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March 27, 2015

U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Re: Proposed Amendment to U.S.S.G. §2B1.1

To Whom It May Concern:

I write to contribute comment on the Commission's consideration of a possible amendment to the use of and method for calculating "intended loss" for guideline purposes.

"Pound for pound," I received the worst sentence ever in 56 years of practice based upon intended loss, a story most succinctly told, in the portion of our Brief for Appellant in the case of U.S. v. Richard Margulies, USDC, ED PA, #08-736, a copy of which is enclosed for your information.

The guidelines in this matter called for a sentence of 63-78 months for $1,000 kickback on a $5,000 sale of treasury stock by the CFO of a start-up bio-medical company in desperate need of funds to complete second-phase testing. The "buyer" was a government informant trying to work off his own sentencing exposure for a $44 million- dollar fraud.

The sentencing judge calculated the intended loss at $2.5M - $7M, although there was no proof of any intention to "dump" the stock; but he did grant a 12-month downward departure based on the fact that it was a sting, there was no actual loss, and the defendant had a good motive.

The sentence was affirmed on appeal. 442 Fed. Appx. 727, 2011 WL 3728552 (CA3, #10-3846).

Please call if you would like any additional information about this matter.

Thank you for your consideration.

Yours very truly,

STEPHEN ROBERT LaCHEEN

SRL/rab
Enclosures
cc: Mr. Richard Margulies

Docket No. 10-3846

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD J. MARGULIES,

Appellant.

On Appeal from Judgment of Sentence in a Criminal Case
filed and entered September 7, 2010, in No. 2:08-CR-736,
in the United States District Court
for the Eastern District of Pennsylvania (Robreno, J.)

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BRIEF FOR APPELLANT MARGULIES

(including Volume 1 Appendix, pp. 1a-34a)

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b. Statement of Facts

At the time of the plea, Mr. Margulies agreed (2App. 62a) that the following factual statement, as recited by the prosecutor from the government's plea memorandum, was true:

> The Defendant was the chief financial officer and a director of Adv[a]tech, Incorporated, which was a biotechnology company. It was publicly traded under the ticker symbol ADVA on the pink OTC market, which is an inter-dealer electronic quotation and trading system in the over-the-counter securities market, commonly referred to as the pink sheets, which is a national securities exchange.
>
> On May 21st, 2008, the Defendant met with Eduardo Rodriguez, who has since pleaded guilty to various stock-manipulation schemes before Judge Dalzell, and also met with an individual who was secretly cooperating with the Government, who we have identified as the CW [that is, Waltzer]. And, during that meeting, which was recorded, as well as all the other meetings were recorded in this case, they discussed the scheme to artificially inflate the price of Adv[a]tech stock. Specifically during the meeting, they agreed that the Defendant would pay Rodriguez and the CW to cause others to purchase and hold Adv[a]tech stock, this would create artificial demand in the stock and drive the price up. The Defendant told Rodriguez and the CW that he personally owned about 30 percent of Adv[a]tech's stock and that he otherwise controlled the free-trading stock and, with that level of control, he would be in a position to make sure that this fraudulent buying was effective in their scheme.
>
> During the meeting, the Defendant agreed to pay Rodriguez and the CW 20 percent of the cost of the shares in Adv[a]tech stock that they or individuals working with them purchased and held as part of the scheme. The Defendant further agreed to provide them with confidential shareholder lists and access to news releases before they became public.
>
> These shareholder lists are valuable to illegal stock manipulators because they help them keep track of the buying and the selling in the stock, and the news releases are helpful because they can justify the purchases based on the news and, therefore, conceal the scheme.
>
> During the meeting, the Defendant explained to Rodriguez and the CW that, to avoid scrutiny, he wanted to move Adv[a]tech's stock up slowly. Initially, he

said they should keep the price between a dollar and $1.50 a share and, at the time of this discussion, the price was at about 30 percents [sic]. Defendant stated that he wanted the co-schemers to purchase between 150,000 and $250,000 of his stock, but they should spread the purchases out over time. He said that, with about 100,000 to $200,000 of funding, the stock could be trading at eight or $9 a share. Following this meeting, they continued to discuss the fraud scheme.

On May 30th, 2008, the Defendant e-mailed to the CW a confidential list of shareholder positions in Adv[a]-tech. On June 11th, 2008, the Defendant told the CW by telephone that an upcoming Adv[a]tech press release would announce an agreement with a major university and that they should, quote, "move the stock up nice and slow so it doesn't look like we're a bunch of idiots."

On June 12th, 2008, the Defendant told the CW by telephone that he was issuing the press release on June 16th and he expected it to create trading activity in the stock. To avoid scrutiny, the Defendant said that the individuals who were purchasing the stock should not do so until the news was released.

On June 16th, 2008, before its public release the next day, the Defendant e-mailed the CW an Adv[a]tech press release announcing a research agreement with a major university, and then they had some further discussions about buying the stock. The Defendant agreed to wire the CW's fee after the trades were cleared, but to conceal his involvement in the scheme the Defendant said that he would make the payment from an account that was not his. The same day, at about 3:20 p.m., the Defendant and the CW discussed that the news had not yet been released and the CW should refrain from purchasing the stock until the news was released because he did not want buying in the absence of news. Later, he said the release was available and they should purchase the stock as agreed.

On June 17th, 2008, the CW caused purported retail purchases to be made of about 1,000 shares of Adv[a]-tech stock at a price of about 90 cents a share for $900. These trades were paid for using undercover funds of the FBI.

On June 18th, the Defendant had the CW cause retail purchases to be made of about 4100 shares of Adv[a]-tech stock at about $1 a share for $4100, and those trades were also settled with FBI funds.

> On June 19th, 2008, the Defendant discussed with the CW that he himself had bought shares of Adv[a]tech stock, to raise the price to a dollar. The Defendant confirmed that he was going to pay the 20-percent fee but, to conceal the scheme, he wanted to make the payments in multiple transactions from different accounts. He also confirmed that he would compensate Rodriguez for his participation in the scheme.
>
> On June 20th, 2008, the Defendant deposited into an undercover account maintained by the FBI at a financial institution in Philadelphia, Pennsylvania approximately $520 as partial payment to Rodriguez and the CW for the buying activity.
>
> On June 20th, 2008, the Defendant requested that the CW send him a fake invoice to disguise the deposit. The Defendant instructed the CW to direct the invoice to a shell company that he controlled. The Defendant also said that, to avoid detection, he should not communicate with him about the scheme by e-mail.
>
> Three days later, the Defendant deposited an additional $520 to pay Rodriguez and the CW for the initial buying activity, and that was also deposited in that F[B]I account in Philadelphia.
>
> On December 15th, 2008, the Defendant was arrested. He was advised of his rights; he waived those rights and spoke with the agents. He said that he knew it was illegal to pay the CW and Rodriguez to cause buying in Adv[a]tech stock. He had paid kickbacks for that unlawful buying from a separate company that he controlled and he had improperly provided the CW with non-public press releases.

2App. 54-62a. Mr. Margulies owned or controlled 1.475 million of the 5.6 million shares of Advatech,[3] a biotech company established in 1989. 2App. 207a. Advatech was undercapitalized. It held a potentially valuable patent on an electromagnetic technique for speeding the healing of wounds, which had been the focus of its activity since 2001. Id. Advatech's research contract with Johns Hopkins University was likewise genuine.

Mr. Margulies had known Michael Spiegel, Ph.D., Advatech's

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[3] Margulies owned 1.019 million shares outright.

"chief scientist" and Vice President for Research and Development, 2App. 221-22a, since Spiegel, then a graduate student, tutored him in high school. 2App. 238a. Dr. Spiegel had recruited Mr. Margulies to purchase an interest in Advatech in 2002 (2App. 135-36a) when the firm's CEO was dying. 2App. 238a. In 2003, at a critical stage in the company's development, he become Advatech's CFO. See id.; PSI ¶48(a), at 11. In that capacity, it was Margulies' responsibility to attract funding to the company. 2App. 238a. The scheme proposed to him by Rodriguez allowed him to fulfill that commitment. He would raise at least $100,000 (and possibly as much as $200,000) for Advatech, 2App. 199a, by selling some of the company's "house" or Treasury stock[4] -- then valued at only $0.30/share -- for at least $2 per share. 1App. 9a, 26-27a. This rise in the price would be accomplished in a dishonest and illegal manner.[5] Speaking between themselves after the May 21 meeting, with Waltzer's recording device still running, Rodriguez and Waltzer commented that what Mr. Margulies wanted was thus "more of a pump" than it was like a "pump and dump." 2App. 199a.

Judge Robreno appeared to credit this explanation when the court commented at sentencing that "good motives do not justify

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[4] Only about five million of the authorized 50 million shares had been sold previously. 2App. 229a.

[5] Judge Robreno noted that "None of the actions taken by Defendant, Waltzer, or Rodriguez would have resulted in a direct capital investment to Advatech." 1App. 9a. However, indirectly, the increased price would make the stock more attractive to investors by creating "the false appearance of an active market." 1App. 8a.

criminal conduct.[6] We do not adhere, and it would be wrong[] to adhere[,] to sort of a Robin Hood mentality, that is, that the particular nob[le] end which might have been involved in the crime[] would have justified it." 2App. 268a.

SUMMARY OF ARGUMENT

The 51-month sentence of imprisonment imposed in this case was based on a two-level downward variance from a determination of the Guidelines range. The calculated range, however, incorporated both a legal and a factual error in measuring the "loss." In a securities fraud case based on a "sting," loss can only be predicated on "intended loss," that is, the financial harm that the defendant actually, subjectively intended to impose on innocent buyers of the affected stock. Here, where the court agreed that the defendant intended fraudulently to induce from $100,000 to $200,000 of new investment, the court erred in holding him responsible for upwards of $2.5 million in losses, which could only occur if the defendant intended to sell all of his stock at the inflated price (a "pump and dump"). The district court reversed the burden of proof by ruling that an inference of intent to sell out should be drawn unless the

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[6] In its findings following the pre-sentence hearings, the court described as "untenable" the defense "position that this scheme cannot qualify as a 'pump and dump' scheme and is limited only to inducing capital investment ...." 1App. 15a. Why the court thought the defense interpretation was "untenable" was never explained. While the government's expert found the circumstances to be "consistent" with a "pump and dump" scenario, 2App. 122a, there was no direct or even indirect evidence that Mr. Margulies actually intended to "dump" his own shares when and if the price rose to $2 or more.

defendant demonstrated that his only intent was to attract investment.

Even if the district court applied the correct formula for estimating "loss," and did not misallocate the burden, its decision in this regard was predicated on a clearly erroneous finding. A preponderance of reliable information did not support the inference of a subjective intent to "dump" all of the defendant-appellant's stock once the price was "pumped" to a level sufficient to attract outside investment. Because the government will not be able to establish that either of these Guidelines errors was harmless, the appellant is entitled to a resentencing.

In addition, the court below wrongly ruled that it lacked authority to depart downward from the Guidelines range it had determined to be correct, on the basis that the recommended range overstated the seriousness of the offense. This ruling was directly contrary to this Court's decision in United States v. Kushner, 305 F.3d 194, 199 (3d Cir. 2002). For this second reason as well, the sentence is unreasonable, requiring a remand for resentencing.