady the nerves of any others who are concerned about it."[39]

Black continued to face inquiries from shareholders and the press about the Ravelston management fees, the non-compete fees, and other matters. On or about May 1, 2003, he told the

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[39] In an April 22, 2003 letter to a shareholder, Black criticized the shareholder for sharing concerns about the non-compete agreements with the press, and invoked Asper's letter in response: "Our reward from you for these efforts is endless self-righteous carping and whining about how we are feathering our nests. You even dragged out the worm-eaten chestnut of the non-competition agreements and misled the Sunday Times by claiming we had taken them from the consideration due to Hollinger. As you know perfectly well, and as I have in writing from Izzie Asper, they were his idea, he insisted on them, they were entirely personal to David and me . . . ."

International Audit Committee that he would "take on the task of hosing down shareholders in need of it as a matter of some priority," and that he was endeavoring to bring shareholders "back on to the reservation." Black then engaged in a series of communications with one shareholder about adding new independent directors to International's board, who, among other things, would review matters relating to International's corporate governance. But Black stated that any such review would be prospective only: "[W]hat we are talking about is a review of future compensation and related party transactions (if any in the latter case). We will not accept a consequential review of past arrangements, which have been fully revealed and discussed.. . . . Neither new directors nor anyone else will have any license, and I trust none is requested, to rummage through the past." The shareholder responded that Black's terms were unacceptable, and that a review of the past transactions was necessary "to clear up certain allegations of conflicts of interest."

Black shared his correspondence with Atkinson. In a May 8, 2003 e-mail, Atkinson cautioned Black about adding new independent directors to the board:

> Our ability to control the vote at board meetings is crucial. If we do not, with a majority vote the board can go off on any direction and could, strictly speaking, fire all of us. . . . As it now stands the insiders do not control the board. With the addition of 3 new directors we could be in jeopardy. I realize you would count on the loyalty of the existing independents but that would be risky. They may come under intense pressure and some of them could turn against us. To be safe, we should always have a majority position on that board.

Black responded that he was "gradually whittling [the shareholder] down." He stated, "I think I have made it clear that we will not accept any review of the past . . . . Nor will we accept directors that we do not have confidence will be loyalists, by which I mean conscientious, responsible, thorough, but well-disposed, like the incumbents, though obviously, I didn't say that."[40/]

[40/]During this same period of time, a reporter for *Forbes* magazine was writing an article (continued...)

In the wake of the shareholder inquiries, one Audit Committee member asked Black to provide a memo identifying the issues and setting forth the facts, so that the Audit Committee members would have accurate information. The following week, Black sent a memo to the Audit Committee, after seeking input from Radler, Boultbee, Atkinson, Kipnis, and the Investor Relations Officer. The memo stated that International's shareholders were concerned about corporate governance, including issues relating to management services, related-party transactions, non-compete payments, and expenses (including aircraft, household staff, and apartment maintenance). Black stated that the "Audit Committee have been responsible for approving all of these matters . . . ." As to the non-compete payments, in particular, Black stated that this was a "lightning rod issue" that continued to upset the shareholders. Black invoked the handwritten letter Asper provided at Black's request, commented upon earnings that International achieved on the Canadian assets, and stated, further:

> Izzie Asper expressed concern that [Radler] and I, without the non-competition agreements, would buy the Sun newspapers privately and compete with Izzie in four or five Canadian cities. He emphasized that he wasn't concerned about Hollinger, but about us as individuals and that he was prepared to pay for this assurance of non-competition. . . . Some shareholders are gunning for more [explanation] on this, but I don't see any reason or necessity to do more than explain the facts recorded here. This has become a symbolic issue and must be defused, but not by unjustified defensiveness.

With respect to shareholders' concerns about expenses, Black said that as to International's corporate jets, "there has been no [personal] use, with any liberality of definition at all. Such matters

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[40](...continued)
about Hollinger. Black was quoted in the May 26, 2003 article as telling the reporter, with respect to the non-compete payments, "It isn't anyone's business how I make my personal money."

are monitored carefully and there are no abuses."[41]

On or about May 14, 2003, there was a meeting of International's Audit Committee. Representatives from International's auditor, KPMG, participated in the meeting, along with Kipnis. At the conclusion of the meeting, one of the Audit Committee members inquired whether the non-compete payments had been the subject of audit and/or legal opinions. Kipnis stated, among other things, that in 2000, it was believed that non-compete payments were made directly to executives by CanWest, and that Black and Radler believed such payments were over and above the purchase price.

On or about May 20, 2003, one of International's shareholders filed a notice with the SEC, identifying its "questions and comments" with respect to International's management fee payments to Ravelston, non-compete payments to executives and Ravelston, and other matters. Following the filing, Atkinson wrote to Black, cautioning against adding more independent directors to the board before the annual meeting with shareholders: "I think they are setting a trap. We should only add three after the non compete review phase is completed by the board." Black agreed, stating that he could drag his feet about reaching agreement. He stated further, "I am no longer in any more of a hurry than you and Jack to make a breakthrough. We have at least nine months before we would be under any real pressure . . . . There aren't many more blows they can inflict on us for awhile, and we are still in control. If the independent directors crack, we may [add another director], but failing that, we can hold our corner more or less indefinitely."

The annual International shareholders meeting was held in New York on May 22, 2003.

[41] In the process of drafting this memo, Black told the Investor Relations Officer in an e-mail that the purpose was to "clothe the directors with a full suit of armor."

Among others, Black, Radler, Boultbee, Atkinson, and Kipnis attended the meeting. In Black's address to the shareholders, he acknowledged that the company was "in the midst of a corporate governance controversy," and, with respect to the non-compete payments, stated:

> I must profess astonishment at the durability of the [concerns about the] non-competition agreements that we issued. I received a letter last month from the chairman of CanWest, Israel Asper, stating that he insisted on a non-competition agreement with his company, which was the principal object of the controversy over this subject. [Black quotes from Asper's letter.] Although the agreement covered the Hollinger companies also, it was always clear that Mr. Asper and others who required these agreements intended them to cover Mr. Radler and others – including me personally – when corporations were added because we were associated with those companies. It was clearly established by the audit committee of this company that the intended transactions were overwhelmingly in the corporate interests of this company, and that the transactions would probably not be completed without those agreements.

In his initial address, Black also addressed concerns about perks, including his New York apartment, stating: "I bought the apartment, having paid personally for all the renovations and decorations. There were concerns expressed a couple of years [ago] that executive directors should not receive director's fees, so they were discontinued." Concerning use of the corporate jet, he said, "There is virtually no completely non-corporate use of the aircraft."[42] Black concluded:

> Some serious abuses in some large and now infamous companies have come to light in recent times, and some crimes have been alleged. Here, what we are talking about is the size and approval process of relatively small amounts of money, properly approved and fully disclosed, paid to those who built and guided this company in a short span from an embryonic state to the brink of the prosperity that does excite the hopes of all of us. Like all fads, corporate governance has its zealots and its tendency to excess. For the benefit of all the shareholders, the controlling shareholder will address the legitimate concerns, and we will do our best to ensure that the corporate governance crusaders don't inadvertently throw the baby out with the bath water.

Later in the meeting, one of the shareholders asked about the CanWest non-compete

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[42] Later in the meeting, Black reiterated, when asked the number of hours flown for business versus personal use, "None for personal use."

payments to executives. Black responded:

> On the question of: Did the payment come out of the consideration that would otherwise have gone to this company? . . . Our position, I think, roughly stated, is that, no, it did not, because we had undertaken to get over 10 times EBITDA. The buyer insisted on them. And as far as we were concerned, since we achieved – more than achieved – our goal, they did not come from this company.

The shareholder asked Black to cite other examples where management had been paid directly for non-compete agreements when a publicly held company sold assets. Black said he could not, but further stated, "I've done no research on it." The shareholder asked, "Where did the idea come from?" Black responded, "I've told you this many times, and I've offered you Mr. Asper's letter, which you did not ask me to give you. . . . It came from him. He says it came from him."

Q. The Special Committee Process.

Following the meeting, International's board of directors voted to convene a Special Committee to examine various matters, including the non-compete payments. In the wake of the meeting, Black drafted a letter for publication in the British press, responding to attacks on him and Hollinger. Among other things, Black's proposed letter stated that the non-compete payments had been made "with full appropriate approvals and at the request of the buyers." Atkinson commented on the draft, stating to Black in a June 2, 2003 e-mail, "Until the special committee completes its review I think we should say little about the non-competes. CanWest required them but CW did not put the price on them or stipulate that monies be paid to the individuals and Ravelston. I do not know if non-compete payments are frequently made to officers of public companies. Our position is that we would not have signed them and given up our ability to compete in Canada unless we were compensated for that loss."

In the following months, Black engaged in written correspondence with various reporters

about the non-compete payments, management fees, and related issues. Responding to one reporter's question about whether it was Hollinger who determined how to disperse non-compete funds in the CanWest transaction, rather than CanWest, Black stated (in an August 27, 2003 e-mail), "I never suggested that the distribution of the amounts was determined other than by us, except that Mr. Asper made it clear that he was concerned about individuals and wanted the incentives paid to those individuals, adequate as a disincentive to compete with him. Of course the Hollinger Audit Committee and board approved the arrangements and the Audit Committee recommended them; otherwise there would have been a substantial question of propriety, which there is not." To another reporter, on August 28, 2003, Black recalled Mr. Asper's letter and the company's achievement of more than ten times EBITDA, then stated, "We have paid non-competition fees countless times in acquisitions we have made in the United States and elsewhere and have always paid them to individuals." In a September 18, 2003 e-mail to a reporter, who asked why non-compete payments were made to individuals instead of to International, Black stated:

> [W]e bought dozens of newspapers on this basis in Canada and the United States and never heard of paying non-competition agreements to a company but often did to individuals. I think it was also judged likely that I might become a UK citizen and cease to be a Canadian citizen, which would make it possible for me to participate in the acquisition of Canadian newspapers, . . . [and] that this would effectively disqualify the Hollinger companies from acquiring Canadian newspapers. This was discussed, but was a secondary reason. Non-competition payments are not, in practice, to the best of my considerable experience, ever paid to companies.

Meanwhile, International's Special Committee began its work. As part of its work, Special Committee representatives conducted interviews of various people with knowledge about the matters under review. This included interviews of Boultbee, Atkinson, and Kipnis.

The Special Committee interviewed Boultbee on October 29, 2003 and November 13, 2003. Among other things, Boultbee stated:

- He did not know about the $2 million paid to Inc. in connection with the *American Trucker* transaction, and did not know if the money was used to offset a loan from International to Inc.;

- He could not recall Inc.'s February 1999 receipt of $12 million;

- He did not know how Inc. became a signatory to the non-compete agreements;

- It was unnecessary to disclose International's payments to Inc., because such payments were not related-party transactions;

- He could not recall any conversations in early 1999 about whether non-compete payments were treated differently for tax purposes;

- There was no requirement to disclose the CanWest non-compete payments;

- Audit Committee approvals for the non-compete payments to individuals were unnecessary;

- The justification for the non-compete payments received by individuals in the CNHI (II) transaction was the same as the justification for such receipt in the CanWest transaction;

- He was not sure why the APC non-compete agreements and checks were backdated to December 31, 2000; and

- The backdating was not appropriate, but that did not mean it was "evil."

Boultbee also stated, among other things, that:

- The non-compete money was a way to get him bonuses;

- He knew that non-compete money was not taxable in Canada;

- He did not know the purchasers of newspapers who purportedly paid not to compete with him;

- He did not declare any alleged non-compete money on his Canadian tax returns;

- He had no involvement with the operation of International's newspapers, other than consolidating the financials;

- He did not read the non-compete agreements that he signed;

- Statements in International's 10-Ks that the CanWest non-compete payments were a condition of the deal's closing were wrong;

- CanWest did not care about how non-compete money was allocated to the executives;

- The September 11, 2000 board of directors minutes were incorrect with respect to the CanWest non-compete payments; and

- He had no idea why Inc. received non-compete money.

The Special Committee interviewed Atkinson on October 9 and 10, 2003. Among other things, Atkinson stated:

- The Chairman had a "handle" on what was going on;

- Before Cravath, no firm told International that disclosure of the CanWest non-compete payments was required; and

- Atkinson did not know if minutes from September 2000 Board minutes were right or wrong; he could not understand the theory of the early termination fee since he had never heard it before (although he later conceded he had);

- There was confusion as to what International really saved in the CanWest deal by Ravelston "break fee."

Atkinson also stated, among other things, that:

- If Atkinson could close a $3 billion deal for the first time in the company's history, he thought himself entitled to a bonus and felt he should make sure that he got one;

- Atkinson saw CanWest transaction as working himself out of a job and that is why it was the first time he sought a bonus for himself in a direct fashion;

- For tax purposes, it was better not to have the payment defined as a bonus;

- The $80 million figure from CanWest deal was set by a Hollinger executive, and CanWest had nothing to do with the allocation of the non-compete fees;

- The $80 million figure was excessive;

- Non-compete money of 3-5% was not likely to get the Canadian Tax Authority's attention;

- He did not declare the non-compete money on his Canadian tax returns;
- He understood the Canadian tax treatment of non-compete money;
- The break fee was based on the notion that Ravelston was entitled to a bonus because it had successfully put CanWest deal together and, as a result of the success, it would lose a stream of income that it had received in the past; and
- The company did not make timely appropriate disclosures of the non-compete payments.

The Special Committee interviewed Kipnis on August 6 and 7, 2003, November 5, 2003, and March 11, 2004. Among other things, Kipnis stated:

- He could not recall any non-compete payments to individuals other than the CanWest payments; there might have been some, but not in any significant amount;
- He could not recall any effort at the May 2001 Audit Committee meeting to re-characterize CanWest's payment to Ravelston as a non-compete fee, as opposed to a "break fee" or "early termination fee";
- The recipients of the CanWest non-compete money were troubled by language in the September 2000 board minutes, and therefore a presentation was made to the Audit Committee to change the language;
- Executives proposed that Ravelston receive money in the CanWest transaction as a reward for convincing CanWest that Ravelston could operate in the future with $11 million less in fees;
- He did not think it was odd that Inc. received a payment in February 1999 for a transaction that occurred in May 1998;
- He did not think that Inc.'s receipt of $14 million in non-competes was a related-party transaction;
- His $100,000 bonus was unexpected;
- Non-compete "bonuses" would not affect International's taxes, because the recipients were not International employees.

Kipnis also stated, among other things, that:

- There was no board of directors approval for the $2 million *American Trucker* payment to Inc., or the $12 million CNHI money to Inc.;

- The non-competes on CanWest were "odd and unusual," and simply a way to get bonuses to the executives;

- The executives became enamored of getting "non-compete" money in lieu of bonuses;

- CanWest did not request non-competes from all the executives who gave them, and the non-competes from all four executives were not truly a condition of closing, as stated to the Audit Committee;

- He could not reconcile the language of the September 11, 2000 Audit Committee minutes with the language of the May 2001 Audit Committee memo, with respect to CanWest's requiring the non-compete agreements;

- His May 1, 2001 memo to the Audit Committee was intended to strengthen the language to protect the tax-free nature of the non-competes under Canadian law;

- The CanWest non-competes were used as a "guiding principle" for future non-competes for the executives;

- The CNHI (II) non-competes were changed the day of closing at Radler's request; and

- Non-compete money to the officers was "silly."

Black declined the Special Committee's request for an interview.

During this time, in approximately September 2003, Atkinson also had a meeting with KPMG representatives at 10 Toronto Street. The purpose of the meeting was for the KPMG representatives to talk with Atkinson about the Special Committee's request for documents and working papers from KPMG relating to KPMG's work for International and Inc. During the meeting, one of the KPMG representatives asked Atkinson why he had felt he should receive a non-compete payment in connection with the CanWest transaction. Atkinson stated that CanWest was a huge transaction, and he didn't feel uncomfortable with taking a non-compete payment, because

it was far less than then the bonus he was promised for completing the CanWest transaction. Likewise, in November 2003, Atkinson told a Torys lawyer that he believed he had "earned" his CanWest non-compete payment.

R. U.S. Community Non-Compete Payments to Inc. Are Revealed.

While the Special Committee was investigating, International's outside counsel at Torys, and its auditors at KPMG, also reviewed information concerning the U.S. community non-compete payments to Inc. (as well as to Black, Radler, Boultbee, and Atkinson) and discussed such payments with the defendants and others at the company. Representatives of both firms looked at various minutes and transactional documents concerning such payments, and interviewed various members of management. As part of this review, Torys and KPMG learned for the first time of undisclosed non-compete payments to Inc. in connection with the U.S. community newspaper sales. Both firms concluded that the payments had not been disclosed to or approved by International's Audit Committee at the times the transactions were consummated.[43]

Torys attorneys spoke with Kipnis about the U.S. community non-compete payments. Kipnis said, in substance, that the individual non-compete payments to Black, Radler, Boultbee, and Atkinson in connection with the U.S. community newspaper transactions were made in lieu of accrued management fees in order to obtain favorable tax treatment for the individuals. Kipnis further stated that he was unaware of International's Audit Committee reviewing or approving such payments.

In late October and early November 2003, one of KPMG's lead auditors interviewed Black,

[43] International had disclosed $15.6 million in U.S. community non-compete payments to Black, Radler, Boultbee, and Atkinson in the company's 2001 and 2002 filings; but there had been no disclosure of non-compete payments to Inc.

Radler, Boultbee, Atkinson, Kipnis, and others about the non-compete payments. KPMG's representative spoke with Boultbee on October 27 and 31, 2003. Boultbee said:

- He was not aware of non-compete payments made to Inc. in 1999;
- The CanWest non-compete payments had originally been approved for the wrong reasons; the matter was later clarified with the Audit Committee; and
- All the non-compete money he received was in connection with non-competes signed with purchasers (and he didn't know otherwise with respect to the $5.5 million paid in connection with Forum and Paxton).

KPMG's representative spoke with Atkinson on October 27 and 31, 2003. Atkinson said:

- He was not aware of non-compete payments made to Inc. in 1999; and
- Upon receiving checks for various U.S. community newspaper non-competes, he called Radler and asked if such amounts had been approved by the independent directors; Radler said that such amounts had been approved.[44]

KPMG's representative spoke with Kipnis on October 27, 2003. Kipnis said:

- As to the CNHI (II) transaction, he was instructed the day of closing to amend the non-compete agreements to add Black, Radler, Boultbee, and Atkinson as recipients of non-compete moneys;
- He did not specifically remember discussing the CNHI (II) non-compete payments with the Chairman, but recalled that the possible reason for the payments was that having just completed the CanWest transactions, the executives were enamored with the Canadian tax-free treatment of the non-compete payments and, instead of making management-fee payments to Ravelston, the amounts would be paid directly to the executives tax-free, as "non-competes";
- As to the Jamestown, Paxton, and APC payments, Radler instructed him to make the $5.5 million payment to the executives; APC had cash and accrued management fees owing to Ravelston, and he was asked to "paper" a structure to allow the executives

[44] In or around October or November 2003, Atkinson told International's Investor Relations Officer that he had been told that the U.S. Community newspaper non-competition payments had been approved. Around the same time, Atkinson told the Officer, with respect to the individual U.S. community non-compete payments, that he felt awful and was going to pay the money back right away.

to receive "non-compete payments," as such payments would be tax-free; and

- There was no substance to the non-compete agreements, as APC was not carrying on active business at that time; also, the payments were not linked to the Forum or Paxton transactions, and the non-competes signed with APC were not requested by any purchaser.

KPMG's representative spoke with Black on October 31, 2003 and November 1, 2003. [45]

Black said:

- He had nothing to do with negotiations of the non-compete agreements and was not aware of specific details of the non-compete transactions;
- He had spoken to Radler, Boultbee, and Kipnis and indicated that their current amnesia is not acceptable and disgraceful;
- Perhaps the division of non-compete agreements between Inc. and International was not a related-party transaction; and
- He was aware of some payment to Inc. but was not aware of the details.

The Inc. Audit Committee convened on November 3, 2003 to discuss issues relating to the U.S. community non-compete payments, including payments to Inc. At the meeting, Atkinson described in detail the conclusions reached by Torys and KPMG concerning non-disclosure of the payments. Atkinson also stated that the onus was on International to demonstrate that non-compete payments made to Inc. in connection with the CNHI (I) transaction were not bona fide, and that no funds should be reimbursed to International at that time.

The next day, there was a joint meeting of International's Audit Committee and the Special Committee. Atkinson attended a portion of the meeting, and stated in substance that he and others

[45] In the midst of these discussions, on November 1, 2003, Black e-mailed Atkinson about the need to explain the non-compete payments. Black stated that he had discussed this with Boultbee, telling Boultbee that "he and [Radler] and [Kipnis] are going to have a consciousness-raising session. I also told him [Boultbee] that if they couldn't produce any explanation of what happened [concerning the non-compete payments], I would do so."

disguised compensation to themselves as "non-compete" payments for tax reasons, and that he and others took steps to conceal this conduct from International's Audit Committee.

A few days later, KPMG informed Black that it was unable to reach any conclusions on its evaluation concerning the U.S. community newspaper non-compete payments, and it would look to the Special Committee to perform the investigation. On November 6, 2003, Black called a KPMG representative and cautioned against using words like "fraud" to describe the conduct under inquiry. Black stated that International had engaged an investment banker to solicit and receive offers for any or all assets and shares of the companies in the Hollinger group. Black stated that the Special Committee process would end if all public shares were acquired or cancelled.

On or about November 6, 2003, the Special Committee sent letters to Black, Radler, Boultbee, and Atkinson, with questions about their and Inc.'s receipt of U.S. community non-compete payments. Each submitted a written response.

Meanwhile, Black negotiated with the International board about a "restructuring proposal," which would address International's management fee payments to Ravelston, repayments of non-compete money to International, and who would manage the company on an ongoing basis. Black wrote in a November 14, 2003 e-mail to Boultbee that "[t]he only advantages of what is proposed are that it seems to head off a real investigation . . . ." International's board met on November 15, 2003, and Black summarized the restructuring proposal. He told the board that under the restructuring proposal, the investigation currently being conducted by the Special Committee would continue and would not be affected. Black said that he would return certain non-compete payments

that he received. Black further identified various personnel changes, including his resignation as International's CEO.[46]

Later, in mid-January 2004, Black sent a letter to International's board of directors, taking back the statements he made in November 2003, and claiming that the restructuring proposal to which he had agreed was invalid. Litigation ensued in the Delaware Chancery Court, and Black testified at a deposition and a court hearing. Among other things, Black testified that he was unaware of non-compete payments to Inc. until late 2003; he had nothing to do with and didn't know about the *American Trucker* payment to Inc.; CNHI requested the $12 million payment to Inc. in the CNHI (I) transaction; he had nothing to do with and didn't know about a non-compete payment to Inc. in the CNHI (II) transaction; he asked Radler and others about whether his individual CNHI (II) non-compete money ($4.3 million) had been approved by the Audit Committee and was assured that the payment was approved; his failure to disclose the $4.3 million on his 2001 proxy questionnaire was "inadvertent"; he did not take millions from APC in the guise of non-compete payments in 2001 for tax reasons ("this is a cannard that your clients have invented and inflicted upon credulous press. I did not structure it at all, I had nothing to do with it, as you well know."); and there was no tax advantage in Canada in structuring payments as non-compete payments.

S. The SEC Begins an Investigation.

On or about November 18, 2003, the SEC advised Black's counsel that it was conducting an investigation concerning International. Accompanying the SEC's notice was its first subpoena

[46] At a November 16, 2003 meeting of Inc.'s board of directors, Black stated, among other things, that "certain inadvertencies had taken place," such that payments to him and others had not been approved by International's Audit Committee. Black also described the restructuring proposal and its likely impact on the company.

for documents. Black sent an e-mail that day stating, “I assume from the arrival of subpoenas that the SEC is conducting an investigation.” The next day, November 19, 2003, Black resigned as International’s president and CEO.

In November 2004, the SEC filed a complaint for permanent injunction against Black. On or about March 21, 2005, the U.S. Attorney’s Office for the Northern District of Illinois filed a motion to intervene in the SEC action, advising of an active investigation concerning Black’s criminal activity, as it related to International.

In October 2004, an Inspector was appointed for Inc. by the Superior Court of Justice in Ontario, Canada. In December 2004, the Inspector ordered that no documents could be removed from Inc.’s 10 Toronto Street office without the Inspector’s consent or further court order. A Hollinger executive periodically circulated memos, informing all staff that documents could not be removed from the office.

In May 2005, the SEC served a subpoena for documents on Black. The same day, Black, along with his executive assistant and chauffeur, removed 13 boxes of documents from Black’s 10 Toronto Street office, without the Inspector’s consent. This was captured on video by security cameras. When asked in or about March 2006 by a reporter from the *Toronto Sun* what he was doing removing documents from 10 Toronto Street, Black stated, “I was taking out stuff that was brought in there after there was a subpoena.”

IV. CONCLUSION.

The above is an outline of the evidence that the government will introduce to establish that a scheme or joint venture existed involving defendants Black, Boultbee, Atkinson, and Kipnis, and their co-schemers, as well as various individuals who acted as their agents in ways that allowed the defendants to commit their frauds. This Court should find, based upon this proffer, that co-schemer and agents' statements are admissible pending the introduction of evidence to support this proffer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following documents:

Government's Evidentiary Proffer Supporting the Admissibility of
Co-Schemer and Agent Statements

were served on December 11, 2006, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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