U.S. Department of Justice

United States Attorney
Eastern District of New York

SLT
#2002RO1364

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December 13, 2006

Via ECF and Facsimile

The Honorable Arthur D. Spatt
United States District Court Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11201

Re: United States v. Barry Drayer
Criminal Docket Number 02-767 (ADS)

Dear Judge Spatt:

The government respectfully submits this letter in response to the defendant Barry Drayer's objections to the Presentence Report ("PSR") in the above-referenced case. On February 17, 2006 the defendant Barry Drayer was found guilty by jury verdict of all counts of a seven-count superseding indictment charging him with one count of conspiracy to commit bank fraud, five counts of substantive bank fraud and one count of conspiracy to commit money laundering. The defendant is scheduled to be sentenced on December 15, 2006.

On December 9, 2006, the defendant filed objections to the PSR challenging, among other things, the offense conduct described in the PSR, the loss amount and the amount of restitution owed to victims. On December 12, 2006, the government received an additional submission from the defendant Barry Drayer in which he challenges the evidence offered against him at trial and the credibility of the government's witnesses. For the reasons set forth below, the defendant's objections to the PSR are without merit.

In addition, although the exact amount of out-of-pocket losses suffered by the financial institution victims is not ascertainable at this time due to outstanding issues regarding restitution payable to these victims from a settlement with the

Bank of New York, the court may proceed with the scheduled sentencing and make a final determination of the victims' losses for restitution purposes at a later date.

I. Defendant's Objections to the PSR Lack Merit

A. Drayer's Fraudulent Intent Was Proven at Trial

The majority of the defendant's objections to the PSR consist of factual disputes to the government's evidence that the defendant unsuccessfully raised during the trial and repeated in the defendant's post-trial motion for a Judgment of Acquittal and/or a new trial pursuant to Fed. Rules of Crim. P. 29 and 33, which your Honor denied in its entirety on September 29, 2006. Specifically, the defendant challenges the PSR's description of his criminal intent and the fraudulent nature of his various schemes including the Riteway and MedPro false-invoice scheme, the Mailboxes, etc. scheme, the HSMT scheme, the escrow agreement scheme, the altered checks scheme, the multiple funding scheme and PLS' practice of fraudulently keeping the proceeds from prepaid and cancelled loans. As set forth in exhaustive detail in the government's response to the defendant's post-trial motions, the evidence adduced at trial overwhelmingly proved the defendant's guilt beyond a reasonable doubt.

As the Court noted in its September 29, 2006 decision, "[o]verwhelming evidence was presented at the trial to show that Drayer had the requisite intent for both the conspiracy and substantive counts of bank and wire fraud. The evidence plainly supports the rational inference that Drayer, acting in concert with others, directed or supervised no less than seven distinct schemes to fraudulently obtain funds from financial institutions." Sept. 29 Dec. at 26-27. Specifically, documentary evidence and the testimony of multiple witnesses, particularly Susan Cottrell, Roger Drayer, Jennifer Tarantino, Tallie Jo Allen and Rochelle Besser firmly established that Drayer orchestrated a scheme to fraudulently obtain funds from financial institutions using false invoices from Riteway Health Services and MedPro Equipment Company. As the testimony of several financial institution victims made clear, the use of the false invoices to misrepresent existing equipment on working capital and sale lease back loans to falsely portray them as loans for financing of new equipment resulted in the financial institutions funding PLS on riskier loans that they would otherwise not have approved.

In addition, the government established through documentary evidence and testimony, particularly from Rochelle

Besser, Lynn Walker, Dan Ciocca, and several medical provider witnesses that PLS, at Barry Drayer's direction, routinely kept the proceeds from loans that were cancelled or prepaid by the medical providers. The evidence at trial also established that PLS failed to buy back or replace loans where the medical providers went into bankruptcy. As established by the trial testimony of Rochelle Besser, Roger Drayer, Frank Zambaras, Lynn Walker and Jennifer Tarantino, among others, Barry Drayer and PLS hid this fraudulent activity from the financial institutions and the medical providers themselves through a combination of schemes including using altered checks, fake telechecks and Western Union money grams to make monthly payments to the institutions and changing the addresses of the medical providers to Mailbox etc. accounts maintained by PLS so that the medical providers would not be billed for loans they had cancelled or already paid off. The testimony from multiple witnesses, including Roger Drayer, Frank Zambaras and Dan Ciocca further established that PLS actively concealed records from American Express/First Sierra auditors by, among other things, pulling incriminating records from PLS loan files prior to the audit and creating a false computer database with doctored records to show to the auditors.

The government also established through documentary evidence and testimony, particularly the testimony of Rochelle Besser and Susan Cottrell, the fraud surrounding HSMT, including: the use of false Riteway invoices to portray existing equipment as new; the fact that Drayer presented the loans to financial institutions as being for the financing of new medical equipment despite being informed that the financing was actually for a hotel; and the fact that PLS engaged in multiple funding by obtaining loans from twelve different financial institutions for a total of more than $2.3 million, only $600,000 of which was ever paid out to HSMT.

Finally, the government established at trial through documentary evidence and testimony, particularly that of Rochelle Besser, that PLS did not properly set up escrow accounts for loan funds and in fact co-mingled the money coming in from loan payments by borrowers to be used for various purposes including making monthly payments on defaulted, prepaid or cancelled loans. As established by the testimony of several financial institution witnesses, particularly Keith Shurtleff and Scott Weaver, the escrow agreements were an important factor in their banks' decision to fund PLS loans.

Accordingly, all of the defendant's objections to the PSR with respect to the description of his fraudulent intent and the nature of his crimes are without merit and should be

dismissed in their entirety.[1/]

B. No *Fatico* Hearing is Required To Determine the Loss

The defendant objects to the PSR's calculation of the loss amount and seeks a *Fatico* hearing on this issue because "it assumes that of the approximately 7,000 to 8,000 loans outstanding when PLS stopped doing business in June 2002, that none of the doctors made good on their loan payments." Def. Ltr. at 2. For the reasons set forth below, this objection is without merit and no *Fatico* hearing is required with respect to the loss amount because it is supported by competent evidence adduced at trial.

As an initial matter, the calculated loss amount does not simply include the total amount of PLS's 7,000 to 8,000 outstanding loans. Rather, the loss amount includes only loans that were specifically identified and proven to be fraudulent at trial because: (1) the loans were funded by the financial institution but never paid to the borrower; (2) the loans were cancelled or prepaid by the borrower but PLS never remitted the funds back to the lender; (3) the loans were in default but PLS never bought back the loans from the lender as it was required to do; or (4) the loans were obtained under fraudulent pretenses through the use of sham invoices from Riteway or MedPro. In some cases, the loans were fraudulent for two or more of these reasons. The government introduced evidence at trial, including the testimony of Rochelle Besser, a summary chart outlining the fraudulent nature of each of the loans included in the loss calculation (GX 122), and the underlying bank records and PLS documents establishing the amount PLS had fraudulently obtained from the funding institutions for each of these loans.

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[1] In a 32-page letter and accompanying 89-page binder of materials, defendant Barry Drayer recites a litany of "Trial Allegations of Prosecutorial Abuse" that amount to nothing more than baseless accusations and challenges to the credibility of witnesses, many of which deal not with the trial itself, but with testimony offered during a pretrial evidentiary hearing. Many of these contentions merely repeat arguments offered by the defendant at trial or issues unsuccessfully raised in the defendant's post-trial motions. As discussed above, and in more detail in the government's response to the defendant's post-trial motions, the defendant's intent and the fraudulent nature of the schemes he supervised or directed were proven by overwhelming evidence at trial.

For purposes of determining the applicable loss amount under U.S.S.G. § 2B1.1(b), the proper measure is the "greater of actual loss or intended loss;" in other words, "the pecuniary harm that was intended to result from the offense." U.S.S.G. § 2B1.1 comment 3(A); see also United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997). In cases where a defendant obtains a loan through fraudulent pretenses, as occurred in this case for each loan PLS obtained through the use of false Riteway and MedPro invoices, the loss amount for sentencing purposes is the total amount of the fraudulently procured loan, regardless of whether the defendant intended to repay the loan. See, e.g., United States v. Brach, 942 F.2d 141, 143 (2d Cir. 1991) (holding that "loss" within meaning of Sentencing Guidelines was the face value of $250,000 loan the defendant obtained by wire fraud even if he intended to repay the loan); cf. United States v. Lasky, 25 F. Supp.2d 125, 126 (E.D.N.Y. 1998) (Spatt, J.) (holding that loss amount for defendant convicted of embezzlement was the $690,000 he took even though a reserve fund might have prevented the victim institution from suffering any actual loss).

Indeed, courts in this Circuit have consistently found that the loss amount may properly be calculated based on the amount the defendant took by fraud at the time the scheme was discovered, notwithstanding any money the defendant had returned by the time of sentencing. See, e.g., United States v. Matt, 116 F.3d 971, 975 (2d Cir. 1997) (in sentencing defendant convicted of bank fraud for check kiting scheme the court determined that the loss amount for purposes of sentencing was the entire amount the defendant had obtained from the banks including amounts the defendant had repaid after discovery of the scheme); United States v. Arjoon, 964 F.2d 167, 172 (2d Cir. 1992) (defining "loss" as "not the ultimate harm suffered by the victim, but... rather the value of what was taken" and holding that loss amount for purposes of sentencing should not take into account property returned by the defendant to the victim before the theft was discovered).

Accordingly, for every loan PLS obtained through the use of false Riteway and MedPro invoices, the loss amount should be calculated as the face amount of the loan PLS received from the lending institution.

With respect to loans in which the borrower went into bankruptcy, prepaid or cancelled the loan, the PSR properly calculated the loss amount based on the amount of the loans outstanding since PLS ceased operating. On bankrupt, prepaid or cancelled loans, there will be no subsequent payments from the underlying borrowers. Thus, the financial institutions could not

expect any further payments once PLS stopped making payments on these loans and the loss amount should appropriately reflect the remaining outstanding balance on these loans at the time PLS ceased to function (which it does).

Accordingly, the defendant's objections to the loss amount calculated in the PSR, and the enhancements based on that loss amount, are without merit.

II. Restitution May Be Determined at a Later Time

The actual out-of-pocket losses for many of the financial institution victims in this case are not ascertainable at this time because the government is still in the process of calculating restitution payments to these victims from a settlement reached with the Bank of New York. Payments from this settlement received by victim institutions may reduce the amount of restitution recoverable by the same victims in this matter. Pursuant to 18 U.S.C. § 3664(d)(5), however, if the victims' losses are not ascertainable prior to sentencing, the Court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." Accordingly, the government respectfully requests that the Court proceed with the defendant's sentencing on December 15, 2006 and set a date 90 days after the sentencing date for purposes of making a final determination of the applicable restitution amount.

Respectfully submitted,

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