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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, :
 :
 Plaintiff, : 2:02CR 0787 DAK
 :
 v. :
 : **GOVERNMENT'S SENTENCING**
 THOMAS E. MOWER, : **MEMORANDUM**
 LESLIE D. MOWER, :
 JAMES THOMPSON, : Judge Dale A. Kimball
 :
 Defendants. :

Pursuant to Federal Rule of Criminal Procedure 32 and United States Sentencing Guidelines (U.S.S.G.) § 6A1.3, the United States of America, through its undersigned attorneys, respectfully submits the following information relevant to sentencing for the Court's consideration.

BACKGROUND

On March 18, 2005, defendants Thomas E. Mower and Leslie D. Mower were found guilty on Counts 1 - 7 of the April 8, 2003 Superseding Indictment. Defendant James Thompson was found guilty on Count 1 and Count 8 of the April 8, 2003 Superseding Indictment. On October 11, 2005 defendant Thomas E. Mower filed a Motion for a Tax Loss Hearing. On

November 3, 2005, the government responded to defendant's Motion opposing a tax loss hearing. On February 13, 2006, the Court held a tax loss hearing. On April 7, 2006, the Court issued its Amended Findings of Fact and Conclusions of Law Relating to Tax Loss. On May 23, 2006, the government filed a Motion for Reconsideration of Court's Amended Findings of Fact and Conclusions of Law. On July 31, 2006, the Court denied the government's Motion for Reconsideration.

1. FACTUAL STATEMENT RELEVANT TO SENTENCING¹

A. Background²

During the prosecution years, 1989-2002, Thomas E. Mower and Leslie D. Mower evaded their personal income taxes by failing to report approximately \$3.2 million in commission income they received from their multi-level marketing companies, resulting in a total individual tax loss of \$1,262,081³. James Thompson, a corporate attorney at the Mowers' company, helped them conceal their evasion by creating a bogus loan document that purported to claim that some of this income was a non-taxable loan.

Thomas E. Mower and Leslie D. Mower owned an international multi-level marketing business called Neways, Inc. (Neways U.S.) headquartered in Salem, Utah. Neways U.S. sold

¹ Since the government respectfully believes that it should have been given an opportunity to present additional relevant facts to the Court concerning the tax loss determination and other sentencing issues, including evidence not submitted at trial, and since it respectfully believes it was not given a full opportunity to do so prior to the Court's issuance of Amended Findings of Fact and Conclusions of Law, the government presents the following information now for the record. Fed. R. Crim. Proc. 32(i)(2), U.S.S.G. § 6A1.3, United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990). The government may present additional evidence at the Sentencing hearing on September 13, 2006.

² The following information was either presented at trial or discovered during the investigation.

³ This number only represents the tax loss associated with the personal tax evasion for Counts 2 through 7.

cosmetic and healthcare products in the United States and abroad.⁴ The Mowers also served as Directors of Neways U.S.; Thomas E. Mower was the Chief Executive Officer (C.E.O.) and Leslie D. Mower was the Chief Financial Officer (C.F.O.). Both played an active role in recruitment of distributors and were the public persona for their company, representing it throughout the world at conventions. Tom Mower was generally focused on product development and distributor interaction, while Leslie Mower was responsible for distributorship relations, putting out the “Employee Express,” dealing with customer service and product complaints. She, as C.F.O., often dealt directly with the accounting department; many employees looked to her for direction.

The Mowers also owned and controlled Neways companies in other countries including Australia (Neways Australia) and Malaysia (Neways Malaysia). Additionally, the Mowers owned a holding company, Mower Properties, Inc., which held real property, some of which was used and leased by Neways U.S..

As a multi-level marketing company, the various Neways companies sold their products through chains of independent salesmen, known as distributors. Distributors received commissions or bonuses based on the sales of those distributors whom they recruited to their “downline.” Thomas E. Mower and Leslie D. Mower owned and received commissions from distributorships in the United States, Australia and Malaysia and between 1989 and 2002, they received more than \$3 million in commission income from these distributorships.

James Louis Thompson graduated from Marylherst College in the State of Oregon with a Bachelor of Arts degree in Humanities and a minor in business. In April 1990, he obtained a law

⁴ Before being renamed Neways, Inc., the Mowers’ company was known as Images & Attitudes, Inc.

degree from the J. Rueben Clark College of Law at Brigham Young University in Provo, Utah.

In October 1995, Thompson went to work for Neways U.S. as associate corporate counsel. He was later promoted to chief corporate counsel and remained with Neways U.S. until he was fired in the Summer of 1997. Mr. Thompson was charged and convicted in the State of Utah for state income tax evasion in December 1998.⁵

B. Operations of Neways U.S.

During the prosecution years, Neways U.S. grew exponentially, becoming a multi-million dollar-a-year company. Neways U.S. had an in-house accounting department, headed by a C.F.O. There was rapid turn over in the accounting department until Neways U.S. hired Richard Wogksch⁶, who was C.F.O. for over a year. Neways also used an outside accounting firm, first employing Gilbert and Stewart, but later alternating between that firm and Grant Thornton. During the prosecution years, Karin Lane, first an accounting employee but later the Neways U.S. comptroller, compiled the information needed for preparation of the Neways U.S. and Mower Properties Inc.'s tax returns.

When Richard Wogksch came on board as C.F.O., he and Brett Jenkins, the corporate attorney, advised the Mowers that they should get some expert advice on the best way to structure the companies. Neways hired Grant Thornton to complete an audit of their records, to

⁵ Mr. Thompson was convicted for altering 1099's to make it appear that he had less income. He had a W-2 for \$20,000 and had Neways pay his personal expenses on his behalf, for which he should have received a 1099. He told a Neways employee to zero out the 1099 so that the additional income would not be reflected. He was arrested on April 19, 2002, for violating his parole relating to the tax conviction. According to court documents, Thompson was ordered to pay penalties assessed by the Utah State Tax Commission, and that once paid, his sentence would be complete. Mr. Thompson was released from jail after the hearing.

⁶ Mr. Wogksch passed away prior to trial and was therefore unavailable to testify.

advise them regarding structure and transfer pricing, and to prepare the above referenced tax returns.

According to Grant Thornton, the firm was contacted by Richard Wogksch and hired to perform an audit of Neways' books and records and financial statements for the calendar year 8/31/94 in case Neways wanted to make a public stock offering. Tom Elderedge, a staff auditor, went to Neways at the start of the audit and met with various in-house accounting employees, including Richard Wogksch and Karin Lane.

The audit procedures included downloading Neways' general ledger and using audit modules that were standard procedure for Grant Thornton. Foreign income was discussed during the audit. Intercompany accounts and Loans Payable/Accounts Receivable from the foreign entities was focused on. The question was what relationship the companies had to each other.

Shane Edwards does not recall any discussions about or information provided to him that Thomas E. Mower was a distributor in foreign corporations or about Neways U.S. being a distributor or receiving payment from foreign distributorships. He stated that he would remember this, had it been discussed, because it would have been an audit issue that would have required resolution for an opinion to be issued.

The accounts receivables from the Australian and foreign entities came from realizable receivables created on reasonable transfer pricing for products purchased by the foreign entities. Edwards stated that, depending on the corporate relationship, the accounts receivable entry would just be an adjustment in the investment in foreign corporate account. It would have "perked up" Edwards' ears if he had heard anything about foreign distributorship income being paid to Thomas or Leslie Mower or Neways U.S.

The audit was never completed. Shane Edwards stated that Grant Thornton was not able to issue an opinion on the financial statements of Neways U.S. because the company failed to provide some of the information requested in the audit modules.

In February 1993, Revenue Agent Kent Wells of the I.R.S. began an audit of Images & Attitudes for tax years 1990, 1991 and 1992. Wells met primarily with C.F.O. Wogksch but he also met with Tom and Leslie Mower at the beginning and end of the audit when they signed-off on the adjustments.

The primary adjustments in the audit related to unreported income. Wells found that the company's books and records did not reconcile to the tax return and a \$533,374 adjustment was taken to bring the 1991 tax return in line with what was shown on the books. He also found that, in 1991, the Mowers failed to include income that had been deposited into an account in Texas in the amount of \$84,825 which ultimately went to Tom Mower when the account was closed.

The audit also concluded that cash sales were not correctly reported and were short \$15,388 in 1991 and \$22,965 in 1992. Moreover, Wells found that this money went to Leslie Mower. She stated that this money was for repayment of loans that she had made to the company. Examination of the books and records did not indicate any such loans and Wells treated the money as dividend income to the Mowers. Wells also concluded that even if there had been a loan, the company should have reported the cash sales.

Wells further found that the company had deducted \$30,000 relating to the cost of a building that was owned by the Mowers and rented to the corporation. Wells disallowed the deduction and included the \$30,000 as dividend income to the Mowers. Wells also determined that the Mowers' house payment was being paid by the corporation and he disallowed this

expense and passed it on to the Mowers as a dividend.

Wells also questioned an entry on the Images & Attitudes tax return which indicated that the Mowers had contributed \$800,000 in capital to the company. This large number was out of line with the small amount of income the Mowers were reporting on their personal tax returns. Wells was told by a Neways employee that this entry was an accounting mistake and that this money was actually a loan from Neways' foreign companies. In 1992, Neways U.S. changed this entry on its balance sheet to a loan and increased it to \$999,636. Wells was presented with loan papers to substantiate these supposed loans. Testimony from Randy Lindstrom, Neways U.S.'s former C.F.O. and Tony Martin, Neways U.S.'s in-house accountant, concluded that the \$800,000 figure actually represented sales from Australia and that the loans never existed. Thomas Mower stated that he did not want to pay tax on these sales and instructed the employees to find a way to make it non-taxable, both in Australia and the U.S.. The sales were recorded as loans.

From the Wells audit, the total adjustments resulted in the Mowers receiving dividend income of \$48,700 in 1990, \$178,735 in 1991 and \$64,219 in 1992. Total adjustments to Images & Attitudes' returns were \$218,418 in 1990, \$695,308 in 1991 and \$22,966 in 1992.

C. Operations of Neways Australia and Neways Malaysia

Neways Australia and Malaysia are essentially sister companies to Neways U.S. – either the U.S. company sells them the product and then the international company sells it to their distributors, or the international company has a manufacturing facility that produces the product for that country.

Neways Australia was headed by C.E.O./C.F.O. John Hunter. It employed an in-house accountant and retained an outside accounting firm to prepare tax returns. Neways Australia was set up as an Australian company with the Mowers as the owners. Hunter was hired by the Mowers in 1989 to start Neways Australia.

Neways Australia produced financial statements each month and copies of these reports were sent to Thomas and Leslie Mower at Neways U.S. These reports reflected sales and commissions paid; the Mowers wanted to know Australia's current financial position.⁷

Neways Australia started out small, with only two employees, Virginia Clouden and Marija Lee. Lyn Knarston was hired shortly thereafter. Marija Lee was responsible for the computer/data entry department and Lyn Knarston took over the general office management. By 1994, Neways Australia had over 30 employees. The company grew quickly, having only \$1 million in sales in its first year but \$24 million in sales by its fifth.

Neways Australia maintained two main checking accounts at National Australia Bank – a general or operating account and a bonus account. Payments for product were made from the general account and were usually wired to Neways U.S. Commission or bonus payments were made from the commission account. Cancelled checks were not returned to account holders in Australia. John Hunter and Thomas Mower had signature authority over the Neways Australia bank accounts. In the early years, only John Hunter had signature authority. At some point, Tom Mower insisted that his signature appear on the bonus checks to distributors and the signature

⁷ While the government has the Neways financial statements and tax returns in its possession, neither of these were introduced as evidence at the trial.

was added electronically to the computer generated bonus checks.

In the beginning, Neways Australia received product from Neways U.S. and did not pay for it. An intercompany account entry was placed on the books of Neways Australia to account for what would have been account payable accruals for the product. There were no formal loan documents or inter-company loan agreements. Several witnesses, including John Hunter, John Dwyer, Michael Cunningham, and Robert Nichol⁸ stated that there were never any loans other than these inter-company accounts. As the company grew, Neways Australia paid for product when invoiced. Payments would have been wired from the operations or general checking account in Australia to Neways U.S..

When Neways U.S. ran short of money, Thomas Mower or Randy Lindstrom would call Neways Australia and ask for money. Neways Australia wired the funds to Neways U.S., though not more than \$30,000 to \$50,000 at a time, and netted this payment against product received from the U.S. Neways U.S. never sent funds to repay Neways Australia.

In 1994, Thomas Mower asked Hunter to come to Utah and run Neways U.S. Hunter thought Mower wanted him to duplicate the successful operation he had created in Australia and that Mower would leave operations to him and concentrate on promoting the company.

Once Hunter arrived in the U.S., Thomas Mower refused to relinquish control over operations. Hunter was never paid for his work in the U.S. and soon resigned because he did not agree with the way Mower treated his distributors, and also because of Mower's attitude. Hunter

⁸ Only John Hunter and Michael Cunningham testified at trial. John Dwyer and Robert Nicol did however sign affidavits to that effect.

went to Leslie Mower and told her he was quitting. Hunter left Neways Australia in August 1994.

_____Neways Malaysia operated in a manner similar to that of Neways Australia. Malaysia was headed by a C.E.O./C.F.O.; first Germit Singh, then Bobby Pang, then Jeff Yeo.⁹ Singh, a Malaysian citizen, was the first General Manager. Tom and Leslie Mower owned the Malaysian corporation, except for 30% which was owned by a Malaysian citizen, pursuant to Malaysian law.

D. Receipt of Domestic/U.S. Commissions by Mowers

The Mowers received checks from the following six domestic distributorships:

1. Base of the Tree:

Base of the Tree was the first distributorship in the downline/tree, hence the name. Some witnesses stated that the ownership interest in Base of the Tree was with Neways U.S. Witnesses also stated that Base of the Tree was Tom and Leslie Mower's distributorship; that the way M.L.M.'s work was to have the owners at the top. According to Patricia Anderson, Tom Mower was in charge of deciding who could get into the Base of the Tree downline. There is no S.S.N. associated with this distributorship, though there is an internal Neways number: 000-00-0003.

2. MP Trust/Thomas E. Mower distributorship:

MP Trust was Tom and Leslie Mower's personal distributorship. This is the only domestic money that was reported on the Mowers' Schedule C and the only distributorship to

⁹ None of these three individuals testified at trial.

have Tom Mower's social security number. These checks were deposited into the Mower Properties bank account, the Rezults bank account and Tom and Leslie Mower's personal checking account.¹⁰

3. BP Sales¹¹:

This distributorship was originally owned by Bobby Pang, the former CEO of Neways Malaysia. When Pang began working as manager of Neways Malaysia he thought he gave up this distributorship and was under the impression that the downline went inactive since he was not making orders. All of these checks were negotiated by Leslie Mower.

4. MP Enterprises

None of the witnesses knew who's distributorship this was. At trial, through testimony elicited by Leslie Mower's lawyer, Karin Lane stated that Leslie Mower told her that MP Enterprises was one of their downlines. The SSN associated with this entity is for a teenager who has no relation to the Mowers.

5. Neways Independent Distribution Ad Pool:

Witnesses testified that this was not a distributorship, but an account set up to pool advertising expenses for distributors. There is an Ad Pool bank account. Ad Pool checks were deposited to the Ad Pool account and to Rezults, though only in 1994. This entity does not have

¹⁰ During the investigation, Leslie Mower met with Special Agent Elder who questioned her about the use of funds in the Mower Properties bank account. She personally reviewed a spreadsheet of the payments out of this bank account and delineated which payments were personal and which were corporate. While some of the funds were used for corporate expenses, a large number of the payments were for personal expenditures.

¹¹ Again, Bobby Pang did not testify at trial, but the government learned this information through personal interviews with him.

a valid EIN or SSN, but an internal Neways number: 000-00-0500.

6. Revenol:

Hayden Cameron owned the Revenol/Marketing Services distributorship. In 1995 he began a business relationship with Neways and Thomas Mower. Cameron was working for a newspaper in Florida and that paper had a marketing division. Cameron wrote two stories about Neways which ran in the papers owned by American Media, Inc.

While in Utah for the story, Cameron negotiated an agreement with Tom Mower for the paper to market and sell Revenol. American Media set up a corporation, Marketing Services, to receive commissions from Revenol sales generated by the ads. Commission checks were sent to American Media, but written to Marketing Services. In late 1995 or early 1996, a dispute arose from a delay in payment of commissions on these sales. Marketing Services and Cameron never lent any money, nor did they borrow any money from Neways or the Mowers. Leslie Mower negotiated all of these checks.

E. **Australian and Malaysia Commissions**

The Mowers' receipt of the foreign commissions occurred in a different fashion from the manner in which it was accomplished in the United States. When the Mowers first set up Neways Australia, Thomas Mower told Hunter that he wanted his own distributorship at the top of the downline in Australia, as had been done with Base of the Tree. Hunter advised Mower against placing himself at the top of the chain, explaining that other distributors would perceive the owner in the downline as a conflict of interest. Hunter suggested instead that Mower place seven distributorship positions at the top of the chain and put them in the company name,

initially "Image & Attitudes 1" through "Images & Attitudes 7." Over the course of the conspiracy, these names changed to Neways 1 through 7, then Mower Properties 1 through 7, and ultimately, to a variety of different names. Hunter suggested the number seven because the Neways bonus plan paid commissions up to seven levels. Hunter explained that, by using the seven entities, the money could be sent to the United States, and be deducted by the Australian company as a bonus expense.

To qualify for commissions, a general distributor had to purchase a minimum amount of product for resale. Neways 1 through 7 were not required to qualify for payment but rather automatically received commissions based on the sales volume of the entire Australian downline each month. When the Neways 1 through 7 bonus checks were late, Leslie Mower would call Hunter and ask where the bonus checks were.

Thomas Mower instructed Hunter to send the checks to his attention. Hunter thought Mower needed the funds to keep the U.S. company afloat. Hunter did not care who received the checks and did not know who actually received the money – the Mowers and the U.S. company were one and the same to Hunter.

Marija Lee, who was running the bonus program in Australia, pulled the Neways 1 through 7 checks each month and gave them either to Lyn Knarston or Hunter. Hunter would mail the checks in a separate envelope to Thomas Mower at Neways each month, along with the monthly distributor statements for each entity. In 1995, the checks began being wired to the Mower Properties bank account.

John Dwyer, the Financial Controller of Neways Australia since September 1994, stated

in a January 1998 Affidavit stated that, the monthly distributorship bonus payments which were wired to Mower Properties were “for seven distributorships owned by Thomas Mower at the base of the multi-level marketing tree of Neways Australia.” Robert Nichol was a chartered accountant at Deloitte Touche in Australia who, since 1992, performed accounting work for Neways Australia, including preparation of financial statements and tax returns. In a January 1998 Affidavit he stated that, to his knowledge “there have been no withholdings on the Neways Intl. (Australia) Pty. Ltd. distributorship payments made to Thomas Mower/Mower Properties, or any Mower entity for the distributorships owned or controlled by Thomas Mower.”

Neways Malaysia, like Neways Australia, was not profitable in the early years. However, once it became profitable, the GM instructed Marija Lee, as she was instructed in Australia, to restructure the distributorship tree, adding seven entities to the top of the tree. Management told her the name to assign to each entity.

When Bobby Pang¹² began working for Neways Malaysia, he saw distributorship positions for Mower Properties 1 through 7 on the bonus reports. Michael Cunningham told Pang that these were Thomas Mower’s distributorships. These distributorships automatically qualified for bonus payments each month; they did not have to qualify by purchasing products like other distributorships. Pang also talked directly to Thomas Mower and Mower called them “my distributorships;” he would become very angry if he did not get the checks on time. Mower told Pang to combine all 7 checks and have the bank wire money or issue one check. Marija

¹²Bobby Pang did not testify at trial. However, his previous statements to the government were corroborated by Marija Lee’s trial testimony. She testified that the Neways 1 through 7 distributorships operated in the same manner in both Australia and Malaysia.

Lee, who ran the bonus program, pulled the bonus checks and statements for Pang to send to the Mowers. Pang would go to the bank and get a demand draft or wire transfer and he would send the draft with bonus statements separately to Thomas Mower. Pang was also aware of the seven distributorships at the top of the Australian downline because he talked frequently with Michael Cunningham.

Pang recalled that, just before he left Neways Malaysia, there was talk about changing the name of Mower Properties 1-7 to different company names. Pang did not think that it looked good for Mower to have seven distributorships at the top of the tree in his own name. As owner, Mower was entitled to the funds, but company policy directed that individuals could only own one distributorship in the company. Pang thought a name change would make it less obvious that the owner was in the downline. The names of the distributorships were changed shortly before Pang left the company to: Thomas Mower, Rezults, M. Trust, M. Properties, Bioscience, Eclat and CC Corp.

The distributorships in Australia and Malaysia did not have written distributorship agreements. They were numbered with zeros where the SSN field required a number to be associated with the entity. That is, they were numbered 000-00-001 through 000-00-007. They were the only distributorships with zeros. Other foreign distributorships were numbered with triple numbers associated with their countries. For example, Malaysia was 888, plus additional numbers completing the SSN field and Australia began with 333.

Patricia Anderson, Thomas Mower's personal assistant in the United States, stated that the Malaysian commission checks and downline reports would arrive at Thomas Mower's office

addressed to him. Initially, she would open the envelopes and leave them for Mr. Mower. He would place them in his desk drawer. Eventually, Thomas Mower instructed her to deposit the checks into a bank account he controlled known as the Rezults account. Anderson never gave the checks to corporate accounting and she was the only person who had authority to open or have access to Thomas Mower's mail.

The Mowers used their commission income in a variety of ways. In 1994, \$373,388.93 of Australian and Malaysian commissions were used by the Mowers to purchase property known as Hobble Creek. This property was titled in the name of the Mower Family Trust, a revocable living trust, of which Thomas and Leslie Mower were trustees and beneficiaries. The checks were not deposited into any bank account, but were endorsed directly over to the sellers of the Hobble Creek property. Approximately \$55,302.83 of the Australian commissions were deposited into Leslie Mower's personal savings account.

F. Unreported Income

In filing their joint individual tax returns, the Mower's reported none of their overseas commission income and only about half of their domestic commission income. Tom and Leslie Mowers' reporting history on their Individual Income Tax Returns, Forms 1040 did not mirror the exploding success of their companies, as they reported minimal income

Year	W-2 Income	Sch. E Income	Sch. C Income	Tax	Owed (Ref)	Prepared by
1990	\$26,000	\$24,570	\$0	\$3,791	\$4,041	Gilbert & Stewart
1991	\$0	\$60,994	\$0	\$7,319	\$2,561	Gilbert & Stewart
1992	\$31,500	\$0	(\$1,755)	\$1,189	(\$2,635)	Gilbert & Stewart
1993	\$213,064 ¹³	\$0	\$16,000	\$58,506	\$48,697	Richard Wogksch
1994	\$88,800	\$68,614	\$4,797	\$31,818	(\$17,614)	Annette Jenkins
1995	\$17,077	\$70,120	\$5,576	\$24,321	\$11,159	Gilbert & Stewart
1996	\$0	\$75,054	\$5,425	\$19,195	\$1,108	Gilbert & Stewart
1997	\$0	\$111,000	\$6,401	\$25,000	\$6,600	Gilbert & Stewart

In 1993 and 1994 the Mowers' Forms 1040 were prepared in-house, by Richard Wogksch and Annette Jenkins, respectively. Richard Wogksch stated that he did not want to sign the 1993 tax return because he knew income was missing and told Leslie Mower that. Annette Jenkins worked in the accounting department at Neways and was asked by Leslie Mower to assist in the preparation of the Mowers' individual income tax returns. Leslie Mower came over to Ms. Jenkins' home to have the returns prepared. Mrs. Mower brought in a list of checks, Forms 1099, Forms W-2 and the amounts that should be included as Schedule C income. Ms. Jenkins asked Leslie Mower questions regarding income and then prepared the return using a computer

¹³ In 1993, while their W-2 income substantially increases to \$213,064, according to witnesses and Internal Revenue Service documents, this W-2 is a combination of both W-2 and 1099 income.

program while Leslie Mower watched. Leslie Mower informed Annette Jenkins that, with regard to the MP Trust 1099, she had not received in excess of \$438,000 in checks, but had turned the checks back into the company. Ms. Jenkins, for want of better place to account for it, took a bad debt expense on the Mowers' Schedule C, thereby reducing their income by that amount. Leslie Mower was not being truthful; she had in fact received all of those checks and had deposited a substantial portion of them into the Mower Properties bank account.

A few years after Gilbert and Stewart¹⁴ had terminated their relationship with the Mowers and Neways U.S., Leslie Mower called Lynn Gilbert and asked if he could help prepare the Mowers' personal income tax returns. Leslie Mower came in with Karin Lane to discuss the preparation of the first personal return. After that, Gilbert dealt with Karin Lane.

Karin Lane, with Leslie Mower's help, gathered all of the tax return information in the later years. Leslie Mower provided Karin Lane with the information for the preparation of the Mowers' 1995 and 1996 tax returns. She asked Mrs. Mower questions to try to make sure that all of the income was being reported. Karin Lane filled out a questionnaire from Gilbert & Stewart to assist in the preparation of the returns; among the questions was whether Leslie Mower and her husband had any income from foreign sources. Leslie Mower said "no." Karin Lane testified that she went over each question with Mrs. Mower.

None of the information relating to the unreported income was provided to Karin Lane during the preparation of these returns. She was not provided any information on the Results

¹⁴ Lynn Gilbert and Roxanne Wells (from Grant Thornton) did not testify at trial, however, they were interviewed and their statements for the basis for the information.

bank account, where a large amount of the unreported income was deposited. In fact, she did not learn about the existence of this account until late 1997 after the I.R.S. showed up. She did not include the money from Neways Australia that was wired into the Mower Properties account because she was told by “somebody at Neways” that the money was a loan to Mower Properties for the building of a warehouse.

G. Concealment

1. False Employer Identification Numbers and Social Security Numbers

The Mowers used false Employer Identification Numbers (E.I.N.) or Social Security Numbers (S.S.N.) and separate bank accounts with false E.I.N./S.S.N.’s to conceal their receipt and control of the money. The Mowers used this unreported income to purchase assets, including the Hobble Creek property and the Neways warehouse, which benefitted their other wholly owned corporation, Mower Properties. Additionally, Thomas Mower concealed from the I.R.S. in excess of \$1 million of Neways, Inc.’s gross receipts received from Neways Australia.

2. The I.R.S., the Interview and the Phone Messages

The actions of the Mowers and James Thompson really heated up when the I.R.S. showed up in March 1997 at Neways U.S.’s corporate offices. On March 27, 1997, I.R.S. Special Agent Elder attempted to interview Thomas E. Mower at Neways U.S.’s corporate offices. The Special Agent was informed that Mr. Mower was not present and gave a receptionist a letter for Mr. Mower that informed Mr. Mower that he was under investigation for his personal tax liability.

Allen Davis¹⁵ testified that he and James Thompson met briefly with the special agent on this occasion.

Davis and James Thompson then discussed the investigation with Mr. Mower, decided the I.R.S. might be interested in the purchase of Hobble Creek, and looked for documentation about the purchase. Thompson and Davis found no documentation regarding the purchase of Hobble Creek. Prior to further contact with the I.R.S., Thompson, Davis and Mr. Mower had a conference call with Michael Cunningham of Neways Australia and requested information about the nature of the money used to purchase Hobble Creek. Cunningham informed them that he thought the payments were distributor payments.

Thompson created a loan document to support the purported loan for Hobble Creek. The loan document indicated that Neways Australia loaned money to the Mower Family Trust to purchase Hobble Creek. This was despite the telephone conversation prior to Elder's arrival where Michael Cunningham informed Thomas Mower, James Thompson and Allen Davis that these were likely distributorship payments to the Mowers. There were no loans between Neways Australia and the Mower Family Trust. The loan document was signed by Tomas E. Mower.

On March 31, 1997, Special Agent Elder returned to Neways U.S. and interviewed Thomas E. Mower in the presence of his attorneys, James Thompson and Allen Davis. During this interview, Thomas E. Mower stated that the funds used to purchase Hobble Creek were a loan from Neways Australia. He did not indicate that the funds were distributorship or

¹⁵ Allen Davis testified pursuant to a letter of immunity, protecting him from criminal charges concerning his involvement in the creation and passing of the false loan document to the Special Agent.

commission payments. At the end of the interview, James Thompson asked Special Agent Elder if there was anything else he could provide to the I.R.S. Special Agent Elder responded that he would like any documents relevant to Hobble Creek. After this request, Davis and Thompson left the room where Davis argued with Thompson about producing the document; Thompson felt this was a way to establish the loan and satisfy the I.R.S., despite the fact that Cunningham had said the funds were distributor payments and the lack of any documentation to that effect. A receptionist provided the purported loan document to James Thompson, who in turn handed it to Thomas E. Mower who then gave it to Special Agent Elder. Both Thompson and Mr. Mower looked at the document before giving it to the special agent.

James Thompson attempted to contact Special Agent Elder regarding this interview and the Hobble Creek property by leaving phone messages on the special agent's voice mail on April 4 and April 8, 1997. Special Agent Elder's impression of these messages was that James Thompson was saying "we gave you everything. I don't think you need to go any further."

Special Agent Elder also interviewed Thomas E. Mower and James Thompson on August 11, 1997 in order to get permission to inspect Australian records. During this meeting, it was again represented to the special agent that a loan from Australia existed.

3. Amended Tax Returns

After the March 31, 1997 interview with the I.R.S., amended personal tax returns that reported some of the overseas commission income were prepared for the Mowers. Davis and Karin Lane had concluded that, based on the character and use of the funds, the money was the

Mowers' personally. However, these returns were never filed with the I.R.S.¹⁶ Allen Davis testified that Tom Mower decided that the money should not be reported on the personal returns, but should instead be reported on the corporate income tax returns, despite Michael Cunningham's conclusion that the funds were for the Mowers' distributorships. Leslie D. Mower was apprised of the passing of the loan document and she knew that amended individual income tax returns had been prepared. The Mowers caused Neways U.S. to file two sets of amended corporate returns which reported some of their overseas commission income as corporate income.¹⁷ Leslie D. Mower signed these amended corporate tax returns.

II. **GOVERNMENT'S POSITION REGARDING SPECIFIC SENTENCING ENHANCEMENTS AND OTHER SENTENCING ISSUES**¹⁸

The government objects to the 1997 edition of the Guidelines Manual being used in this case. Under U.S.S.G. § 1B1.11(a) and Tenth Circuit law, the Court should use the Guidelines

¹⁶ Gilbert and Stewart was approached by the Mowers to prepare amended individual income tax returns for 1994 through 1996. Lynn Gilbert does not know if these returns were ever filed; the evidence shows that they were never filed.

¹⁷ Grant Thornton prepared Neways amended Forms 1120 for 1992 through 1994. They did not receive an explanation as to why the amended returns were being filed at such a late date, other than faxed instructions to amend the returns with the figures provided and to give the explanation that the income had been left off the original returns.

Gilbert and Stewart prepared all of the second amendments of Neways corporate return. Karin Lane approached Lynn Gilbert to complete the amended returns. She provided the Rezults account spreadsheet and the summaries prepared by her. Gilbert also received copies of the original and amended returns prepared by Grant Thornton. Gilbert asked why Grant Thornton was not preparing the amended returns and was told it had something to do with a "timeliness issue." Gilbert had already completed the amended individual returns and thought that the additions to the corporate return were in addition to the increases on the personal returns.

¹⁸ Since the final PSR has yet to be filed, the government reserves the right to make any additional formal objections to the Report at that time. On July 28th the government served the Probation Officer and opposing counsel with its objections and filed a copy with the Court.

Manual in effect on the date that the defendant is sentenced. U.S.S.G. § 1B1.11(a); United States v. Sullivan, 255 F.3d 1256 (10th Cir. 2001). The last overt act of the conspiracy was January 11, 2002, after the November 1, 2001 amendments to the United States Sentencing Guidelines. Therefore the 2005 Guidelines Manual which is in effect at the time of sentencing should be applied.¹⁹

 A. **Government’s Position on Tax Loss and Relevant Conduct pursuant to U.S.S.G. §§ 1B1.3 and 2T4.1**

The government, has previously argued its position concerning the tax loss in its Proposed Findings of Fact and Motion for Reconsideration. It incorporates by reference all of its factual and legal arguments made in its Motion for Reconsideration concerning the Court’s tax loss determination, references the above stated facts as relevant to the tax loss determination under Rule 32 and realleges that the correct intended tax loss should be as follows:

The total tax loss relating to Count One of the Indictment is \$1,553,661. Thomas E. Mower, Leslie D. Mower and James Thompson are each responsible for the entire tax loss relating to Count One. This tax loss is comprised of the \$1,262,081 tax loss relating to the Mowers’ personal tax evasion for years 1992 through 1997 and the \$291,280 tax loss relating to the concealment of \$800,000 of Neways U.S.’s corporate receipts as a loan from foreign entities

¹⁹ “The one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses committed in a series will be sentenced together under the Sentencing Guidelines Manual in effect at the end of the series. Thus, a defendant knows, when he continues to commit related crimes, that he risks sentencing for all of his offenses under the latest, amended Sentencing Guidelines Manual. Analogous to a continuous criminal offense, like conspiracy, the one book rule provides notice that otherwise discrete criminal acts will be sentenced together under the Guidelines in effect at the time of the last of those acts.” U.S. v. Sullivan, 255 F.3d at 1261, citing, United States v. Bailey, 123 F.3d 1404-05 (11th Cir. 1997).

on the 1991 Images & Attitudes tax return as a loan.

The tax loss for Counts Two through Seven of the Indictment is \$1,262,081. This is due to the failure of Thomas E. Mower and Leslie D. Mower to report their receipt of personal commission income on their Federal Income Tax Returns, Forms 1040. Thomas E. Mower and Leslie D. Mower had a tax due and owing of \$66,402 in 1992 (Count Two), \$213,843 in 1993 (Count Three), \$381,247 in 1994 (Count Four), \$225,661 in 1995 (Count Five), \$217,774 in 1996 (Count Six), and \$157,154 in 1997 (Count Seven).

B. Government's Position on Enhancement pursuant to U.S.S.G. § 2T1.1(b)(2) - Sophisticated Concealment

Under U.S.S.G. § 2T1.1(b)(2), the offense level should be increased by two levels because the evidence at trial established that Thomas E. Mower and Leslie D. Mower used sophisticated means to carry out their conspiracy and tax evasion scheme, in addition to using sophisticated means to impede discovery of the nature or extent of the crime.

According to the Sentencing Guidelines, "although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes." Moreover, the Sentencing Guidelines, for purposes of illustration, state that "sophisticated concealment means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment." United States v. Kontny, 238 F.3d 815, 821 (7th

Cir. 2001); United States v. Lewis, 93 F.3d 1075, 1082 (2d Cir. 1996).

The enhancement properly applies if the efforts go beyond the concealment inherent in tax fraud. In United States v. Guidry, 199 F.3d 1150, 1158 (10th Cir. 1999), the Tenth Circuit correctly distinguished cases dealing with simple falsehoods on a tax return and sustained the enhancement where the defendant had taken additional steps (short of opening foreign bank accounts or using corporate shells) to conceal her income. These acts of concealment allow defendants to not only conceal their income from the I.R.S., but make it difficult to uncover and ascertain the extent of the tax loss suffered by the government. U.S. v. Guidry, 199 F.3d at 1158. Moreover, even if certain acts do not constitute sophisticated means when considered in isolation, they can constitute sophisticated means when viewed in the aggregate. United States v. Tandon, 111 F.3d 482, 491 (6th Cir. 1997).

The evidence established the extensive use of fictitious/nominee entities and false and fraudulent social security numbers. The heart of the concealment of their income was the use of nominee names – Neways 1 through Neways 7 in Australia and Malaysia, and the use of bank accounts with false or misleading social security numbers in order to evade reporting to the I.R.S.. Thomas and Leslie Mower utilized the nominee names in order to conceal their ownership of the distributorships. The names of the nominees changed continuously, from Images and Attitudes 1-7, to Neways 1-7 to Mower Properties 1-7 and the entities had bogus E.I.N./S.S.N. associated with them so as to not trigger reporting requirements in the United States. Furthermore, on the Mowers' own bank accounts which they used to deposit the unreported commissions, they utilized either their childrens' social security numbers or social

security numbers of unknown individuals to conceal control and ownership of the bank accounts.

Thomas and Leslie Mower also created or caused individuals to create false and fraudulent documents to conceal their income from the I.R.S. Initially, Thomas Mower caused false loan documents to be passed to the Revenue Agent during the earlier 1992 audit and in 1997, James Thompson, Allen Davis and Thomas Mower caused a false loan document to be presented to Special Agent Elder. Leslie Mower was fully aware of the passing of this loan document, as Allan Davis testified he had informed her of this event. James Thompson made two phone calls to the I.R.S. in the hopes of preventing the investigation from continuing. Thomas and Leslie Mower provided false information to numerous return preparers for the preparation of the false amended Forms 1120 for Neways US. In the face of being caught, Thomas and Leslie Mower caused additional false and fraudulent tax returns to be prepared which falsely reported their personal income as corporate income.

These were not bank accounts associated with their company, but were bank accounts opened and controlled solely by the Mowers. The Mowers had just finished the 1992 audit and learned one important thing. The I.R.S. was interested in where you deposited your money. If you could take increased steps to remove yourself from the identifying or reporting information, then it might be less likely that the I.R.S. could trace the funds to you. Except for a few instances where their son, Thomas Mower Jr. had signatory authority on the account, the Mowers were the only individuals using these accounts. Not one of these accounts has a Neways employee as signatory.

_____The scope and nature of these acts illustrates that the Mowers' tax evasion scheme was

not your “run of the mill” tax case, but a sophisticated and complex conspiracy to conceal from the I.R.S. over \$3 million in income. Contrary to defendant Thomas and Leslie Mower’s contention that the level of sophistication existed for the purpose of running the business and was not related to the criminal conduct, the facts of this case do not support this conclusion. The nominees, the use of bank accounts with false or misleading social security numbers and the use of false loan documents were intended to impede the discovery and extent of the offense. Therefore, a two level sentence enhancement for sophisticated means under U.S.S.G. § 2T1.1(b)(2) should be applied to both Thomas and Leslie Mower guidelines calculation.

C. Government’s Position on Enhancement pursuant to U.S.S.G. § 3B1.1 (c) - Aggravating Role in the Offense or Otherwise Extensive

Under U.S.S.G. 3B1.1(a), the offense level should be increased by four levels because the evidence established at trial that Thomas and Leslie Mower had an aggravating role in the offense and/or because the criminal activity was “otherwise extensive.”

1. Leader Organizer

The Court should consider “the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation and planning or organizing the offense, the nature and the degree of control and authority exercised over others” when examining whether a defendant had a leadership and organizational role, rather than just management or supervision. United States v. Beaulieu, 893 F.3d 1177, 1182 (10th Cir. 1990); Commentary to Sentencing Guidelines § 3B1.1.

The Tenth Circuit, in comparison, has defined “supervisor” for purposes of the two point enhancement under U.S.S.G. § 3B1.1(c) as an individual who exercised “any degree of direction or control over someone subordinate to them.” United States v. Backas, 901 F.2d 1528, 1529 (10th Cir. 1990) (In order to be a supervisor, one needs merely to give some form of direction or supervision to someone subordinate in the criminal activity for which the sentence is given).

In this conspiracy, there were numerous members, including Thomas E. Mower, Leslie D. Mower, James Thompson, and unindicted co-conspirator Allen Davis. This does not take into account the other employees and individuals who assisted the Mowers in carrying out their tax fraud scheme, including Randy Lindstrom, Anthony Martin, Richard Wogksch, and Michael Cunningham. Furthermore, there were multiple witnesses at trial who testified that Thomas and Leslie were the bosses. They called the shots when it came to defrauding the I.R.S. Both Thomas and Leslie Mower had contact and decision making authority in Australia. Thomas Mower helped set up the downlines and Leslie Mower would call John Hunter and ask where the checks were. In the U.S., Leslie Mower would instruct the Neways U.S. employees which distributorship checks should be pulled and set aside for her. The Mowers decided where to send the money and how to spend it. Thomas and Leslie Mower had responsibility for the personal and corporate income tax returns and directed employees as to how to have these tax returns prepared. They controlled what information should be disclosed to the return preparers and they both signed the false corporate and personal tax returns.

The government alleges that given the definition of “supervisor” for purposes of the enhancement, both Thomas and Leslie Mower’s activities far exceed that description and their

base offense level should be enhanced by four levels as “leader/organizers.”

2. Otherwise Extensive Criminal Activity

According to the Sentencing Guidelines commentary, in assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. The Court should look at “the totality of the circumstances, including not only the number of participants, but also the width, breadth, scope, complexity and duration of the scheme.” United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991). Thus, a fraud that involved only three participants but used the unknowing services of many outsiders should be considered extensive.

Here, the Mowers’ scheme to defraud the United States was otherwise extensive. The Mowers were convicted of a conspiracy that spanned more than ten years. They not only employed the services of individuals who knowingly participated in the scheme, but exploited numerous Neways U.S., Neways Australia and Neways Malaysia employees. Furthermore, they knowingly took advantage of accountants at Gilbert & Stewart and Grant Thornton to carry out their scheme by flip-flopping between the accounting firms in order to avoid having to answer questions concerning the numerous amendments. Thomas and Leslie Mower’s base offense level should be increased by four levels because their tax fraud scheme was “otherwise extensive” under U.S.S.G. § 3B1.1(a).

D. **Government’s Position on Enhancement pursuant to U.S.S.G. § 3B1.3 - Use of Special Skill**

Under U.S.S.G. § 3B1.3, a defendant’s offense level should be increased by two levels, if

they used a special skill, in a manner that significantly facilitated the commission or concealment of the offense. Here, James Thompson was an attorney who specifically used his role as such to carry out, further and conceal the conspiracy.

A special skill, according to the Sentencing Guidelines commentary, “refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists and demolition experts.” U.S.S.G. § 3B1.3 Application Note 3. The government must show that the defendant used the special skill to facilitate the commission of the crime. United States v. Gandy, 36 F.3d 912, 915 (10th Cir. 1994).

In the instant case, James Thompson used his special skill as a lawyer to facilitate and carry out both the conspiracy and the obstruction. James Thompson created the false loan document which was provided to Special Agent Elder on March 31, 1997. At the end of this interview, Thompson asked whether there was anything else he could provide to the I.R.S. Elder responded that any documents relevant to Hobble Creek would be appreciated. In response, Thompson, as explained by Davis during his trial testimony, provided the loan document to the I.R.S. as a way to establish the loan and satisfy the I.R.S. On April 4 and 8, 1997, Thompson, in his representative capacity, called Elder and continued to obstruct and impede the I.R.S.’s ability to uncover the extent of the fraud by again asserting that Hobble Creek had been paid for by a loan from Australia.

Thompson utilized his position as a lawyer to draw up a loan document and to assert his influence over Special Agent Elder with the hopes that his actions would make the case go away.

Therefore, James Thompson's base offense level should be enhanced by two points for use of a special skill under U.S.S.G. § 3B1.3

E. Costs of Prosecution

By statute, costs of prosecution is a mandatory part of a defendant's sentence. United States v. Jungels 910, F.2d 1501, 1504 (7th Cir. 1990). The Eighth Circuit, however, has tempered the word "mandatory" by indicating that the district court must take into account the defendant's ability to pay. United States v. May, 67 F.3d 706, 708 (8th Cir. 1995). The Government's position is that all three defendant's have the ability to pay. The total costs of prosecution is \$14,255.11.

F. Acceptance of Responsibility

The burden of proof for establishing entitlement to a reduction of the offense level for acceptance of responsibility is on the defendant, who must establish the mitigating factor by a preponderance of the evidence. United States v. Rogers, 899 F.2d 917, 924 (10th Cir.1990).

A defendant is entitled to a two level adjustment to his offense level if he "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1. However, "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." See Id. Application Note 2; United States v. Guavin, 173 F.3d 798, 806 (10th Cir. 1999); United States v. Salazar-Samaniega, 361 F.3d 1271, 1281 (10th Cir. 2004). "Conviction by trial," Application Note 2 to Section 3E1.1 states, "does not automatically preclude a defendant from consideration" for an adjustment for acceptance of responsibility.

However, situations in which the defendant puts the government to its burden of proof at trial and nonetheless receives credit are “rare” and usually involve the defendant challenging aspects of the case unrelated to factual guilt, such as making “a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct.” Id. In these cases, “a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.” Id.; United States v. Jaramillo, 98 F.3d 521, 526 (10th Cir. 1996); United States v. Wooten, 377 F.3d 1134, 1146 (10th Cir. 2004).

Thomas E. Mower, Leslie D. Mower and James Thompson are not entitled to acceptance of responsibility based on the sole fact that they put the government to its burden of proof at trial and none of their defenses at trial involved their challenging aspects of the case unrelated to factual guilt, such as making “a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct.” At trial their defenses were factual innocence - that they did not know what they were doing was illegal or that they did not have the intent to commit the crime. Thus, under the application note and case law, this case would have to be truly exceptional to warrant the departure. United States v. Salazar-Samaniega, 361 F.3d at 1281. However, nothing in the trial record, the defendants’ pre-trial conduct or statements suggests that there is any exceptional reason to make the downward adjustment.

Furthermore, Thomas Mower’s post-trial conduct does not rise to the level of acceptance of responsibility. He has not admitted his guilt, in fact, he still denies it. While Mr. Mower has filed tax returns for 1998 through the present, the majority of these years are not at issue in this case for purposes of unreported income. Thomas Mower was convicted of personal tax evasion

for 1992 through 1997 and none of these tax returns have been amended.

Leslie Mower and James Thompson have not put forth any specific reasons as to why they are entitled to acceptance of responsibility and the government will respond to their specific arguments if and when they make them.

Therefore, the Court should deny Thomas Mower, Leslie Mower and James Thompson a three point reduction in the total offense level for acceptance of responsibility.

G, Special Conditions of Supervision

The government objects to not including a mandatory condition of supervision which would require Thomas and Leslie Mower to cooperate fully with the I.R.S. This type of condition is routine in most criminal tax cases and is appropriate in this case. Neither Thomas nor Leslie Mower have filed amended tax returns for 1992 through 1997, the years for which they were convicted of personal tax evasion.

The government requests the following condition of supervision: Defendant is required to meet and cooperate with Internal Revenue Service officials in the determination and satisfaction of his civil tax liabilities. Defendant further agrees to make all books, records and documents available to the Internal Revenue Service for use in computing Defendant's taxes, interest and penalties for the years 1989 through 2002. Defendant agrees to cooperate fully with the I.R.S. in filing true and correct tax returns for the years 1989 through 2002 and in determining his corrected tax liability for the years 1989 through 2002 including any penalties and interest owed. Defendant agrees to make satisfactory arrangements with the I.R.S. for payment of any taxes, penalties and interest owed.

DATED this 4th day of August, 2006.

STEPHEN SORENSON
Acting United States Attorney

 /s/ Caryn D. Mark
CARYN D. MARK
JOHN E. SULLIVAN
Special Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

Neil Kaplan

Max Wheeler

Scott Williams

/s/ Caryn D. Mark