IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 5:14-cr-00081-PAG
	)	
Plaintiff,	)	JUDGE PATRICIA A. GAUGHAN
	)	
v.	)	
	)	
ANTHONY J. DAVIAN	)	GOVERNMENT'S SENTENCING
	)	MEMORANDUM AS TO ANTHONY
Defendants.	)	J. DAVIAN
	)	

I. INTRODUCTION

Now comes the United States of America, by and through its attorneys, Steven M. Dettelbach, United States Attorney, and Christos N. Georgalis, Assistant United States Attorney, and files this Sentencing Memorandum as to Defendant Anthony J. Davian.

II. FACTUAL BACKGROUND

From approximately July 2008 through July 2013, Anthony Davian operated Davian Capital, a fraudulent investment company. Davian told potential investors that he graduated from the University of Akron with a degree in accounting and managed hundreds of millions of dollars, created multiple investment funds in order to create the appearance of success, and sent his investors fictitious client statements. Overall, Davian deceived investors into investing almost $2,000,000 with only two clients ever receiving any returns. Instead of investing the

money as promised, Davian used investor money to enrich himself, to begin construction on a $3 million luxury home, to purchase a luxury automobile, and to pay off a very limited number of earlier investors. Davian also put some investor money towards office expenses in order to prolong his fraudulent scheme.

In one instance in or around June 2013, Davian, while aware that he was under federal criminal investigation, pressured three brothers into bundling together several hundred thousand dollars to invest with his funds. He told them that if they acted fast, he would give them a break on Davian Capital's management fees. Not wanting to miss out on such an opportunity, the three brothers each contributed $75,000.00. On July 5, 2013, the brothers wired $225,000.00 to Cleveland Gravity's (an investment fund operated by Davian Capital) bank account. The three brothers never authorized Davian to use those funds for anything other than investing in Cleveland Gravity. Unbeknownst to the three brothers, Defendant immediately used their money to fund the construction of a luxury house for his personal use. In other instances, Davian used his investor's money to buy an expensive car, pay off his attorneys, and pay the full balance on his office lease.

III. LAW AND ARGUMENT

A. Sentencing Law

The U.S. Supreme Court has held that the U.S. Sentencing Guidelines are "effectively advisory." Booker, 543 U.S. 220, 245 (2005). The Supreme Court advised sentencing courts that, even "[w]ithout the 'mandatory' provision, the [Sentencing Reform] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals," specifically citing those goals listed in Title 18, U.S.C. § 3553(a). Id. at 259. Therefore, a district court must properly calculate and consider the advisory Guidelines range. See, e.g., Gall

v. United States, 522 U.S. 38 (2007); United States v. Haj-Hamed, 549 F.3d 1020 (6th Cir. 2008).

In Rita v. United States, 551 U.S. 338 (2007), the Supreme Court held that courts of appeals may apply a non-binding presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. Id. at 347. The Supreme Court further held that rather than having independent legal effect, the courts of appeals' "reasonableness" presumption "simply recognizes the real-world circumstance that when the district judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." Id. at 350-51.

To facilitate appellate review, the Sixth Circuit has encouraged the sentencing judge to "explicitly state [the] reasons for applying particular Guidelines, and sentencing within the recommended Guidelines range, or in the alternative, for choosing to sentence outside that range." United States v. Jones, 399 F.3d 640, 650 (6th Cir. 2005); see also Gall v. United States, 522 U.S. 38 (2007); United States v. Haj-Hamed, 549 F.3d 1020 (6th Cir. 2008).

B. Advisory Guidelines Calculation

The Probation Office has correctly set forth the advisory guidelines calculations in Defendants' final Presentence Investigation Report (the "PSIR"), which, but for the loss amount determination, was explicitly agreed to by Defendant in his Plea Agreement with the United States. The Probation Office's total offense level calculation was as follows:

Base Offense Level	7	§ 2B1.1(a)(1)
Loss Enhancement	+16	§ 2B1.1(b)(1)(I)
Involved Over 10 Victims	+2	§ 2B1.1(b)(2)(A)(i)

Specific Offense Characteristic	+1	§ 2S1.1(b)(2)(A)
Adjustment for Role in the Offense	+2	§ 3B1.3
Subtotal Before Acceptance	28	

This sentencing memorandum addresses the loss enhancement only as the Defendant already agreed to recommend all other offense enhancements identified by Probation in the PSRs and outlined above.

C. Loss Amount, U.S.S.C. §§ 2B1.1/2C1.1

As an initial matter, a district court is required to make a finding as to loss amount by a preponderance of the evidence using a reasonable estimate predicated upon the facts of the case. The Sixth Circuit Court of Appeals has announced that a district court determines loss by a preponderance of evidence standard. United States v. Blackwell, 459 F.3d 739, 772 (6th Cir. 2006) (citing United States v. Davidson, 409 F.3d 304, 310 (6th Cir. 2005)). In describing the above standard for ascertaining a loss amount, the Sixth Circuit noted that, "the district court's findings are not to be overturned unless they are clearly erroneous." United States v. Triana, 468 F.3d 308, 321 (6th Cir. 2006) (citing United States v. Guthrie, 144 F.3d 1006, 1011 (6th Cir. 1998).

With respect to adjudicating the loss amount arising from financial frauds, the Triana court noted, "[i]n situations where the losses occasioned by financial frauds are not easy to quantify, the district court need only make a reasonable estimate of the loss, given the available information. Such estimates 'need not be determined with precision.'" Id., 468 F.3d at 320 (citations omitted) (citing United States v. Miller, 316 F.3d 495, 503 (4th Cir. 2003); Application Note 2, subpart (c), to U.S.S.G. § 2B1.1). The Triana court also noted the U.S.S.G.'s distinction between "actual loss" and "intended loss." Id. "Actual loss" is "the reasonably foreseeable

pecuniary harm that resulted from the offense." Id. (citing Application Note 2, subpart (A)(I) and (ii), to U.S.S.G. § 2B1.1). "Intended loss" is the "pecuniary harm that was intended to result from the offense and it includes "pecuniary harm that would have been impossible or unlikely to occur." Id. (citations omitted). In analyzing the foregoing distinction, the Triana court followed Application Note 2 (now Note 3) to U.S.S.G. § 2B1.1, which states that, "loss is the greater of actual loss or intended loss." Id. Therefore, a district court must determine the greater of actual loss and intended loss, making a reasonable estimate, by a preponderance of the evidence.

A defendant's loss calculation is predicated upon the actual loss or intended loss caused by defendant's conduct rather than his or her own personal gain as a result of the criminal conduct. In Triana, the defendant, who had previously been convicted for health care fraud, was convicted of fraudulently billing Medicare, through his company, for approximately $2,900,000 for podiatric services and receiving approximately $1,700,000 in payments. The district court found the appropriate loss amount to be $1,700,000. On appeal, Triana argued that his loss amount should have been the amount of his own personal gain. The Triana court rejected this argument in holding, "[C]ourts have consistently held that in calculating loss, 'substitution of defendant's gain is not the preferred method because it ordinarily *underestimates* the loss.'" Id., 460 F.3d at 323 (emphasis in original) (citing United States v. Snyder, 291 F.3d 1291, 1295 (11th Cir. 2002); United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995); United States v. Haddock, 12 F.3d 950, 960 (10th Cir. 1993)). Accordingly, defendants are responsible for the entire scope of the financial harm occasioned by their criminal conduct rather than the benefit they received.

D. Intended Loss

The Probation Office correctly calculated the loss amount from the resulting offenses as being $1,787,679.62 and appropriately applied an offense level enhancement of +16 to Davian's guidelines calculation. The intended loss is calculated based on his promoting and selling of securities through misrepresentations to investors while enriching himself from approximately July 2008 to July 2013. It is the government's position that Davian's entire operation was a scam for which there can be no legitimate expense. The victims all gave their money to Defendant and, except for the one or two victims partially redeemed, they were all left with nothing: neither cash nor stock holdings. It's all gone.

In response to the initial PSIR, Defendant objected to several of the victims' loss amounts, stating that the loss amounts listed in the PSIR exceeded the actual investment of those individuals. It was Defendant, however, that provided the government with the initial investments of these investors, along with any redemptions made, that the government attempted to confirm with the victims. If the government was able to confirm the loss amounts with the victims, the confirmed number was used. If the government was unable to confirm with the victims, the government used the loss amounts provided by Davian. For instance, for "Brian and Bobby V [sic]," Davian initially told the government that their loss from investment was $50,000. The government contacted "Brian and Bobby V [sic]," and they stated that their loss was in fact $40,000, which is the number the government used in aggregating the victims' total loss. Similarly, with "Melissa and Jason T," Davian originally told the government that their loss was $50,000. The government confirmed with these victims that their loss was actually $30,000, which was the amount used to aggregate total loss. With respect to Ryan S., Davian told the government that his loss was $5,000, which the government confirmed with the victim

and applied towards total loss. Davian's objection that Ryan S's total investment of $30,000, therefore, does not apply. With respect to the remaining investors on Davian's objection list (i.e., Adam M. Estate, Daniel [sic] D., and Tim and Kathy D.), the government was unable to confirm the loss amounts with the victims themselves and thus relied on the loss amounts Davian previously provided to the government.

The PSIR sets forth in great detail, victim by victim, how the loss amount was totaled in this case. As further explained below, this Court should adopt the Probation Office's analysis.

i. Intended Loss Is The Appropriate Measure Where Davian Intended To Defraud His Victim Investors From The Outset.

Davian intended to defraud investors from the outset. While soliciting investors for their initial investment, Defendant misrepresented to prospective investors that he managed hundreds of millions of dollars to create the illusion that Davian Capital was larger and more sophisticated than it actually was. He created multiple limited partnerships as private investment funds managed by Davian Capital to further maintain the illusion that Davian Capital was a significant and successful operation. He provided prospective investors with marketing materials falsely touting his funds' supposedly high returns (sometimes as high as 27%) and describing his purportedly profitable trading strategies. He provided investors with fictitious letters and client statements that reflected positive investment performance and high balances when, in reality, the statements did not reflect the true position of the investors' funds.

Davian started making fraudulent misrepresentations when he began soliciting investments. As such, Davian never had any intention of building up Davian Capital as a legitimate company. Moreover, given that Davian completely fabricated imaginary returns on client account statements and the amount that he had under management, it was Davian's plan to continue defrauding investors until the investors lost their entire investment.

ii. Using The Amount Of Money Invested By The Victims Without Any Deductions For Business Expenses Is The Correct Way To Calculate Loss.

This Court should not reduce the actual loss amount for what would otherwise be legitimate business expenses. Defendant may argue that costs associated with running a legitimate business, such as building expenses, salaries, etc., should be deducted from the victim's loss amount because these expenses were the same as would be paid by investors in a legitimate business. This argument fails. Recent Sixth Circuit decisions and the decisions of other courts hold that expenses used to prolong fraudulent investment schemes are not legitimate expenses. United States v. Healy, Nos. 12-6008, 12-6367, 2014 U.S. App. LEXIS 1971, at *4-5 (6th Cir. Jan. 29, 2014). In Healy, defendant made false representations about patent rights to medical chips, the capabilities of these chips, and his own credentials in order to secure investors for his company. Id. After obtaining money from investors, defendant traveled to different companies and tried to sell medical chips, incurring "business expenses" as he did. Id. When investors wanted to see a sample product or a purchase contract, defendant came up with excuses to avoid these meetings because he did not have a working product. Id.

During his sentencing, defendant argued that much of the money from the investors was spent on "legitimate business expenses" such as compensating employees, traveling, and meeting with clients, and therefore should be deducted from the loss calculation. Id. at *12. The Sixth Circuit rejected this argument and found that these expenses could not be considered "legitimate" because the "investor money was used to lull investors into believing the company was legitimate and prolong the life of the fraudulent scheme." Id. at *16. Likewise, any money that Davian spent to operate Davian Capital and his other investment corporations, including building expenses and employee salaries, should not be deducted from the loss amount. Similar to Healy, Davian lied about the abilities of his company and his credentials in order to secure

investors who otherwise might not have invested with his company. Davian also avoided meeting with clients who tried to withdraw their money and used the money he raised from his investors to pay for personal expenses as well as office expenses. Davian's business expenses protected the fraud from exposure and extended the length of the fraud, and therefore cannot be legitimate business expenses to be deducted from the victim's loss.

This interpretation of loss is also supported explicitly by the Eighth Circuit and implicitly in Sixth Circuit rulings in other areas of fraud. The Eighth Circuit has held that fraudulent investment schemes cannot have legitimate business expenses if they further the fraud. United States v. Craiglow, 432 F.3d 816, 820 (8th Cir. 2005) (rejecting the argument that money spent to perpetuate a Ponzi scheme is a "legitimate business expense); United States v. Whatley, 133 F.3d 601, 606 (8th Cir. 1998) (refusing to reduce loss to account for costs occurred while running the fraudulent business). Similarly, in tax fraud, defendants are not permitted to deduct expenses in furtherance of illegal activity for tax purposes. United States v. Lukasik, Nos. 05-1956, 2007 U.S. App. LEXIS 23543, at *9 (6th Cir. Oct. 3, 2007) (refusing to deduct investor money spent on the fraudulent business from the amount of unreported income). Because Davian's enterprise was based in fraud, all expenses and income was illegitimate, and, therefore, the victims' loss should be calculated as $1,787,679.62.

E. The Section 3553(a) Factors Weigh In Favor of a Lower Sentence

An examination of the statutory factors under 18 U.S.C. § 3553(a) shows that a sentence of sixty-four months, which is the middle of the guidelines range, is appropriate in this case.

Title 18, United States Code, Section 3553(a) states, in pertinent part:

> (a) Factors to be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> [. . .]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. . . .

Defendant committed a serious crime, and he did so with impunity. The lengths to which Davian went to steal from his victim investors seemed to have no limit. When it came to his own ambition, he seemed to have no inhibition. He stole from his own family. He stole from his friends and colleagues. He stole from people he duped into subscribing to his newsletter. He created a false persona, using social media to create the illusion that he was something he was not. There were times when he used high pressure sales tactics to get people to invest hundreds of thousands of dollars with him. And there were times when he slowly lulled people into investing more and more money into his funds. He knew how to get people to open their wallets. He knew how to get people to trust him. And he knew how to exploit them once they did.

A sentence of sixty-four months would also provide just punishment for the offense and afford adequate deterrence for this criminal conduct. Davian's fraud was not the result of just one bad trade. Davian's fraud was a systematic depletion of investor monies to enrich himself and to pay his expenses. His victims were not wealthy investors that could absorb the sting of an

investment scam. They were not anonymous victims on a boiler room operator's cold call list. They were people he knew. As one investor stated in her victim impact statement: "Anthony Davian didn't just lie, cheat, and steal from wealthy investors, but he lied, cheated and stole from two retired cancer survivors, who are also the parents of one of his closest friends. The type of person that would do that deserves to be punished for his crimes to the fullest extent of the law."

Imposing a sentence of sixty-four months is consistent with sentencing decisions in similar cases. In Healy, for instance, defendant conned approximately $1,400,000 from investors and was sentenced to fifty-seven months in jail. Healy, 2014 U.S. App. LEXIS 1971. Imposing a sentence of sixty-four months reflects the increased amount of funds fraudulently gained and is consistent with other sentences imposed for similar crimes.

F. Restitution

Although a district court may look to intended loss in calculating total loss under the sentencing guidelines, it must base its order of restitution on actual losses. United States v. Riddell, No. 08-5539, 2009 U.S. App. LEXIS 15095, at *2-3 (6th Cir. July 1, 2009) (citing United States v. Simpson, 538 F.3d 459, 465-66 (6th Cir. 2008) ("It is true that the MVRA refers only to 'actual' loss, and unlike § 2B1.1 of the Guidelines does not include 'intended loss'"); United States v. Finkley, 324 F.3d 401, 404 (6th Cir. 2003) (remanding where the government conceded that the district court erred by awarding restitution in the amount of intended loss instead of actual loss)). In his plea agreement, Davian agreed to pay any restitution that the court ordered. Here, this Court should grant restitution to each of the twenty-seven victims in the amount of their total loss, totaling $1,787,679.62.

IV. CONCLUSION

For the foregoing reasons, this Court should calculate the loss amount as being $1,787,679.62, apply an offense level enhancement of +16 to Davian's Guidelines calculation, and sentence him to sixty months. Moreover, this Court should impose a restitution order totaling $1,787,679.62 to the victims for the loss caused by Defendant's conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2014, a copy of the foregoing Government's Sentencing Memorandum as to Anthony J. Davian was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Christos N. Georgalis
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