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August 7, 2007

Via ECF

Honorable Arthur D. Spatt
United States District Court
Eastern District of New York
200 Federal Plaza
Central Islip, NY 11722

Re: United States v. Stephen Barker
Criminal Docket Number 02-767 (ADS)

Dear Judge Spatt:

As you are aware, I am attorney for Mr. Barker who is scheduled to be sentenced by Your Honor on August 9, 2007. I ask the Court to consider the contents of this submission when imposing sentence.

I write to address several Guidelines issues relevant to Barker's sentencing determination. First, I respond to the Government's letter of August 7, 2007 wherein, among other things, they advance the legally and factually false claim that Barker is responsible for losses approximating $12.5 million but, as the precise amount is undeterminable, he should merely be accountable for Guidelines purposes for $4.3 million. (Gov't. ltr, p.2,3) As outlined herein, the Government's position is wholly merit less as, in fact, actual loss attributable to Barker's conduct can readily be determined – the governing standard for determining loss in this Circuit and under the Guidelines. (See, 2B1.1, Commentary app. Note 3) When applied to the facts of this case, the unmistakable reality becomes clear – that while determined by the jury to be wrongful, Barker's offense conduct resulted in no Guidelines losses. Next, I address several other enhancements raised in the PSR and the Government's August 7, 2007.

Barker's Offense Conduct In This Case, While Wrongful, Resulted In No Actual Loss To Any Financial Institution And The Government's Loss Theories Should Be Rejected By This Court As They Run Contrary to The Facts Of This Case And Governing Legal Principles

This Court is well familiar with the facts of this case. The indictment charged Barker with Counts One and Seven of a nine count indictment. Barker was unnamed in Counts Two through Six, Eight and Nine, each of which charged co-defendant Barry Drayer with the commission of schemes *wholly unrelated* to Barker. Drayer's unrelated schemes, which apparently resulted in significant losses to financial institutions, are detailed in this Court's decision of September 29, 2006 denying a motion for a judgment of acquittal and a new trial. Drayer's schemes included the use of phony and forged financial instruments designed to trick lending institutions into accepting payments from PLS (Drayer's financing company); a scheme involving the use of mailbox accounts to intercept invoices sent by financial institutions intended for PLS borrowers; a multiple lending scheme involving PLS' submission of a legitimate loan application to several different lenders without the borrower's consent; the Riteway and GHT sham company scheme, and the Hospitality Services of Middle Tennessee scheme which involved the funding of a fraudulent loan to a hotel under the false statement that it was a medical clinic. (Dec. p.6-16) As stated, Barker was not charged with participating in any of these events and no trial evidence was adduced pointing to his involvement in these unrelated schemes. As the Court is aware, Drayer's schemes resulted in significant losses. At Drayer's sentencing, the Government agreed to reduce the actual loss amount resulting from Drayer's conduct which apparently exceeded $30 million to the $12.5 million in actual losses established at trial.

Barker's case is quite different. As the Court is aware, Barker operated a loan brokerage in California named CareFree which specialized in providing financing to physicians. CareFree brokered approximately 1,300 loans to physicians during the time charged in the indictment. As charged in the indictment, Barker's wrongful conduct consisted simply of his use of an entity called MedPro to make it appear that the loans brokered by CareFree were "new equipment" loans rather than working capital loans. Out of the 1,300 loans brokered by CareFree, approximately 1,000 involved the use of MedPro. The remaining number were straight working capital loans. *All of the loans brokered by CareFree were fully performing non-default loans.*

Determining loss for Guideline purposes in fraudulent loan cases is a simple matter. In fraudulent loan cases, loss is *actual loss*, defined as reasonably foreseeable *pecuniary harm*. Guideline 2B1.1. Comm. app. Note 3 A. (i). In determining actual loss, money paid toward the loan, of course, acts as a credit. supra. app. Note 3 E. A court shall only use the gain that resulted from an offense as an alternative measure of loss where there, in fact, is a loss but it reasonably cannot be determined. supra. app. Note 3 B.

Thus, in Barker's case, the analysis is simple. First, each of the CareFree loans which improperly utilized a MedPro invoice must be identified. Next, a determination is made as to which, if any, of these loans defaulted resulting in pecuniary harm to a financial institution. As indicated above, if this proper analysis were undertaken by the Government, it would reveal that no actual losses were sustained resulting from Barker's conduct.

The Probation Department recognizes the propriety of this analysis. In the PSR, Probation seeks to hold Barker accountable for $336,249.97 in losses purportedly sustained by five banks as a result of six unpaid CareFree loans. And, Probation seeks to hold Barker accountable for an additional $1.9 million representing a sum allegedly improperly diverted by Barker to his own use. (PSR, ¶30, 33) Probation's analysis is legally correct but factually off the mark.

First, as detailed in the undersigned's letter of July 30, 2007 to Probation Officer Giblin, (Exhibit A) the $1.9 million sum was not improperly diverted by Barker. The legitimate business practice of CareFree included the remission of loan proceeds to the lendee physician in the form of a cashier's check. CareFree banked in California with the Bank of America. In order to obtain a cashier's check with this financial institution, procedure required that CareFree supply the bank with a check drawn on its account to "cash." This check would be supplied to the Bank of America who, in turn, would issue a cashier's check in the name of the lendee physician. In short, the $1.9 million referenced in the PSR as funds diverted by Barker for his own use represent checks made payable to cash and supplied to the Bank of America so that the loan proceeds could be supplied to the physicians in the form of certified checks. A simple analysis of these checks made payable to cash would reflect that they were not endorsed and thus not negotiated by Barker. I have communicated with the Bank of America branch in California who has corroborated this standard banking procedure. Thus, while if Barker had improperly diverted these funds, he should be held liable for loss purposes, in point of fact, Probation's contention in this regard is simply in error.[1]

With regard to Probation's view that $336,249.97 in losses sustained by five banks on six unpaid loans is accountable to Barker, again, Probation is legally correct but factually misinformed. As indicated above, PLS (Drayer's company) obtained financing for CareFree (and other loan brokers) for years. All of the CareFree loans funded were fully performing, and resulted in no loss to a single financial institution. These six unpaid loans resulted from *Drayer's* own improper diversion of these funds. As revealed at trial, in early 2002, PLS suddenly claimed that they were unable to further fund any loans for CareFree and these six pipelined loans from CareFree were cancelled without notice. Trial evidence further revealed that PLS had, in fact, already funded these loans, received the loan proceeds from the lending institution, and retained the proceeds. This diversion *by Drayer* was not a jointly undertaken act with Barker and was not reasonably

[1] I have subpoenaed a Bank of America employee from California who is available to corroborate these facts. However, it appears that the Government has conceded the error. (Gov't. ltr. p.2, footnote 1)

foreseeable to Barker as it was without notice and represented a stark deviation from routine funding practices which had been followed for years. Thus, Barker should not be held accountable for Drayer's improper retention of these funds without notice to Barker. See, United States v. Studley, 47 F3d 560, 565 (2d Cir. 1995), in order to determine a defendant's Guidelines loss accountability for the conduct of others, the court is required to determine the scope of the criminal activity the defendant agreed to jointly undertake and that the conduct of others was reasonably foreseeable by the defendant; United States v. Johnson, 378 F3d 230, 236 (2d Cir. 2004) . . . "it is well-established that (this Circuit) requires a district court to make two particularized findings before a defendant may be held accountable for his co-conspirators' acts. In order to hold a defendant accountable for the acts of others, a district court must make two findings: (1) that the acts were within the scope of the defendant's agreement and, (2) that they were foreseeable to the defendant, citing, Studley at 574. See, also, United States v. Molina, 106 F3d 1118, 1121 (2d Cir. 1997).

Obviously, Drayer's own retention of these funds was not within the scope of any agreement with Barker and was not reasonably foreseeable to him. Thus, pursuant to Studley and its progeny, Barker is not accountable for the sum as a Guideline loss.[2]

With this, the flaws in the Government's loss position as outlined in their letter of August 7, 2007 are obvious. First, they advance the specious claim that Barker is jointly responsible with Drayer for losses up to $12.5 million. (ltr. p.2) In support, they advance the factually and legally false contention that. . . "the fact that Drayer also engaged in a number of schemes *independent* from Barker does not change the fact that Barker was his partner and an integral member of the false invoice scheme." (p.2) In fact, Drayer's schemes independent from Barker does directly bear on the loss analysis and as revealed in the indictment; the trial evidence, and this Court's own decision cited above, Drayer's many schemes were wholly unrelated to Stephen Barker.

Next, the Government advances a fall back position -- equally flawed – that since the precise amount of losses cannot be determined, Barker should be held accountable for the $4.3 million in commissions CareFree received over many years.[3] In fact, as noted above, determining actual loss in this case can readily be determined by (1) segregating the loans which improperly used MedPro invoices; (2) determining which of these defaulted (none did), and (3) crediting against this sum any monies received by the financial institution and payment toward the loan.

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[2] If the Court is considering holding Barker accountable for this sum, we respectfully request the scheduling of a Fatico hearing on this issue. Besides this sum not representing conduct within the scope of Barker's agreement with Drayer, two of the loans within this batch did not involve the use of a MedPro invoice.

[3] In advancing this position, the Government argues against itself by stating that the difficulty in ascertaining the loss amount stems from Drayer having procured fraudulent proceeds through his many other schemes, thus making clear that these schemes were independent of Barker. (p.4)

Finally, the Government advances their second fallback position in stating that Barker should be held responsible for a minimum of $336,249.97 – the sum reflecting Drayer's own improper retention of loan proceeds. In doing so, the Government ignores controlling law in this Circuit which requires a determination as to whether this loss and its attendant conduct was within the scope of the agreement between Barker and Drayer. See, Studley, supra. As indicated above, it clearly was not.

With this, the Government has failed to establish in this fraudulent loan case that Barker's offense conduct resulted in actual losses sustained by financial institutions.

Other Guidelines Issues

A. Enhancements for multiple victims and receipt of $1 million

The PSR suggests the applicability of a two level enhancement for an offense involving more than ten victims pursuant to 2B1.1(b)(2)(A) and two levels for Barker's receipt of more than $1 million from a financial institution as a result of the offense conduct pursuant to 2B1.1(b)(13)(A).

This Court's determination of these enhancements is linked to a setting of the appropriate loss figure as noted above. The Government concedes this point. (ltr., p.12) In addition, upon information and belief, the identities of these financial institutions has not been established.

B. The Abuse of Trust Enhancement

The PSR notes that a two level enhancement for abuse of trust pursuant to 3B1.3 applies. (PSR, ¶44) In earlier meetings between the undersigned and the Government, the Government has conceded the inapplicability of this enhancement. (ltr., p.13)

C. The Obstruction Enhancement

Based upon information supplied by the Government, the PSR notes a two level enhancement for obstruction based upon Barker's alleged partial compliance with the subpoena issued years ago at a time when he was unrepresented by counsel. The Government, similarly, seeks the enhancement. We dispute the applicability of the enhancement and seek a Fatico hearing on this issue.

D. The Sophisticated Means Enhancement

The PSR and the Government seek a two level enhancement for 2B1.1(b)(9)(C) citing Barker's alleged sophisticated means in committing the offense conduct. Probation cites the creation of fraudulent MedPro invoices and fraudulent checks. In fact, Barker was not engaged in the creation of fraudulent checks. The Government cites MedPro as the trigger for the enhancement and the creation of this "sham" entity and its bank account.

Again, Drayer's varying intricate schemes may have employed sophisticated means in their creation and operation. Barker is different. His offense conduct consisted of the simple use of a MedPro invoice and the attendant creation of a bank account for the deposit of funds. It was a simple fraud, not a sophisticated event. All the other documents associated with each of these loans were completely customary and legitimate the wrong simply constituting the representation that a loan was for new equipment as opposed to working capital.

This simple misrepresentation among otherwise legitimate loan documents did not render the conduct "*especially* complex or *especially* intricate" warranting application of this enhancement. See, Commentary, app. note 8(B) to 2B1.1 (emphasis supplied)

I will be prepared to elaborate on these issues at the sentencing proceeding.

Thank you for your consideration.

Very truly yours,

KEVIN J. KEATING

KJK:jv
Encl.

cc: Stephen Tiscione, Esq.
Assistant U. S. Attorney