UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

JEFFREY TOGNETTI,

Defendant.
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99 Cr. 0699 (DAB)

ORDER

DEBORAH A. BATTS, United States District Judge.

On January 26, 2000, the Defendant Jeffrey Tognetti was convicted after a jury trial on a one count Indictment charging him with securities fraud. Specifically, the Defendant was charged and convicted of violating 15 U.S.C. § 77q(a), which makes it a crime for a defendant to commit fraud in connection with the offering of securities. In order to establish that charge at trial the jury had to find that the Government established the following elements beyond a reasonable doubt:

> That in the offering or sale of share certificates of, and/or interests in Edge Money Management, the Defendant did any one or more of the following:
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> First--
> (1) employed a device, scheme or artifice to defraud, or
> (2) obtained money or property by means of untrue statements of material facts or failure to state material facts which made what was said, under the circumstances, misleading, or
> (3) engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser;
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> Second, that the Defendant acted willfully, knowingly and with the intent to defraud;

> Third, that the Defendant used, or caused to be used, any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the scheme.

Thus, to meet its burden at trial under these statutes, the Government did not have to prove any specific monetary loss caused by the Defendant's crime.[1] This, unfortunately is not the case at this stage of the proceeding, where, under the Sentencing Guidelines, the amount of loss is a crucial factor for the Government to establish in ascertaining the Guideline Offense Level. USSG § 2F1.1(b)(1); United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997). "For the purposes of subsection [2F1.1] (b)(1), the loss need not be determined with precision. The Court need only make a reasonable estimate of the loss, given the available information." USSG § 2F1.1, app. note 9.

The discrepancy between the Government's burden at trial under the statutes and at sentencing, under the Sentencing Guidelines, has created an evidentiary void that the Government has repeatedly ignored, despite numerous opportunities this Court

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[1] Indeed, after the jury returned a guilty verdict, the Court requested that the jury provide for its guidance at sentencing an advisory verdict on the amount of monetary loss they found resulted from the Defendant's crime. The jury found no monetary loss.

has given them to fill it.[2] See United States v. Ruggiero, 100

[2] Sentencing in this matter was originally scheduled for May 1, 2000. On April 12, 2000, the Court received a request for adjournment of sentencing because the Probation Department "had difficulties obtaining information from the Assistant U.S. Attorney" and therefore was "unable to complete the Offense Conduct, Offense Calculations, and Sentencing Options sections of the" Pre-Sentence Report ("PSR"). In light of the difficulties ascertaining the appropriate loss figure in this case, the Court scheduled a hearing on May 1, 2000, to discuss the loss figure and any other sentencing issues.

At the May 1, 2000 hearing, the Government asserted that the entire amount raised by Defendant from certain sources (the "Investors") counted toward the "loss" figure for purposes of USSG § 2F1.1, even though it was clear at trial, and the Government conceded, that at least some of that money was used by Defendant in ways that had been properly disclosed to the Investors. (See, e.g. Tr. of May 1, 2000, at 7-8.) The Court then directed the parties to prepare a joint submission within twenty days, itemizing the Investor money and the purposes for which it was spent, "based on the exhibits that went in at the trial." (Id. at 30; see also id. at 30-46.) At the end of the hearing, the Court also directed the parties to notify the Court "before you submit something that is like two separate huge submissions," in the event that another hearing was necessary. (Id. at 48.) Another hearing on the submissions was scheduled for May 31, 2000.

On May 19, 2000, the Court received a submission from Defendant regarding the appropriate loss figure. The cover letter from Defendant stated that the Government "has not responded to our requests regarding the submission of one chart outlining the Edge and Tognetti expenses." (Ltr. from Paul K. Rooney, Esq., dated May 19, 2000.) There was no submission from the Government and no response to the cover letter.

On May 26, 2000, in light of the single submission from the Defendant, and the Government's "[failure] to submit any materials in support of its theory of the approximate loss figure, and [the Government's failure] . . . to inform the Court that it had no intention of complying with the Court's direction to make a joint submission," (Order of May 26, 2000), the Court found that the Government had waived its arguments concerning the loss calculation. The Court adjourned the hearing on May 31, and directed that a new PSR be prepared in light of Defendant's submission.

F.3d 284, 290 (2d Cir. 1996) (Government bears burden of establishing, by preponderance of evidence, disputed facts relevant to sentencing).

Thus, for the following reasons,[3] the Court declines to accept the Guideline Offense Level recommendations as set forth in the PSR.

Appropriate Guideline Offense Level

A. USSG § 2F1.1 (Loss)

Defendant asserts that there should be no enhancement to the Guideline Offense Level because the intended loss was zero. (Def.'s Mem. of May 19, 2000, and Def.'s Mem. of Jul. 19, 2000.) However, the language of § 2F1.1 suggests that "intended loss"

On June 6, 2000, at 7:00 p.m., the Government submitted a curious letter in which they sought both an opportunity to submit arguments on loss, and conceded that they would have raised no new arguments other than those considered and denied by the Court at the hearing on May 1, 2000. (Ltr. from AUSA Alan R. Kaufman, dated Jun. 6, 2000.)

Ultimately, the Court reset sentencing for August 14, 2000, and directed that any Government submission relevant to sentencing be submitted on or before July 31, 2000, more than two months after the initial date for such submissions. (Order dated Jul. 24, 2000.) No submissions from the Government regarding any aspect of sentencing had been submitted to the Court between May 1, 2000 until July 31, 2000, fully three months after the Court's initial directive on May 1, 2000.

[3] Even though not required to provide advance notice, (United States v. Rivera, 96 F.3d 41, 43 (2d Cir. 1996)), the Court herein does so.

may be used as a substitute for actual loss only if it is greater than the actual loss. USSG § 2F1.1, app. note 8. Here, based upon the trial testimony of the Investors and the Defendant himself, the Court agrees with Defendant that there was no intended loss.

This is not to say, however, that the Government did not present any evidence to the jury relevant to loss during the trial. To the contrary, the Government introduced at trial Government-generated charts, (GX 1A, GX 2A, GX 3A, GX 4A, GX 5A, GX 6A, GX 7A), with thousands of pages of copies of checks, ATM withdrawal slips, bank statements, etc. From this evidence, the Government argued the jury could deduce (should they choose to wade through that evidentiary quagmire) that Defendant used Investor monies for purposes other than what the Investors were led to believe. The Government itself, however, did not do that homework.

One difficulty with the Government's analysis -- or lack thereof -- is that, from April 1997 on, the Government did not establish that monies coming in from non-Investors were not the monies used for the personal and undocumented expenses the Government claims were fraudulent. (*See* GX 1A, DX U4.) Indeed, by April 1997, the non-Investor funds entering the account exceeded the amounts spent by Defendant for questionable

purposes. Nor did the Government establish that the "interest" paid to the investors after April 1997, was not indeed from sources other than their own monies. At best, the Government established at trial that the actual loss was "interest" paid back to Investors, which could only have come from their own funds from January 1997 until April 1997, and personal expenses withdrawn from investor monies by Defendant when no other sources of monies were in the accounts in question.[4]

Further, the Government did not allow for any compensation at all to be paid to the Defendant from December 1996 through June 1997, even though some Investor witnesses, when asked, allowed that they expected Defendant would be compensated. (See, e.g. Tr. of Jan. 11, 2000, at 180, 213.) As of July 1997, the Government was willing to limit the Defendant to compensation as set forth in various drafts of an Offering Plan and Prospectus, (the "Private Placement Memorandum"), that some or all of the investors may have seen. The Government did not credit Defendant

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[4] The testimony at trial was at best ambiguous about whether the "3% return" checks issued to Investors in January through March 1997 were fraudulent. The Government maintains that these checks were really the Investors' principal being paid back to them as "return," but Defendant maintains that they were "future-looking" returns being paid now to be reimbursed from future earnings. (Tr. of Jan. 20, 2000, at 937-51.) Because at this stage of the proceedings the Government's burden is by a preponderance of the evidence, the Court will resolve this question in the Government's favor.

with any of the outlay for computer equipment, staff and business setup that all of the Investors said they saw personally.

During the Rule 29 motion and the charging conference, the Court expressed its concern to the Government that the Government's proof did not establish conclusively that there was a monetary loss as a result of Defendant's actions.[5]

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[5] See, e.g. Tr. of Jan. 21, 2000, at 1133-35:

> MR. OLDS: I'll explain it as I understand it. What Mr. Quinn did was whenever it was clear to him that money that was coming in should be attributable to Mr. Tognetti in terms of money coming in to Mr. Tognetti for Mr. Tognetti's personal expenses -- I'm sorry, money that was paid to him personally, he reflected that. But loans, for example, or money that came in from Andover, or loans that were deposited by other individuals presumably on behalf of Mr. Tognetti, he did not credit that to Mr. Tognetti. His method of putting together spreadsheet 1A [GX 1A] was only to credit Mr. Tognetti with deposits that he, Mr. Tognetti, himself made. That was how he constructed his spreadsheet.
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> THE COURT: That doesn't help the defendant. He [Mr. Quinn] was up here simultaneously testifying that every time there was a question, he did it in favor of the -- he said in favor of Mr. Tognetti, but I think that Mr. Rooney gave a specific example on his cross of how that just wasn't so. My concern is that if the government starts out with a theory that is so arbitrary on a mainly circumstantial evidence case, then it seems to me that there is a real burden shifting here from the government to the defendant, which is totally inappropriate. And for him to say that he assumed a loan to Tognetti was not a loan to Tognetti, I don't understand that.
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> . . .
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> Indeed, as an officer or an investigator for the United States Attorneys' Office, it seems to me in putting

The Government conceded as much.[6] The Government cannot now

> together a case that there is an obligation to go beyond just the face of the document. After all, there is a determination made to indict somebody criminally, and it seems to me, that other than just looking at the document with blinders on and not making any telephone calls or doing any follow-up investigation, I think Mr. Rooney's cross was quite effective establishing very little, if any, was done outside of the documents by Mr. Quinn.

See, e.g., Tr. of Jan. 21, 2000, at 1160:

> THE COURT: The jury is always expected to review exhibits that they ask to see. But when we are talking about I think it is safe to say thousands of pages --

. . .

> -- of mostly illegible microfiche, where even the parties and counsel have trouble reading them, that may be a Herculean task to thrust upon the jury. Again, this is where a little more in-depth analysis or organization or research or something might have been of assistance to the jury, even though, yes, you do have a right to throw everything at them, including the kitchen sink, and having them have to sort through it. I do acknowledge that this is certainly something that any litigant has a right to do.

See also Tr. of Jan. 18, 2000, at 563, 567, 590, 598 et seq., 616; see also Tr. of Jan. 21, 2000, at 1101, 1108 et seq., 1114 et seq., 1116.

[6] See, e.g., Tr. of Jan. 18, 2000, at 558-59:
THE COURT: I am just asking you, is there something that traces this money so that there is evidence to establish that $134,000 of that 174 [thousand, invested in January 1997] was lost in day trading?

MR. OLDS: I think I think the most correct answer is no, your Honor, for the following reason. We know that at the end of the day, the end of the day being when the accounts were closed out at W.S. Clearing and at Cygnet, all that was left was $40,000 . . .

. . .

I don't believe that the government put in specific evidence, nor did it focus on, how we got to the figure of $40,000. In other words, I don't believe that there is evidence in the record specifically that says that that money was lost, because, quite frankly, we weren't charging Mr. Tognetti with any improprieties with respect to his dealings with Cygnet . . . How we get to that figure, in all candor, your Honor is not something that the government focused on and, frankly, is not something that we have charged Mr. Tognetti with.

(emphases added.) But see Indictment ¶¶ 6, 11; Def.'s Mem. of Apr. 25, 2000, at 3-4.

See also Tr. of Jan. 18, 2000, at 591:

THE COURT: There is no support to attributing to Jeff Tognetti personally any and every cash machine withdrawal just because it's a cash machine withdrawal. He may have a point there. That's a close argument. There should have been some indication as to why this could not have been . . .

MR. OLDS: That's a fair point, your Honor.

See also id. at 1152-54:

THE COURT: Those wonderful investigators you had working for you could have made a call. They could have said, it shows it goes to this place, let me call them and ask them. It says cash to these people. Shall I call them and ask them? Time after time, Mr. Quinn, it never occurred to him.

MR. OLDS: Point taken, your Honor, but --

THE COURT: More than taken.

MR. OLDS: Understood, your Honor. But what also happened was that the subpoena was issued and was responded to. Documents were forwarded to the U.S. Attorney's office in response to that subpoena. Then, when there were issues that arose, which are good

issues and which your Honor is focusing on now, we raised those issues with the defense. We said, look, we have a lot of checks here to cash that don't reflect what you guys say that they reflect. You have notations on these checks. But where are the invoices, where are the receipts? We were told at varying times in some cases no receipts were ever given, in other cases receipts had been lost and misplaced.

THE COURT: You certainly can't think that that is inappropriate, considering that Mr. Quinn's 75 to 100 pages of notes are lost and can't be found. You can't hold him criminally liable for that explanation when you have the same one as to why he is not getting what may be Brady and Giglio material.

MR. OLDS: That is fine, your Honor. I understand that point and I won't argue with that point. But I will say this. There is enough that we have produced that we can verify where the payments went that were non-Edge business payments. So if your Honor wants to kick out everything that is questionable in your Honor's wisdom and say the government simply hasn't produced proof on that, the government would contend that there is more than enough remaining that shows that there were inappropriate, improper expenditures from the Edge account having nothing to do with the Edge business that evinced the scheme to defraud that the defendant engaged in . . . There isn't a whole lot of question, when Mr. Tognetti's check indicates down payment for a house, that that doesn't have anything to do with Edge business, or payments to his vet or payments for his children's tuition. Those can't even arguably be construed as being payments made in connection with the Edge business. So if you get rid of everything else and you are just left with that, that alone should be sufficient to send this case to the jury. The other issues or the other expenditures really go, the government would contend, to the weight that the jury is going to give them. The jury may decide the way your Honor seems to be leaning, that, you know what, there really isn't enough proof as to all these checks to cash, because the government didn't do its job thoroughly enough to determine that these

argue, after conceding that the businesses created by Defendant were "validly constituted and did legal, valid business," (Tr. of Jan. 10, 2000, at 17), that the entire amount of money taken Defendant from the Investors should be included in the loss calculation, (Gov. Ltr. of Jul. 31, 2000, at 4-8), with no offset for money actually spent by Defendant in building the business. Further, all of the Investors understood in January 1997 that Defendant would be day-trading their money, and that by the end

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> checks to cash are not backed up by something out there somewhere that would have proven that these checks actually were valid expenditures. That may be, your Honor. At the end of the day the jury, if your Honor lets this case go to the jury, the jury may very well agree with your Honor.

See also Tr. of Jan. 24, 2000, at 1220:

> MR. OLDS: . . . that might occasion some jurors feeling that they actually have to go through page by page the bank records to make a determination [of loss]. While that is doable --
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> THE COURT: It is? Actually, you do it while we have this break. I want you to do a determination for me from the records about what the loss would be if they found that he paid money back to them which was their own money in January and February. Maybe we had better make that a 15-minute break, since I have now made that additional assignment for Mr. Olds.
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> MR. OLDS: Your Honor, I will concede for the record I don't think I can do that.
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> THE COURT: Well, Mr. Olds, if you can't do it, how do we expect a jury or the probation office or the Court to do it? This is a problem.

of January 1997, the Investors' initial total investment of $174,000 had been reduced to $40,000; yet, the Government has charged Defendant with the entire initial investment of $174,000 as "loss." (Def.'s Mem. of May 19, 2000, at 4.)

The Court finds that ATM withdrawals cannot be attributed to a loss calculation because the trial testimony established that many business purchases were made in cash. (Tr. of Jan. 18, 2000, at 649, 704-705, 709, 716-17, 719-20; GX 1A, DX X4 (invoices reflecting cash payments for business expenses).) Further, Investors testified that as early as February 1997, they saw computers and other equipment in use. (Tr. of Jan. 11, 2000, at 143-44, 185, 214; Tr. of Jan. 12, 2000, at 270, 291.) However, there are no invoices in the record (nor was it Defendant's burden to produce them) that show how or when this equipment was purchased. (Def.'s Mem. of May 19, 2000 at 10.) Defendant established at trial, although it was not his burden to do so, that the operating expenses of the business were shared with and paid to Andover Brokerage, and that these operating expenses totaled several thousand dollars per month. (Tr. of Jan. 19, 2000, at 770-82; DX R3).

Finally, beginning in April 1997 and moving forward, it is clear from the spreadsheets that although some checks were being written for personal expenses, income from non-Investor sources

more than covered those checks.[7] Thus, for Defendant's personal expenditures, the Court has looked only to the months of February and March 1997.[8] For the "3% return" to Investors, the Court has

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[7] For example, in April 1997, checks were written to Defendant's wife and for "real estate work" totaling $6,830. In addition, two checks to cash totaling $3,630 were endorsed by Defendant's wife. Thus, the total amount of checks for personal use is $10,460. However, funds from non-Investor sources, Andover Brokerage and Loretta Merz, total $17,858.

In May 1997, a total of $89,685 was paid out of the account in checks to "cash," the bulk of which was a single $86,000 check noting "house down." (GX 1A at unnumbered page 10.) The Government attributes all of this money as personal use of Investor money, (see Indictment ¶ 13b, PSR ¶ 17.) However, a line-by-line analysis by the Court reveals that during that same month, $104,479 of non-Investor money was also deposited into the account, clearly more than enough money to cover the questionable expenses for that month.

[8] At the May 1, 2000 hearing, the Court explicitly warned the Government:

> Now, Mr. Olds, you have to understand something. The Court doesn't buy or agree with your theory that as soon as money, any money is commingled, even if it came from ~~another source,~~ if it is put in a trust fund, it can't be used . . . [I]f you insist on pursuing this, then I want you to show me case law . . . because there is nothing written here, this is the problem. You are assuming what [the Investors] . . . understood. You are assuming it was being put in a trust fund. No . . . [Investor] testified as far as I recall that [they] . . . thought it was going into a trust fund and he wasn't going to use it for any purpose other than this."

(Tr. of May 1, 2000 at 32.) Further, the Investors knew in February 1997 that they were investing in a startup business. (Tr. of Jan. 11, 2000, at 179.)

The Government also conceded during the Rule 29 hearing that non-Investor funds, originally counted as "Investor" money, had been deposited into the same account. (Tr. of Jan. 21, 2000 at 1145-46.)

looked to checks written in the months of February, March, and April 1997, which cover January, February, and March "returns."[9]

1. February 1997

In February 1997, two checks were written to "Jeffrey Tognetti" totaling $6,500. Two checks also were written to "Prime Time Day Care," totaling $1,052, for a total of $7,552.

Investors testified that Defendant was entitled to a "draw" or salary. (Tr. of Jan. 11, 2000 at 180.) Even assuming a modest salary of $40,000 as was specified in the Private Placement Memorandum in June 1997, Defendant could have drawn a total of $3,333.33 per month.

Thus, the "loss" from February 1997 was $7,552, less $3,333.33, or $4,218.67.

2. March 1997

In March 1997, there were checks written for day care, to Defendant's wife, and to an attorney for a house down payment, totaling $50,247. (GX 1A.) Subtracting again an estimated

[9] After Defendant's day trading of the Investors' remaining money in January, he deposited the Investors' money into an account in February 1997. (GX 1A.) The "3% return" checks for January 1997 were paid in February, February "returns" were paid by checks written in March, and March "returns" were paid by checks written in April.

monthly salary for Defendant of $3,333.33, the approximate total "loss" for March 1997 is $46,913.67.

3. "3% Returns"

January "returns" were paid in February 1997, and totaled $2,871, in checks to four Investors. (GX 1A.) February "returns," paid in March 1997, totaled $7,585, in checks to six Investors. (*Id.*)

Although non-Investor money was deposited into the account in April 1997, the total amount of non-Investor money was only enough to offset a portion of the "returns" marked for March and paid in April. A total of $13,875 was paid to Investors in April, for months previous.[10]

In the calendar month of April 1997, $17,858 of non-Investor funds was deposited in the account. A total of $10,460 was spent for personal expenses, in checks written to Defendant's wife, checks cashed by Defendant's wife, and in a check for "Real Estate Work." (GX 1A.) Thus, only $7,398 of non-Investor money remained to pay the Investors' "returns." Thus, the Court finds that $6,477 of the "returns" to Investors made in April 1997 must

[10] One check is written to Leonid Hambro, and does not indicate whether it is a return; however, Hambro was clearly an Investor. Another check, written to "Sandra Scarloa," is noted "Feb. Return." (GX 1A.)

have been made from Investor funds.

For "returns" earmarked January, February and March 1997, the total "returns" paid from Investor funds is $2,871 paid in February, plus $7,585 paid in March, plus $6,477 paid in April, for a total of $16,933.

Thus, according to USSG § 2F1.1(b)(1), the approximate total loss of $68,065.34 is greater than $40,000 but less than $70,000, and the Guideline Offense Level is increased by five (5) levels.

3. Downward Departure

"In a few instances, the loss determined under subsection [2F1.1] (b)(1) may overstate the seriousness of the offense." USSG § 2F1.1, app. note 11. To the extent that he is charged with any loss, Defendant also seeks a downward departure. (Def.'s Mem. of Apr. 25, 2000, at 6.)

The Court finds that a downward departure may be warranted 1) pursuant to § 2F1.1, application note 11, because the actual loss for January through March 1997, estimated at $68,065.34, overstates the seriousness of the offense, and/or 2) pursuant to USSG § 5k2.0, due to the unique circumstances of this case. See United States v. Broderson, 67 F.3d 452, 457-59 (2d Cir. 1995) (in fraud case, "confluence of circumstances was not taken into

account by the Guidelines," thus, district court could depart downwardly pursuant to USSG § 5K2.0).

Defendant never sought out the Investors; instead, they were brought to him. The Investors knew that beginning in February 1997 the nature of their Investment had changed, and the Defendant was now creating a startup business. (Tr. of Jan. 11, 2000, at 162-64, 179, 215, 219.)

The Court is also concerned that at least some of the Investors exhibited an almost willful blindness, in that they invested in high-risk ventures (day-trading and a startup business), expected Defendant to dedicate himself "100%" to investing money for them, expected a 36% annual return, and expected Defendant to do the work for free.

Defendant did not receive any formal training in securities transactions or, more importantly, accounting and bookkeeping. Defendant took money from the account when it contained only funds from Investors; however, he replaced the funds within months, and most of the withdrawals occurred prior to June 1997, when the Private Placement Memorandum drafts (which stated certain amounts and uses of Investor monies) were issued.

Accordingly, the Court finds that a downward departure pursuant to Section 2F1.1, application note 11, and/or Section 5K2.0, may be warranted in this case.

B. USSG § 3B1.3 (Abuse of Trust)

Defendant contends that the 2-level enhancement given in the PSR for "abuse of trust" pursuant to USSG § 3B1.3 is not appropriate. Specifically, the PSR states that Defendant "was entrusted with the discretion to use the [I]nvestors' funds for specific purposes as set forth in the private placement memorandum," but that Defendant instead "converted [I]nvestor funds to his own usage." (PSR ¶ 33.)

However, by the time the Private Placement Memorandum was issued in or around June 1997, there were significant amounts of non-Investor monies entering into the accounts in question, and the non-Investor monies more than offset the personal expenditures from the account. Thus, the Government has not established that, by the time the Private Placement Memorandum was issued, that Defendant was in fact using Investor funds for improper purposes.

Before the Private Placement Memorandum was issued, it was unclear what restrictions, if any, were placed on Defendant's use of the money. The Investors did understand that Defendant would be devoting "100%" to the new business and that Defendant would be entitled to a draw or salary, (Tr. of Jan. 11, 2000, at 180), but there was no proof at trial by the Government as to any amounts that had been agreed upon by the Defendant and the

Investors.

Defendant also asserts that the abuse of trust enhancement is inappropriate because Defendant provided full information and disclosures to the Investors at any time that they sought such information. (See Def.'s Mem. of Jul. 19, 2000, at 12-13 (citing to trial transcript); see also Ltr. from Martin J. Milston to the Court, rec'd Apr. 27, 2000.)

Finally, "[w]here fraud occurs in arm's length transactions not involving fiduciary-like relationships, the 'trust' that is 'abused' is simply the reliance of the victim on misleading statements or conduct of the defendant. The trust in short is a specific offense characteristic of fraud, and a Section 3B1.3 enhancement is inappropriate." United States v. Jolly, 102 F.3d 46, 49 (2d Cir. 1996). Here, Defendant never sought the Investors' money; Defendant was introduced to them by Leonid Hambro. Defendant did not occupy a position of trust vis-a-vis the Investors prior to their investing with him, nor did Defendant seek to conceal his acts. See Broderson, 67 F.3d at 455. Like Broderson, application of an abuse of trust enhancement in this case would be overbroad, requiring such an enhancement any time an arms-length investor relied on statements in order to make the decision to invest.

Thus, a two-level enhancement for abuse of trust is not

appropriate in this case.

C. USSG § 3E1.1 (Acceptance of Responsibility)

Defendant also argues that although the case proceeded to trial, two points should be deducted pursuant to USSG § 3E1.1 for acceptance of responsibility. Although a reduction for acceptance of responsibility is not usually accorded defendants who go to trial, "[c]onviction by trial . . . does not automatically preclude a defendant from consideration for such a reduction." USSG § 3E1.1, app. note 2.

In determining whether a reduction for acceptance of responsibility is appropriate, the Court should look "primarily . . . to pre-trial statements and conduct." Id. Defendant asserts that in or around December 1997, 11 of the Investors were repaid their initial investments, plus, in most cases, additional monies, (DX U4), even though under the Private Placement Memorandum the Investors could not have sold their interests at that time. (Tr. of Jan. 11, 2000, at 100-102; Tr. of Jan. 19, 2000, at 911-13.) Further, the value of the Investors' shares at the time they were repaid was most likely zero, because Defendant was rebuilding his business after the problems with Andover Brokerage. (Tr. of Jan. 19, 2000, at 913.)

USSG § 3E1.1, application note 1(c) states that a reduction

for acceptance of responsibility may be afforded for "voluntary payment of restitution prior to adjudication of guilt." USSG § 3E1.1, app. note 1(c); see United States v. Bean, 18 F.3d 1367, 1368 (7th Cir. 1994) (downward departure under USSG § 5K2.0 inappropriate after trial for bank fraud, where defendant repaid money prior to trial; remanding for consideration of acceptance of responsibility reduction under USSG § 3E1.1) and United States v. Bean, 859 F. Supp. 330, 331 (N.D. Ind. 1994) (on remand, decreasing Guideline Offense Level by two levels for acceptance of responsibility because defendant repaid money before trial).

Here, the facts are even stronger than those of Bean. Defendant repaid all of the Investors' money prior to the Indictment, and indeed, prior to the commencement of the Government's investigation. Accordingly, the Court finds that a two-level decrease for acceptance of responsibility, pursuant to Section § 3E1.1, application note 1(c), is appropriate in this case.

D. § 2F1.1(b)(2) (More than minimal planning)

The PSR adds a two-level enhancement to the Guideline Offense Level because "the offense involved more than minimal planning." § 2F1.1(b)(2) "More than minimal planning" is defined as "more planning than is typical for the commission of

the offense in a simple form . . . [or] if significant affirmative steps were taken to conceal the offense." USSG § 1B1.1, app. note 1(f). "'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Id.

The PSR states that because "the offense involved misrepresentations to induce the investments and repeated withdrawals by the [D]efendant over a period of time," the "more than minimal planning" enhancement is warranted. (PSR ¶ 31.) The Court disagrees.

Although Defendant used Investor funds in the account for personal expenses on several occasions, the Government has not shown that the withdrawals were not "purely opportune," considering that Defendant did not have a bank account, (Tr. of Jan. 19, 2000 at 833), Defendant did not have any other job other than building his business, (Tr. of Jan. 11, 2000 at 180), Defendant did not have any other source of income, (id.), and even the Investors expected Defendant to have a salary. (Id.)

Defendant took no steps to conceal his use of the funds; indeed, he did just the opposite: when checks were written for personal reasons, Defendant clearly indicated so in the "memo" section of the check.

Accordingly, the Court finds that a two-level enhancement pursuant to Section 2F1.1(b)(2) also is not warranted.

E. USSG § 3C1.1 (Obstruction of justice)

The PSR also adds a two-level enhancement for obstruction of justice, stating that "the [D]efendant submitted an altered document to the [G]overnment." PSR ¶ 34. The Court, however, does not agree that obstruction of justice was established by the confusing testimony of Government rebuttal witness Bob Reilly, nor by the single-page, allegedly false document submitted in voluminous material to the Government by the Defendant in response to a subpoena. The Government has not established, to the satisfaction of the Court, that the Defendant intentionally manufactured or altered a fraudulent document and submitted it for the purpose of impeding an investigation. Further, the jury was not required to make a finding on the document or the witness' credibility in order to convict the Defendant on the charged crime.

Accordingly, the Court finds that a two-level increase for obstruction of justice is not supported by the record and shall not be imposed.

Conclusion

The Court finds that the approximate total loss established by the Government is $68,065.34. The Court also finds that Guideline Offense Level enhancements for abuse of trust under USSG § 3B1.3, more than minimal planning under USSG § 2F1.1(b)(2), and obstruction of justice under USSG § 3C1.1, as recommended in the PSR, are not appropriate. The Court also finds that Defendant should be credited with acceptance of responsibility under USSG § 3E1.1.

Finally, the Court finds that a downward departure may be warranted under USSG § 2F1.1, application note 11, and/or USSG § 5K2.0, because the actual loss determined under § 2F1.1(b)(1) overstates the seriousness of the offense, and because of the unique circumstances of this case.

SO ORDERED.

Dated: New York, New York
August 11, 2000

DEBORAH A. BATTS
United States District Judge