

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

NO. 11-cr-20314

Plaintiff

Honorable Paul D. Borman

vs.

D-1 JOHN BRAVATA

Defendant.

GOVERNMENT’S SENTENCING MEMORANDUM

The United States provides this Memorandum in support of its position on sentencing.

I. INTRODUCTION

This case is ordinary in that it involves a common criminal. This case is extraordinary in that uncommon and extraordinary means were used by John Bravata to cheat investors out of a staggering amount of money – almost \$50 million.

John Bravata’s scheme to defraud was uncovered following an investigation and subsequent shut down of his companies by the Securities and Exchange Commission (SEC) and the United States District Court for the Eastern District of Michigan in July 2009.

The extent of John Bravata's fraudulent conduct was detailed in an 8 week trial which resulted in his convictions for Conspiracy to Commit Mail and Wire Fraud and 14 counts of Wire Fraud. It is not an exaggeration to say that John Bravata and his co-defendants orchestrated and managed a ruthless criminal enterprise that resulted in the financial ruin of hundreds of victim investors -- victims that John Bravata targeted because, by virtue of their age, naiveté and resources, they were particularly vulnerable to his lies and manipulation.

John Bravata, was and remains undeterred by the government's investigation and his convictions. Evidence at trial established that with as little as \$22,000 in his company's account and with the SEC on the verge of requesting an injunction to shut the company down, John Bravata callously solicited money. This conduct continued long after BBC Equities was no longer a viable entity.

John Bravata raises several objections to the presentence investigation report. By this sentencing memorandum, the government shows that the ¹Probation Department's recommendations, with a couple exceptions discussed below, are well-founded. Defendant's numerous challenges should be overruled.

The government asks that John Bravata be treated the same as any other defendant brought before the Court for sentencing. After calculating a defendant's

¹The government has attached Exhibit A, a sentencing guidelines worksheet that includes the government's calculations. The government calculates John Bravata's guidelines at "Life."

proper guideline range, the Court will consider all relevant factors under 18 U.S.C. § 3553(a), and impose sentence.

II. SENTENCING GUIDELINE CALCULATIONS

A. Loss: USSG 2B1.1(b)(1)(L)

The PSR correctly applies a 22 level upward adjustment, pursuant to Section 2B1.1(b)(1)(L), because the fraud loss exceeds \$20 million. (PSR ¶ 24) While the Defendant objects to this upward adjustment, there can be no legitimate dispute that the loss in this case exceeds \$20 million.

In determining the amount of loss resulting from a fraud offense, the district court is to determine the amount of the loss by a preponderance of the evidence. *United States v. Triana*, 468 F.3d 308, 321 (6th Cir. 2006). The sentencing court is not required to compute the loss with precision. The district court need only make a reasonable estimate of the loss, given the available information. *Triana*, 468 F.3d at 320; *see also United States v. Jacobs*, 117 F.3d 82, 95 (2d Cir. 1997)(quoting U.S.S.G. § 2F1.1, comment. (n.9) (1987)). As stated by the applicable Guideline:

The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference.

U.S.S.G. § 2B1.1, comment. (n.3(C)); *see also United States v. Bennett*, 252 F.3d 559, 565 (2d Cir. 2001)(court need only make reasonable estimate of loss).

To successfully challenge a district court's loss calculation on appeal, a defendant "must carry the heavy burden of persuading th[e] Court that the evaluation of the loss was not only inaccurate, but was outside the realm of permissible computations." *United States v. Hamilton*, 263 F.3d 645, 654 (6th Cir. 2001)(quoting *United States v. Jackson*, 25 F.3d 327, 330 (6th Cir. 1994)).

In view of these standards, John Bravata is responsible, under the Sentencing Guidelines, for losses totaling more than \$20 million.

First, during cross examination John Bravata admitted he was responsible for bringing over \$50 million into his company BBC Equities. (TT 3/19/13, John Bravata at 74-75; Exhibit B).

Second, the summary spreadsheet entitled "BBC Equities Investor Analysis" which is attached to this memorandum as Exhibit C, sets forth the loss in this case. This document was provided to the Probation Department and the defendants. It is a compilation from an analysis of the defendant's own accounting records, as well as records of the bank accounts John Bravata used in conducting the scheme. It establishes the loss amount at \$44,533,437.86 and represents money investors gave John Bravata based on his lies and omissions. Pursuant to the provisions of U.S.S.G. §2B1.1, comment n.3(E)(i) the government credited the defendant with payments made to victims before the offense was detected. This reduced the loss

to an amount under \$50 million and also reduced the defendant's adjusted offense level by 2 points.

Third, this court must order restitution, pursuant to 18 U.S.C. § 3663A, for monetary losses suffered by individuals the court finds to be victims of John Bravata's fraud scheme. To assist with that determination, the government has compiled the names of victim investors identified in the course of the SEC and FBI investigations (Exhibit C), and included only loss amounts which are cognizable by this Court for restitution purposes (victims' investments less any the received as returns). By any measure, John Bravata's offense conduct resulted in more than \$20 million in loss.

For restitution purposes, the government seeks an order of \$44,533,437.86.

B. More than 250 Victims - U.S.S.G. § 2B1.1(b)(2)(C)

The Probation Department properly found that John Bravata's sentencing guidelines should be increased four levels, pursuant to USSG §2B1.1(b)(2)(C), because his offense involved more than 250 victims. (PSR ¶ 25). The Sentencing Guidelines provide for a four level increase "[i]f the offense . . . involved 250 or more victims." U.S.S.G. §2B1.1(b)(2)(C). "'Victim' means (A) any person who sustained any part of the actual loss determined under subsection (b)(1)." *Id.*, comment (n.1); accord *United States v. Icaza*, 492 F.3d 967, 969 (8th Cir. 2007). "'Person' includes individuals, corporations, companies, associations, firms,

partnerships, societies, and joint stock companies.” U.S.S.G. §2B1.1, comment (n.1). To summarize, a victim must be an individual, corporation or company of some type that sustained part of the actual loss determined by the district court.” *Icaza*, 492 F.3d at 969.

As discussed above with regard to loss, every person listed in Exhibit B suffered, at the very least, an actual pecuniary loss because they invested with BBC Equities. In objecting to this enhancement the defendant offers no support other than a vague statement that evidence at trial referred to 25 victims. Not only does this inaccurately characterize the evidence, it ignores the fact that John Bravata was convicted of a conspiracy to defraud that took place over three years and by his own admission he was responsible for bringing in over \$50 million dollars. As with all offense characteristics under U.S.S.G. §2B1.1, the number of victims is to be determined on the basis of the defendant’s broader course of conduct and common scheme or plan.

C. Violation of Securities Law - U.S.S.G. § 2B1.1(b)(18)(A)(ii)

Probation did not assess a 4 level increase under Section 2B1.1(b)(18)(A)(ii). Bravata qualifies for this four-level enhancement because (a) “the offense involved a violation of securities laws”; and (b) at the time of the offense, he was “a person associated with a broker or dealer.” Each element is discussed below.

1. The Offense Involved A Violation of Securities Laws.

The SEC sued Bravata for securities fraud and other violations of the securities laws. In the course of granting the SEC's motion for a preliminary injunction in that matter, Judge Lawson held: "The Court finds that the SEC has offered substantial proof of violations of the anti-fraud statutes and regulations." *SEC v. Bravata*, 763 F. Supp. 2d 891, 917 (E.D. Mich. 2011). The Court found that the following facts established Bravata's intent to deceive:

From the outset, the individual defendants handled the money entrusted to them in a manner that was antipodal to their professed creed of protecting principal investment and eschewing compensation until they made good on their pledge to investors. Their professed philosophy was "I don't get paid until you get paid," but in practice their approach was "Eat dessert first." They used the initial influx of cash to make purchases of luxury items for themselves, and their use of funds on behalf of investors was to purchase highly leveraged properties that proved to be of little worth. It was plain, as John Bravata acknowledged that the future of the business depended on persuading more people to invest. He was in the process of obtaining money from other people by way of his Phoenix Venture Capital offering—which itself failed to paint a true picture of the shaky foundations of the BBC companies—when the lawsuit was filed. The evidence shows an initial and continuing actual intent to defraud. The plaintiff has offered substantial evidence of the requisite scienter.

Id. at 916-17. These same facts – and the other facts, cited by Judge Lawson, supporting his finding that Bravata’s conduct violated securities laws – were also established in the criminal case against Bravata.²

2. At the Time of the Offense, Bravata Was Associated with a Broker/Dealer

Judge Lawson also held that, based upon the evidence, Bravata violated Section 15(a) of the Exchange Act by acting as a broker-dealer without registering as such with the Commission. *Id.* at 918. Section 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”) makes it “unlawful for any broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security ... unless such broker or dealer is registered [with the SEC].” *SEC v. George*, 426 F.3d 786, 792 (6th Cir. 2005) (quoting 15 U.S.C. §78o(a)(1)). Factors that may qualify an individual as a broker-dealer include (a) regular participation in securities transactions, (b) employment with the issuer of the securities, (c) payment by commission, (d) history of selling the securities of other issuers, (d) involvement in advice to investors and (e) active recruitment of investors. *George*,

² Judge Lawson entered a preliminary injunction predicated upon a “demonstration of both a *prima facie* case of past violations and a reasonable likelihood or propensity to engage in future violations.” *Id.* at 914. This is a somewhat lower standard than the “preponderance of the evidence” standard required of the government to establish enhancements at sentencing. *See, e.g., United States v. Russell*, 595 F.3d 633, 646 (6th Cir. 2010). Thus, Judge Lawson’s ruling arguably has no “collateral estoppel” effect at sentencing. But at the very least Judge Lawson’s ruling establishes the overwhelming evidence supporting the applicability of the “securities law violation” enhancement.

426 F.3d at 797 (defendant violated Section 15(a) when he “was regularly involved in communications with and recruitment of investors for the purchase of securities.”). The “receipt of transaction-based compensation” is of particular importance in making this determination, as such compensation “often indicates that such a person is engaged in the business of effecting transactions in securities. Compensation based on transactions in securities can induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation under the [Exchange] Act.” SEC Exchange Act Release No. 22172, 1985 SEC LEXIS 1217, *13 (June 27, 1985).³

BBC Equities and Bravata Financial both paid their employees and sales agents commissions or “finder’s fees” of at least 8% for successfully selling BBC Equities investments. Bravata was among those who received such commissions or

³ While, under certain circumstances, Exchange Act Rule 3a4-1 (17 C.F.R. 240.3a4-1) exempts an “associated person of an issuer of securities” from the requirements of Section 15(a) of the Exchange Act,” that exemption does not apply if the broker at issue was “compensated in connection with his participation by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities.” 17 C.F.R. § 240.3a4-1(a)(2); *see also SEC v. Rabinovich & Assocs.*, 2008 U.S. Dist. LEXIS 93595, *14 n.5 (S.D.N.Y. Nov. 18, 2008) (“Exchange Act Rule 3a4-1 exempts persons associated with an issuer from the definition of ‘broker,’ provided (inter alia) that the person does not receive compensation for selling the issuer’s securities ... Although Lovaglio was associated with R&A, the issuer of the securities in question, he does not qualify for this exception, because he received compensation for selling the securities.”).

finder's fees. Accordingly, Bravata and Bravata Financial Group acted as broker-dealers.⁴

⁴ Although Bravata and BFG were not registered with the SEC as broker-dealers, the "securities law violation" enhancement does not require that the broker-dealer with whom the defendant was associated be registered. The operative term of that enhancement, "person associated with a broker or dealer," is borrowed from and defined by the Exchange Act. Both the Securities and Exchange Commission and commentators construe that term to include those who are associated with both **registered or unregistered** brokers or dealers. *See, e.g.*, Louis Loss, Joel Seligman, Troy Paredes, *Securities Regulation*, Vol. VI, Ch. 8, pp. 634-39 (4th Ed. Wolters Kluwer) (in the context of Section 15(b)(6), the term "any person who is... associated with a broker or dealer" "is not limited to proceedings against persons associated with **registered** broker-dealers, though other provisions **are** so limited... A bar or suspension order under § 15(b)(6) prohibits association with 'any' broker or dealer as defined in the [Exchange] Act, whether or not he or she is registered.") (emphasis in original); *In the Matter of Vladislav Steven Zubkis*, Exchange Release No. 52876, Admin. Proc. File No. 3-11625, at p. 9 (Opinion of the Commission Dec. 2, 2005) ("Zubkis contends further that he is a 'natural person' and neither a broker nor a dealer 'as defined in the statutes.' From this assertion, Zubkis draws the erroneous conclusion that '[a]ll of the statutes in this section [15 of the Exchange Act] are inoperative as to me.' It is well established, however, that Exchange Act Section 15(b), the section at issue here, applies to natural persons who are, like Zubkis, acting as a broker or dealer or associated with a broker or dealer, such as Z3 [an unregistered broker-dealer]."); *In the Matter of Johnny E. Johnson*, Exchange Release No. 64408, Admin. Proc. File No. 3-14210, at p. 3, n. 2 (Chief ALJ Murray's Order Making Findings and Imposing Sanctions by Default May 4, 2011) ("Exchange Act Section 15(b) applies to persons acting as a broker or dealer or associated with an **unregistered** broker or dealer.") (cite omitted; emphasis supplied).

In *Teicher v. SEC*, 177 F.3d 1016 (D.C.C. 1999), the defendant argued that under Section 203(f) of the Investment Advisers Act of 1940, the SEC did not have the power to exclude him from association with an **unregistered** investment adviser. The D.C. Circuit rejected that argument, holding that "No language in the cited provision remotely suggests that its application is limited to 'registered' investment advisers." *Id.* at 1018. The court noted that in other sections of the Advisers Act, Congress specified 'registered' advisers, and in others those 'exempt [] from registration.'" *Id.* Thus, the court concluded, when the term "investment advisers" is unmodified by "registered" or "unregistered," "there seems every reason to believe that... it means both." (citations omitted).

The same logic compels the same conclusion with respect to the used of the term "brokers or dealers" in the Exchange Act. As the *Loss Seligman* treatise notes, several sections of the Exchange Act are limited to **registered** broker-dealers. *Supra*. The unmodified use of that term in the Exchange Act therefore necessarily means both **registered** and **unregistered** brokers/dealers. Thus, for purposes of the "securities law violation" enhancement, Bravata was "a person associated with a broker or dealer," here Bravata Financial Group, even though Bravata Financial Group was not registered with the SEC as a broker or dealer.

D. Sophisticated Means Enhancement - U.S.S.G. § 2B1.1(b)(9)(C)

The Probation Department did not assess a two-level increase in the defendant's offense level, under U.S.S.G. §2B1.1(b)(10)(C), but the enhancement is appropriate and supported by the facts and evidence presented at trial. The commentary to this section defines "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." Application Note 8(B). Examples of "sophisticated means" include hiding assets or transactions through the use of fictitious entities, corporate shells, or offshore bank accounts. *Id.*

A series of criminal actions may constitute sophisticated means even if none of the offenses, standing alone, is "especially complex" or "especially intricate." *United States v. Tandon*, 111 F.3d 482, 491 (6th Cir. 1997); *United States v. Pierce*, 17 F.3d 146, 150-51 (6th Cir. 1994). More recently, the sophisticated means enhancement was upheld in a series of unpublished decisions. *United States v. Erwin*, Nos. 10-1103, 10-1843, 2011 WL 2848531 (6th Cir. July 20, 2011); *United States v. Cox*, No. 07-6264, 2009 WL 4885266 (6th Cir. December 16, 2009); *United States v. Masters*, 216 No. 05-6832, 2007 WL 438085 (6th Cir. February 6, 2007); *United States v. Erwin*, No. 01-3917, 2003 WL 21376108 (6th Cir. June 12, 2003).

In *Cox*, the court observed that the defendant was not “especially sophisticated,” in that his true name, address and social security number were tied to every account he used in the scheme. *Cox*, 2009 WL 4885266 at *3-4. Nonetheless, it upheld the district court’s sophisticated means enhancement based on its finding that the defendant set up a ““pretty clever and sophisticated method of setting up these [accounts] so it would appear that money was being transferred to charities.”” *Cox*, 2009 WL 4885266 at *4.

In *Masters*, the defendant discovered identification information in publically available reference materials and used it to obtain fraudulent credit cards and to apply for social security. *Masters*, 2007 WL 438085 at *1. Noting that his individual actions “lacked sophistication,” the court nevertheless upheld the application of the sophisticated means enhancement because, overall, the defendant used a “multi-pronged, cross jurisdictional scheme.” *Masters*, 2007 WL 438085 at *2.

In the 2003 *Erwin* case, the defendant-stockbroker embezzled approximately \$2.3 million from twelve client accounts over a five-year period. *Erwin*, 2003 WL 21376108 at *1. The Court upheld application of the sophisticated means enhancement in large part because the defendant “. . .had to constantly monitor those account statements and perform sophisticated calculations in order to render

falsified accounts to his clients and customers. . .” *Erwin*, 2003 WL 21376108 at *4.

In this case, the defendant’s scheme was, by any measure, both especially complex and especially intricate. As noted above, Bravata’s scheme included the following features:

- Bravata created BBC Equities, LLC, Bravata Financial Group, RJR Group, BBC Management. All were funded with investor money. All falsely purported to be conducting legitimate business. (Government’s Trial Ex. 140.)
- Bravata created at least 49 BBC Holdings, LLCs used in the course of the conspiracy. This in addition to his creation and use of dozens of other LLCs. (Government’s Trial Ex. 151.)
- Bravata drafted and caused the distribution of apparently authentic and convincing “private placement memoranda” (PPMs) and “subscription agreements” containing elaborate descriptions of real estate owned, future investment projects other successful ventures throughout the United States. (Government’s Trial Exs. 87, 95.)
- Bravata used lawyers, accountants, real estate brokers and agents, investment advisors, broker dealers and management experts, all in an effort to bolster the false impression that BBC was successful and to increase sales of the bogus “investment.”
- Bravata successfully solicited investments from approximately 500 individuals from various states across the United States, based on convincing false representations concerning the activities and income of shell companies.
- Bravata used accounting software and accountants to manage and keep track of “investments” and to keep track of and pay investors their “interest.” This “interest” always came from new investor funds.

- Bravata successfully managed the scheme and concealed its fraudulent nature for three years.
- Bravata distributed quarterly “investment statements.”
- Bravata orchestrated a relentless media campaign portraying BBC as hugely profitable and John Bravata as a billionaire, all with the intent of luring new investors. (Government Trial Exs. 19, 21, 32, 33, 38, 52, 102.)
- Bravata conducted a lulling campaign intended to calm the nerves of BBC investors, which included false statements of financial liquidity and grandiose lies about future projects. (Government Trial Exs. 34, 60B, 78; TT 2/20/13, Owens at 127.)
- Bravata orchestrated a full court press of seminars which he crafted and organized, that were clearly intended to solicit investors for BBC. These seminars clearly violated the law, and were contrary to advice from lawyers. (Government Trial Exs. 42, 50 51, 53, 69, 70)
- Bravata created a new investment venture - “Phoenix Venture Capital” (PVC) – in order to solicit even more investors. This included the preparation of fraudulent PPMs and subscription agreements and other documents, to make BBC investors believe their BBC “investments” were being rolled over to PVC in order to avoid action by the SEC. (TT 3/01/13, J W at 70-75; Government Trial Ex. 74A.)

Considering the elaborate nature of the scheme, the defendant’s ability to conceal its true nature while convincing hundreds of individuals to invest substantial amounts and the scheme’s resulting success and longevity, it is ludicrous to even suggest the offenses did not involve sophisticated means.

E. Substantially Endangered the Solvency or Financial Security of 100 or More Victims - U.S.S.G. § 2B1.1(b)(15)(B)(iii)

The Probation Department correctly assessed a two point enhancement under the provisions of U.S.S.G. §2B1.1(b)(15)(B)(iii). The defendant objects to this enhancement, and in supports his objection with one flippant comment: “The fact that some elderly investors got jobs is not proof that the loss of their BBC investment substantially endangered their solvency or financial security.” This flies in the face of trial testimony from investors who are faced with excruciating financial hardship and the irreversible loss of their retirement savings and plans because of Bravata’s scheme. (TT 2/8/13, Cowell at 11; TT 2/20/13, Owens at 121-122, 125; TT 2/20/13, Scheer at 75; TT 3/01/13, JW at 39-40; TT 301/13, JW at 61, 69-75.)

It is almost impossible to read through victim letters and FBI 302s and find a victim whose solvency and financial security was not substantially endangered by John Bravata’s scheme to defraud. The government has attached Exhibit D which lists 132 victims whose solvency and/or financial security were substantially endangered. This list is not exhaustive, but is intended to support the government’s position that over 100 victims suffered this specific harm. Supporting documentation includes victim statements, trial testimony and FBI

interviews. The supporting documentation will be delivered to counsel and the court when this memorandum is filed.

The government counts husbands and wives as separate victims for this guideline enhancement. In *United States v. Harris*, 718 F.3d 698 (7th Cir. 2013), the court held that it is reasonable to conclude that “both spouses suffer the loss or enjoy the gain, depending on the performance of the investment.”

F. Organizer and Leader - U.S.S.G. § 3B1.1(a)

The Probation Department only assessed a two point enhancement under USSG §3B1.1(c). (PSR ¶ 28.)

It is the government’s position that a four point adjustment is appropriate under U.S.S.G §3B1.1(a), because the defendant was the leader or organizer of a criminal activity that involved five or more participants or was otherwise extensive. Even though only three individuals were indicted, the evidence at trial established that the defendant’s scheme to defraud involved five or more participants. It is not necessary that every person who was criminally responsible for the commission of the offense be convicted. U.S.S.G §3B1.1, comment. (n.1). Additionally, the criminal activity involved in John Bravata’s scheme to defraud was “otherwise extensive” as defined by U.S.S.G §3B1.1, comment (n.3). Moreover, a crime involving only three participants can be considered otherwise extensive if it used the unknowing services of many outsiders. For these reasons

the government requests that PSR ¶ 28 be amended to add four points to John Bravata's guideline range, rather than two.

When the government brought this to the attention of the Probation Officer his response was:

[T]wo-level adjustment was properly assessed. Less than five people were held criminally responsible for this offense. In regards to the offense being "extensive," there is little questioning that the monetary loss amount is extensive; however, there is no indication that the defendant and others used the service of outsiders to classify the offense as extensive. The Probation Department declines to change the report and refers the matter for the Court to decide."

(Addendum to PSR.)

For purposes of determining that issue, Application Note 1, U.S.S.G. § 3B1.1, defines a participant as "a person who is criminally responsible for the commission of the offense, but need not have been convicted."

Additionally, the enhancement is applicable when either five or more participants are involved, or it was otherwise extensive. Application Note 3, provides that when considering whether a scheme was "otherwise extensive" a court may consider "all persons involved during the course of the entire offense Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive."

This issue was thoroughly addressed in *United States v. Anthony*, 280 F.3d 694 (6th Cir.2002). The court acknowledged that the Circuits disagreed on the correct approach to interpretation of “otherwise extensive,” but decided to adopt the test set forth by the Second Circuit in *United States v. Carrozzella*, 105 F.3d 796, 802-04 (2d Cir. 1997).

... [T]he Second Circuit in *Carrozzella* decided that the “otherwise extensive” language in § 3B1.1(a) is not a license to engage in a sweeping analysis of the offense for any factor that might possibly support a finding of extensiveness. The Second Circuit concluded that the phrase authorizes a four-level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants. *See Carrozzella*, 105 F.3d at 802–04. We believe this test best carries out the intent of the Sentencing Commission, and therefore we subscribe to it. We draw support primarily from the guideline itself. The background commentary to § 3B1.1 states that:

This section provides a range of adjustments to increase the offense level based upon the size of the criminal organization (i.e., the *number of participants* in the offense) and the degree to which the defendant was responsible for committing the offense....

The Commission's intent is that this adjustment should increase both with the *size* of the organization and the degree of the defendant's responsibility.

Id. at 699-700.

The court in *Anthony* emphasized the importance of focusing on the number of participants, but allowed that both knowing participants and non-participants could be counted. *Anthony*, 280 F.3d at 699-700. This reasoning was followed in the following unpublished opinions: *United States v. Porter*, 127 Fed. Appx. 825, (6th Cir. 2005); *United States v. Tomlinson*, 12 Fed. Appx. 235, (6 Cir. 2001).

John Bravata and Antonio Bravata were convicted at trial and Richard Trabulsy pleaded guilty. In addition there were numerous participants in the scheme to defraud who apparently knew nothing about the illegal activity and yet were critical to its success. John Bravata's scheme was especially complex and especially extensive. The following are examples of people he brought into his scheme and upon whom he relied.

- Employees - Robin Francis, Katie Witkowski, Theresa Makowski and Jena Ansara who ran the offices of BBC, sent investor correspondence, managed PPMs, and paid bills. Sandra Bartels and Diana Fyre who managed and solicited investors in Ohio. They were managed, hired and directed by John Bravata
- Attorneys - John Sellers (General Counsel), George Donnini, Justin Klimko, Paul Villaruel and Tracey Batey. They prepared the legal documents relied on by investors and were hired and directed by John Bravata.
- Marketer - Michael Hale who was hired and directed by John Bravata to advertise BBC and John Bravata in media outlets throughout the United States.

- Presenters - Deb Davis, Zak Davis and Jeff Minock. They were hired by John Bravata and presented seminars using verbatim scripts prepared by John Bravata. Their actions were directly responsible for bringing millions of investment dollars into BBC.
- Officers and Directors - Brian Moran (CEO), Gavin Pike (Real Estate), Melissa Traver (CFO). Each was touted by John Bravata as a top tier professional in an effort to make BBC appear legitimate and profitable.

Clearly the number of unknowing participants whose activities were organized and led by John Bravata was extensive. Equally clear, those listed above and many others were necessary to the success of the scheme to defraud. Accordingly, the Probation Department's position that there "is no indication that the defendant and others used the services of outsiders to classify the offense as extensive" is unsupported.

III. APPLICATION OF 18 U.S.C. § 3553

Title 18, United States Code, Section 3553(a) requires the court to impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of sentencing. In order to determine the "particular" sentence to impose, this Court must consider the familiar statutory factors listed in §3553(a)(1)-(7). One of those factors is the advisory range set by the Sentencing Guidelines and another is the Commission's policy statements. *See* 18 U.S.C. §3553(a)(4), (a)(5). Although the Sentencing Guidelines are advisory only, "[a]s

a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38 (2007). For two reasons, this Court should give serious consideration to the advisory Guideline range.

First, the Sentencing Guidelines are the *sole* factor in § 3553(a) that provides any objective sentencing range which can practicably promote the overall goal of minimizing unwarranted sentencing disparities, a statutorily-mandated factor. *See* 18 U.S.C. § 3553(a)(6); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)(“The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country.”); *see also Booker v. United States*, 543 U.S. 220, 250 (2005)(“Congress’ basic statutory goal – a system that diminishes sentencing disparity”); *id.* at 253(“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity”); *id.* at 267 (rejecting other remedial alternatives because they were inconsistent with the “basic objective of promoting uniformity in sentencing”). The Supreme Court created the advisory system to “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individual sentences where necessary.” *Booker*, 543 U.S. at 264-65. The only way to prevent widespread, unwarranted disparities is to give serious consideration to the Guidelines.

Second, the Guidelines generally deserve serious consideration because they are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.” *Gall*, 552 U.S. at 46. It is true that there is no “presumption” that a Guidelines sentence is the “correct” sentence, *Rita v. United States*, 551 U.S. 338, 351 (2007), and that there is broad sentencing discretion post-*Booker*. However, the Commission is “a respected public body with access to the best knowledge and practices of penology; its judgments should not lightly be disregarded.” *United States v. Wachowiak*, 496 F.3d 744, 753 (7th Cir. 2007)(internal quotation and citation omitted), *abrogated on other grounds*. Furthermore, the Commission is charged by statute to periodically review and revise the Guidelines as the Commission collects comments and data from numerous sources in the criminal justice system, 28 U.S.C. § 994(o), and these ongoing efforts to refine the Guidelines are another reason to seriously consider the advisory range.

In the event this Court exercises its discretion to sentence outside the advisory range, there are guideposts for evaluating what the extent of the deviation should be and when a non-Guidelines sentence will be deemed unreasonable on appeal. These guideposts are set forth in Supreme Court cases. The Supreme Court instructs that it is “clear that a district judge must give serious consideration to the extent of any [variance] from the Guidelines and

must explain [his] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.” *Gall*, 552 U.S. at 46. The degree of the deviation from the advisory Guidelines range is relevant in choosing the particular sentence:

If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.

Gall, 552 at 50; *see also United States v. Klups*, 514 F.3d 532, 537 (6th Cir. 2008).

A thorough consideration of all sentencing factors set forth in 18 U.S.C. § 3553(a) dictates that the most appropriate sentence is one within the advisory guideline range of Life. The government recognizes that each count of conviction carries a maximum penalty of 20years. Thus, a sentence of “Life” is not available. However, the guidelines in this case fall solidly within the range of “Life.” Such a sentence can effectively be accomplished with consecutive sentences and would satisfy the intent of the guidelines. The government recommends such a sentence for John Bravata.

A. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

John Bravata’s offenses were complex, highly orchestrated, and devastating to hundreds of investors. Bravata engaged in an extensive, well-planned scheme to

defraud over the course of three years that involved investments of over \$50,000,000. On a daily basis, he defrauded numerous individuals, wreaking havoc on the lives of his victims.⁵ His scheme demonstrated patent disrespect for the law and for basic moral and ethical behavior. His crimes were not the result of a spontaneous decision borne out of financial distress; rather, Bravata's crimes were generated and prolonged by daily and hourly decisions over a three year period. It was within his sole power to cease his criminal activity at any point. Bravata ignored or simply failed to care that his investors made significant life decisions, including decisions about how to care for ill and dying family members, decisions about how to fund the education expenses of children and grandchildren, and retirement decisions, based upon his false promises and his fraudulent documents.

As illustrated by the following passages from the Victim Impact Statements, John Bravata is responsible not only for wiping away the financial resources of multiple generations within families, the effects of which will be felt for decades to come, but also for causing profound levels of emotional distress:⁶

1. In February of 2008 I lost my job of nearly 27 years. I invested my 401K (totaling \$241,000) with Bravata. The little savings I have left has nearly all been exhausted, in order to pay my bills I am 62 years

⁵See the Victim Impact Statements submitted to the Court.

⁶The U.S. Attorney's Office contacted each victim noted below and received the consent to publish the quote from their Victim Impact Statement. Some of the victims, consented to the publication of their quote but requested that their name not be associated with the quote. In that case their initials are used. The Court and the defendants have been provided with all Victim Impact Statements received by the government.

old and cannot find another job. As a result of not having access to my life savings, I am having to work at at 3 part-time jobs, I cannot meet my expenses.

- Robert D. Mason

2. We are now unable to pay our home mortgage and we are at risk of foreclosure, Our monthly bills/utility payments are behind and our debt is piling because of the financial crisis we are in.

- Salem D. & Renee S. Jamil

3. The loss of this investment combined with economic conditions, greater health care costs resultant from the new Federal health care mandates and Michigan's new pension income tax changes influenced my return to the workforce.

Reactive to this crime, at 64-years-old, I am substitute teaching at almost full-time weekly employment to offset the aforementioned encumbrances, forestall home foreclosure, avoid bankruptcy, stay off government entitlement programs; and, HEAVEN FORBID, become burden to my family.

- Jack Dankert

4.
 - We lost our retirement savings of \$1,253,392.30
 - We had to sell our Florida home at a loss which we are still paying off.
 - We had to sell two of three cars we owned.
 - We had to sell our boat at a loss.
 - We had to return our Cancun timeshares to the Timeshare Company because we could not afford the annual maintenance fees. This resulted in a loss of \$12,900.
 - We have had to substantially cut back on gifts to our children and grandchildren.
 - We have had to cut back substantially on our charitable giving.
 - We cannot afford to eat out very often.
 - We have had to cut back on all our expenses.
 - We cannot afford to take trips and vacations.
 - We could lose our Michigan home in the long run.

- William Cowell and Helen Rae Cowell

5. My life has changed dramatically since I lost my life savings of \$50,000 to John Bravata. I am living solely on my social security check from month to month, in a senior co-op in Riverview, driving a Saturn that is 15 years old and leaks badly. I am \$5,000 plus in debt because I do not have any money in savings account as a back up for car problems, medical bills, dental bills. I need a lot of dental work and cannot have it done because I do not have dental insurance and I cannot afford the \$1,000's it will take to complete this dental work. I have \$12 in my savings account and my checking account has \$17. It will take my approximately 11 years to pay the balance because I can only afford the minimum payments. I cannot travel by plan or auto let alone afford the gasoline from month to month to fill my auto. I received federal assistance with my social security and prescription benefits. I am also part of a food program. I had never ever thought, as they say, "in my wildest dreams" that I would ever be in this position and **in this position because of trust and belief if John Bravata and his word and his company.**

- V.B.

6. This was all of my 401K money after working 31 years at GM. When I rolled over my \$414,000 to Bravata in February 2009, I was looking for a stable place to put my money since the stock market was so volatile. I was assured that my principal was safe and that I would receive 8% interest on the principal. My plan was to keep the principal until later years (for inflation purposes) and use the interest as it came in for daily living and certain "project" that I wanted to do – fix up the house and yard and also spend some quality time with my four grandchildren (taking them on an annual weekend trip some place that they would enjoy...like Disney World or Mackinaw, etc.).

This is now impossible. I have to watch every dollar I spend because I no longer have the \$414,000 safety net for later years and neither do I have the \$33,000/year that the 8% would have given me.

- J. B.

As illustrated by these statements and others, the financial and emotional impact of Bravata's fraud on his victims is staggering. Not only did he perpetrate his fraud upon approximately 500 investors, but he proceeded to pour salt into their

wounds by prolonging the justice they were entitled to and lulling them into believing there was hope even after BBC was shut down and its limited resources were exhausted. Once again, it was his selfishness and self-preservation that guided his actions and decisions. As during his scheme, he thought of only himself and never of the devastated victims.

The applicable guideline range appropriately recognizes the seriousness of a financial fraud scheme of this magnitude and the deleterious effect that it had on its victims. In this case, the imposition of a guideline range sentence is particularly appropriate because the impact John Bravata's actions had on victims has gone beyond the usual serious harm that ordinary fraud victims suffer.

Considering all these aspects of John Bravata's crime spree, the seriousness of this offense calls for a within-guideline sentence of life in prison.

B. The History and Characteristics of the Defendant

Given his background and employment, his savvy business sense and extensive connections to the community, Bravata had every opportunity to succeed and thrive in a legitimate career in the insurance industry or in any other business endeavor he chose. Bravata instead chose to abandon honest work to pursue riches, power, and influence through crime. Unlike the vast majority of criminal defendants in our district who resort to crime out of financial desperation, Bravata did not hatch his scheme in the face of economic privation. Despite his capacity to make a living lawfully, Bravata's disrespect and disregard for the law

began when as young man he was fired from two law enforcement jobs for lying. These events did nothing to deter Bravata, who continued his pattern of ignoring the legal and moral consequences of his actions as he planned and executed one of the largest investment fraud schemes in the history of this district.

On February 17, 2011, R.J. Trabulsy had a consensually monitored phone conversation with John Bravata. During that conversation Bravata discussed needing a lawyer:

I'll have to have one. Um, I don't have the ability if it happens tomorrow, you know, in the next week to get the money together to retain a proper lawyer. Now if it was another thirty, sixty days out or something, I mean that was the whole purpose of the other venture was to make sure that I could buy time. To make sure that I could put the money together for a proper defense.

In the face of a criminal investigation Bravata created PVC to “buy time” so he could raise enough money to hire a good criminal defense lawyer. Another demonstration of John Bravata’s callous disregard for his victims’ financial security and solvency.

Further completing the picture of John Bravata’s history and character, it is important not to forget that he fled to Italy with the intent to avoid this prosecution. In fact he went so far as to investigate Italian extradition laws. On February 16, 2011, in a consensually monitored phone conversation with R.J. Trabulsy, Bravata said the following:

Um, so that was that. And then, ah, they got me from Rome, today. And it, actually a ton better than what I told you yesterday. 'member I said you, you know, you gotta get your visas to stay and your citizenship and all that bullshit. And...

Trabulsy: Yeah.

Bravata: ...it's six to nine months and if not, they can, they can still extradite and blah, blah, blah. Well, he, he double checked and he came back and he said, ah, um, mail fraud and wire fraud, if those are the charges, um, don't even carry criminal, um, jail time in Italy. And he goes there's never been a case in history', in Italy, that they can find where Italy actually, um, allowed an extradition in a case that's greater punishment than their own. And, um, so it's actually, there, we can't even find a case where we actually extradited for mail fraud or wire fraud unless it's been a big, very highly publicized case. He goes technically they can ask for an extradition, um, but he goes in order to get it, they would have to go to the appeals court here in Italy and then it would go up to the Supreme Court in Italy and he goes it'd take them five years to least, at least five years to go through that.

When John Bravata was arrested in this case he was arriving in New York on a flight from Italy. When he was searched Bravata was found in possession of a filled out "Application for Italian Citizenship." (Exhibit E.) In the government's view, the history and characteristics of John Bravata, including his remarkable audacity, unquestionably justifies a guideline sentence.

C. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, To Promote Respect for the Law, and to Provide Just Punishment for the Offense

A guideline sentence would reflect the seriousness of the offense, promote respect for the law, and adequately punish John Bravata for the enormity of his criminal behavior. As described above, Bravata engaged in a notorious and unprecedented long-term fraud scheme that damaged over 500 individual victims. His conduct was astoundingly thoughtless as he showed no concern for his numerous victims and, instead, enjoyed the fruits of his scheme. In the face of financial collapse he used victim-investors' hard earned funds to begin building a 20,000 square foot mansion and purchased expensive cars and jewelry. This money supported a lavish life style that not only satisfied Bravata's greed, but also impressed and seduced hundreds of victim- investors. Such callousness and repeated, serious criminal behavior calls for a lengthy prison sentence to punish the defendant and promote respect for the law. A guideline sentence is adequate to achieve those objectives.

D. The Need to Afford Adequate Deterrence to Criminal Conduct and To Protect the Public From Further Crimes of the Defendant

A sentence within the guidelines is necessary to deter other fraudsters as well as to protect the public from further criminal activity of the defendant.⁷

⁷Email and telephone activity reviewed since John Bravata was convicted shows not only that he refuses to accept responsibility, but is engaged in efforts to start new investment companies using the same template and documents he used with BBC Equities.

The justice system must send the appropriate message to those inclined to engage in wide spread fraud -- a clear message that the justice system will severely punish such conduct. A guideline sentence will achieve this objective. A sentence below the guideline range essentially informs society that these crimes are not significant enough to warrant the strictest punishment. A sentence below the guideline range will have less of a deterrent effect on other individuals facing the same temptation as the defendant to use the finances of others for the benefit of himself, his family and co-conspirators. This is of particular concern because of the media attention to this case. A sentence below the guideline range will have less of a deterrent effect on other individuals facing the same temptation as the defendant in his determined quest for easy money.

Furthermore, the public needs to be protected from John Bravata. He is entirely unrepentant. He took the stand at trial and testified for almost four days. He never apologized; he never admitted he was responsible for a single act that harmed a victim. In fact he portrayed himself as a victim: a victim of the economy, the government, experts and traitorous employees and investors. Bravata insisted his "business model" was sound and well on its way to huge successes. Long after BBC was shut down, Bravata assured old investors their money was safe and only tied up by the government. Long after BBC was shut down he continued to promote new and similar "opportunities" and to solicit funds. It is easy to predict that when he is released from prison he will immediately resort to criminal activity and will not follow the law even when it would be most

profoundly in his interest to do so. A guideline sentence will protect the public from his fraudulent conduct as long as he lives.

E. The Need to Provide the Defendant with Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

There is no need in this case to adjust the sentence below the guideline range in order “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” §3553(a)(2)(D). The prison system can accommodate all of Bravata’s medical conditions, if he has any, and there is little likelihood that Bravata would put educational opportunities to good and lawful use.

This factor, as well, justifies a within guideline range sentence; thus far, Bravata has only used his intellect and creativity to operate a sophisticated fraud scheme.

F. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who have been Found Guilty of Similar Conduct

As stated above, while the sentencing guidelines are advisory, they remain the sole means available for assuring some measure of uniformity in sentencing, fulfilling a key Congressional goal in adopting the Sentencing Reform Act of 1984. Reference to the guidelines, coupled with careful consideration of the 3553(a) factors particularly relevant to an individual defendant, is the only available means of preventing the disfavored result of basing sentences on the luck of the draw in

judicial assignments. Accordingly, the Supreme Court has held that “district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process” in order to assure fair, proportionate, and uniform sentencing of criminal offenders. *Gall*, 552 U.S. at 50 n.6.

Defendants who engage in mail fraud, as the defendant did here, uniformly face sentences in the guideline range that applies here. To sentence John Bravata below the sentencing guidelines and give him a lesser sentence than those similarly situated across the nation would hardly seem a just result given the nature of the instant offenses. Each defendant who commits such a large scale fraud scheme with such great loss to over 500 victims should be sentenced equally to avoid unwarranted sentence disparities. Within our district, Bravata’s investment fraud scheme is almost unprecedented. Accordingly, the importance of imposing a sentence commensurate with the magnitude of his offenses in our community is immeasurable.

Two defendants convicted of operating Ponzi schemes in this district recently received sentences of 168 months and 120 months’ imprisonment, respectively, for schemes that were far less significant both in loss amounts and number of victims: in *United States v. Anthony James*, Case No. 08-20674, Anthony James, on September 9, 2010, was sentenced after trial to serve 168 months for orchestrating a Ponzi scheme involving 38 victims and resulting in a loss of \$2,667,761.59; in *United States v. Dante Demiro*, Case No. 10-20594, Dante Demiro, on July 12, 2011, received a sentence of 120 months based upon his

guilty plea to operating a Ponzi scheme involving 15 victims and resulting in a loss of \$12,900,904.

Possibly the most analogous case in our district is *United States v. Ed May*, Case No. 09-20482. On October 4, 2011, May was sentenced to 192 months - within the calculated range of 188-235. The May case is somewhat similar in that it was an investment fraud with losses just under \$50 million. May's guidelines were lower than Bravata's because fewer enhancements applied to May's conduct. Also, May pleaded guilty and admitted he devised and executed a scheme to defraud, evidencing an acceptance of responsibility that has entirely escaped John Bravata. It is also worth noting that Ed May was 75 years old when he was sentenced making it very likely he will spend the rest of his life in prison. John Bravata deserves no less.

IV. CONCLUSION

In light of the egregious nature of John Bravata's conduct, the government submits that there are no §3553(a) factors which militate against imposition of a sentence within the guideline range; to the contrary, the §3553(a) factors, on balance, support the imposition of the recommended guideline punishment. Nothing in this case justifies a downward variance from the applicable range. To the contrary, the §3553(a) factors demand the imposition of the recommended guideline punishment. There are simply no aspects of the case that make it unusual enough to fall below the advisory guideline range of life in custody. John

Bravata's actions are squarely within those few cases which form the heartland of these guidelines. All of the appropriate considerations of sentencing favor the imposition of a within-guideline sentence and the government urges this Court, in exercising its discretion, to impose such a sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

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