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July 30, 2007

Via Facsimile – 631-712-6395

Gregory Giblin
U. S. Probation Officer
United States Probation Department
202 Federal Plaza
Central Islip, NY 11722

Re: United States v. Stephen Barker
Case No. 02-cr-00767 (ADS)

Dear Mr. Giblin:

Please be advised that I am attorney for Stephen Barker who is currently scheduled to be sentenced in this matter on August 9, 2007. I write to register objection to certain aspects of the Presentence Investigation Report you prepared in this matter. The objections concern certain factual assertions contained in your Report and your basis for arriving at Barker's Guidelines calculation.

The Loss Calculation

In the PSR, Barker is held accountable for Guidelines losses totaling $2,236,249.97 and a concomitant offense level increase of 16 (¶39). Specifically, the Report seeks to hold Barker accountable for $336,249.97, representing an aggregate loss suffered by five financial institutions on a total of six loans, and $1.9 million purportedly diverted by Barker for his own personal use. (¶30) As outlined herein, Barker should not be held accountable for any Guidelines losses.

To begin, it is undisputed that Barker had no involvement in virtually all of the criminal activity engaged in by co-defendant Barry Drayer as charged in the indictment. The indictment charged Barker with Counts One and Seven of the nine count indictment. Barker was unnamed in Counts Two through Six, Eight, and Nine, each of which charged Drayer with the commission of separate schemes wholly unrelated to Barker. Drayer's schemes, which apparently resulted in significant losses to financial institutions as

outlined in your Report, included the use of phony and forged financial instruments; the "Mailbox Etc." and "Pay Ahead" scheme; the multiple lending scheme; the Rightway and GHT sham company scheme and The Hospitality Services of Middle Tennessee scheme.

Accordingly, for much of the trial in this matter, Stephen Barker went unnamed as the evidence of his involvement was limited to an isolated alleged scheme involving CareFree, an entity created by Barker which supplied loan financing to medical professionals. CareFree was located in California where Barker resided, whereas PLS (Drayer's company) was located in New York and Massachusetts. CareFree acted as a loan broker to physicians and utilized the services of PLS who dealt directly with financial institutions in obtaining the loan financing. As charged in the indictment, Barker's involvement consisted of his use of an entity called MedPro to make it appear that the physicians' loans brokered by CareFree were "new equipment" loans rather than working capital loans.

Notably, CareFree brokered many hundreds of loans to physicians during the time charged in the indictment, *all* of which were fully performing non-default loans, thus resulting in no loss to any financial institution.

With regard to the purported $1.9 million diversion of funds by Barker to his own use, I initially note that there was no evidence presented at trial that Barker engaged in this activity. The PSR cites no facts or evidence of this alleged diversion, simply stating that it occurred and noting that "it is not known which bank or banks are owed this (sum)." (PSR, ¶33) In point of fact, it never occurred.

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, Barker should not be held accountable for the $1.9 million sum referenced in your Report as it represents no loss or improper diversion of funds due to a third party.

Barker should, likewise, not be held responsible for the $336,249.97 referenced in the PSR as losses sustained by five banks as a result of six unpaid loans. PLS (Drayer's company) obtained financing for CareFree (and other loan brokers) for years. As indicated above, all of these 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 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 foresecable to the defendant" citing, Studley at 574. See, also, United States v. Molina, 106 F3d 1118, 1121 (2d Cir. 1997).

The Government Concedes That The Abuse
Of Trust Enhancement Is Inapplicable

The PSR seeks a two level Guidelines increase based upon Barker's purported abuse of a position of trust in a manner that facilitated the commission of the offense, pursuant to Guideline 3B1.3. The Government agrees with the undersigned that Barker was not in a position of trust as defined by the Guidelines and, thus, the two level enhancement should not apply.

The Obstruction Enhancement Should Not Apply

The PSR cites that Barker is subject to an enhancement for obstruction of justice pursuant to Guideline 3C1.1 based upon the Government's contention that Barker failed to provide certain subpoenaed records at the outset of the Government's investigation despite the fact that he possessed them. Barker disputes this contention and the PSR fails to cite any *facts* other than the Government's bald contention in support of the enhancement. Accordingly, we register objection to this enhancement.

The Multiple Victim Enhancement Has Not Been Established

The PSR notes the applicability of a two level enhancement for an offense involving more than ten victims (citing an estimated 40 victims) pursuant to Guideline 2B1.1(b)(2)(A). As the Report fails to identify the victims and the concomitant loans, the enhancement has not been established.

The Sophisticated Means Enhancement Has Not Been Established

The PSR includes a two level enhancement per Guideline 2B1.1(b)(9)(C) citing Barker's alleged sophisticated means in committing the offense conduct – specifically, the creation of fraudulent invoices from MedPro and fraudulent checks. To begin, no evidence was adduced at trial that Barker had any involvement in the creation of fraudulent checks an act, if true, engaged in by PLS and Drayer. With this, the creation of fraudulent invoices does not elevate the simple alleged fraud to a sophisticated event. All fraudulent activity, by definition, involves a misrepresentation either oral or written. The simple misrepresentation among otherwise wholly legitimate loan documents that the loan's purpose was for new equipment as opposed to working capital does not render the conduct "especially complex or especially intricate" warranting application of the enhancement. See, Commentary, App. Note 8(B) to 2B1.1.

The Enhancement For Barker Having Derived More Than
$1 Million From At Least One Financial Institution Is Inapplicable

The PSR seeks a two level enhancement 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). (¶42) This enhancement is factually inapplicable. CareFree received a broker's commission from PLS – not a financial institution. Thus, the proposed enhancement should not apply.

With this, we request that the Probation Department issue an Addendum to the PSR including the aforementioned modifications.

Thank you for your consideration.

Very truly yours,

KEVIN J. KEATING

KJK:jv
cc: Honorable Arthur D. Spatt
(Via ECF)

Stephen Tiscione, Esq.
Assistant U. S. Attorney
(Via ECF)

Stephen Barker
(Via U. S. Mail)