IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
(TAMPA DIVISION)

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No.: 8:11-cr-00115-T-30-MAP
	)	
TODD S. FARHA, et al.,	)	
Defendants.	)	
	)	

MOTION FOR LEAVE TO FILE "BRIEF OF PROFESSORS AND PRACTITIONERS AS *AMICI* IN SUPPORT OF DEFENDANTS"

Amici curiae hereby move this Court, pursuant to Rule 19, Fed. R. Cr. P., for leave to file the accompanying brief in support of Defendants.[1] In support of this motion, *amici* state as follows:

1. This case presents sentencing issues that are unusually complex and implicate important policy considerations on a national scale.
2. *Amici* possess specialized expertise in the area of federal sentencing. *Amici* are law professors, private practitioners, and former government lawyers from across the country. They teach, conduct research, and/or have practiced in the fields of criminal law and federal sentencing in the United States. Most of these individuals have worked as attorneys for the government. Each has a professional interest in ensuring that federal

[1] In this motion and its supporting brief, any reference to the defendants in this case includes only Paul Behrens, Todd Farha, and William Kale.

sentencing law is interpreted and applied in a manner that coherently advances its purposes.

3. *Amici* respectfully submit that their perspective may assist the Court's effort to determine a fair and reasonable sentence under 18 U.S.C. § 3553(a). Specifically, there is a current trend of judicial criticism, and outright rejection, of reliance on the Sentencing Guidelines' loss table to promote the purposes of sentencing. *Amici*, whose expertise includes significant government experience and active participation in the formation and decision making of the United States Sentencing Commission, possess specialized knowledge to explain these issues.

4. *Amici* include:

    a. Prof. Stephen A. Saltzburg. He served as the Attorney General's ex officio representative on the United States Sentencing Commission in 1989-1990 and is the Chair of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes.

    b. Gregory R. Miller. He is a former U.S. Attorney for the Northern District of Florida and has served as an assistant U.S. Attorney for both the Middle District of Florida and the Northern District of Florida. He also served as a Judge Advocate in the United States Marine Corps. He has taught numerous workshops and seminars

on subjects relating to criminal litigation, and he currently manages the Tallahassee office of Beggs & Lane, RLLP.

c. Prof. Douglas A. Berman. He teaches at the Ohio State University Moritz College of Law. He is the co-author of a casebook, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (Aspen 3d ed.), has served as the managing editor of the *Federal Sentencing Reporter* for more than a decade, and is the sole creator and author of the widely-read and widely-cited blog, *Sentencing Law and Policy*.

d. Prof. Jeffrey L. Fisher. He teaches at Stanford Law School, has written and taught federal sentencing law, and has handled United States Supreme Court cases dealing with federal sentencing issues.

e. Prof. Kate Stith. She served as an Assistant U.S. Attorney in the Southern District of New York, teaches courses at Yale Law School on Sentencing and White Collar Crime, and has written extensively on and testified concerning the federal sentencing guidelines. She is a member of the ABA Task Force that Professor Saltzburg chairs.

f. Prof. Bruce A. Green. He served as an Assistant U.S. Attorney in the Southern District of New York, teaches at Fordham University Law School and writes in the area of criminal law, and is past Chair of the ABA Criminal Justice Section.

g. Neal R. Sonnett. He is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He is a past President of the National Association of Criminal Defense Lawyers and the American Judicature Society, a past Chair of the ABA Criminal Justice Section, and a member of the ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes.

h. Prof. Steven Wisotsky: He teaches separate courses in criminal law, criminal procedure and white collar crimes at Nova Southeastern University Law Center. He has chaired the Appellate Practice Section of the Florida Justice Association and has served as co-chair of the ABA Criminal Justice Section Appellate and Habeas Committee. He is the author of a treatise on appellate practice, PROFESSIONAL JUDGMENT ON APPEAL: BRINGING AND OPPOSING APPEALS (Carolina Academic Press, 2d ed. 2009).

5. The Court may accept amicus briefs in its discretion. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249, n.34 (11th Cir. 2006) ("[D]istrict courts possess the inherent authority to appoint 'friends of the court' to assist in their proceedings."); *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("district courts have inherent authority to appoint or deny amici which is derived from Rule 29 of the Federal Rules of Appellate Procedure"); *United States v. Davis*, 180 F. Supp. 2d

797, 800 (E.D. La. 2001) (noting that district courts have authority to permit the filing of amicus briefs). The role of *amici* is to assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991).

6. None of the *amici* have been paid for their work on this brief, or promised any future payment.

For the foregoing reasons, *amici* respectfully request that the Court grant leave prior to sentencing to file the attached "Brief of Professors and Practitioners as *Amici* in Support of Defendants."

Dated: May 12, 2014

Respectfully submitted,

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Appendix 1

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BRIEF OF LAW PROFESSORS AND PRACTITIONERS AS *AMICI* IN SUPPORT OF DEFENDANTS

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INTERESTS OF AMICI

Amici are academics, lawyers in private practice, former and/or former government lawyers. The fairness of the sentencing process is a primary focus of their academic and professional interest. They have come together because they believe that this case highlights a serious problem facing federal sentencing judges today — namely, that the federal sentencing guidelines as currently written place too much emphasis on economic "loss" and too little emphasis on other factors that traditionally have been important factors in determining a fair and just sentence that takes full account of the factors set forth in 18 U.S.C. § 3553(a).

EMPHASIS ON LOSS IS INCONSISTENT WITH 18 U.S.C. § 3553(a)

The loss table inevitably drives a court away, and distracts it, from focusing on the important statutory instructions that a sentence must be "sufficient, but not greater than necessary" to comply with the purposes of sentencing set forth in §3553(a)(2). In Guideline calculations, which still serve as the starting point for federal sentencing decisions, the loss table dwarfs all other factors and distorts the assessment and impact of all other sentencing considerations. Yet, there is no reason to believe that Congress intended loss to overwhelm other considerations set forth in the statute. To the contrary, there is every reason to believe that the Guidelines' emphasis on loss undermines Congress's interest in a fair and balanced sentencing decision.

Amici submit that loss (actual or intended) as calculated according to the

Guidelines:

(1) is simply one aspect of the "nature and circumstances of the offense" and will not reflect or incorporate other more important sentencing factors;

(2) frequently will not "reflect the seriousness of the offense" and can often overstate its seriousness;

(3) does not help a court decide how "to promote respect for the law" and may undermine respect for the law by producing mechanical sentences based on manufactured and inflated numbers disconnected from the offender's culpability;

(4) does not produce "just punishment for the offense" in many cases and may result in advisory Guideline sentencing ranges that are illogical and indefensibly high;

(5) poorly addresses the need "to afford adequate deterrence to criminal conduct" and may undermine deterrence by focusing on only one, and not always the most important one, of several possible motivations for criminal acts;

(6) will often be irrelevant to the goal of "protect[ing] the public from further crimes of the defendant" and may lead to excessive, unjust and unnecessary prison terms for defendants who pose no or little danger to the public;

(7) may operate, perversely, to preclude or undermine any needed training or correctional treatment given that prison terms may negate the benefits of training and treatment;

(8) may operate, perversely, to preclude or undermine the need "to impose similar punishment on similar offenders" because it can lead to similar Guideline-recommended ranges for offenses involving distinct defendants with disparate motives who produced very different harms to distinct types of individuals and institutions;

(9) and may hinder the opportunity for victims of economic offenses to receive full restitution by effectively preventing offenders from being able to make restitution payments.

Simply put, amici believe that the emphasis on loss in modern Guideline calculations cannot be reconciled with the structure and intent of §3553 and necessarily requires district judges to look to other offense factors in order to properly discharge their statutory sentencing obligations.

Amici here are echoing points made by academics and practitioners in various ways for years. A leading academic has stated that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense." Frank Bowman, *Sacrificial Felon: Life Sentences For Marquee White-Collar Criminals Don't Make Sense*, American Lawyer, Jan. 2007, at 63. Indeed, even former federal prosecutors — and a former general counsel to the FBI — acknowledge that "the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and appear much greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution." Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 Yale L.J. Pocket Part 286 (2007), http://thepocketpart.org/2007/02/21/weissmann_block.html.

In many cases, federal judges have refused to impose sentences recommended by Guidelines calculations driven by the loss table. Indeed, in **most** cases involving losses amounts that inflate Guideline ranges, federal judges feel statutorily required, in light of the instructions of Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, now to sentence white-collar offenders below the guideline range because they readily recognize that the loss table often will result in recommended sentences that are much too high.

FEDERAL JUDGES REGULARLY REJECT RECOMMENDED GUIDELINE SENTENCES INFLATED BY LOSS CALCULATIONS

Since the Supreme Court in *Booker* remedied constitutional problems by making the guidelines advisory, more and more judges regularly recognize the need to reject the Guidelines for fraud offenses as a fair benchmark for just and effective federal sentences. Statistics recently released by the United States Sentencing Commission reveal that, from October 1, 2012 through September 30, 2013, federal district judges imposed sentences in approximately 8,196 cases in which Guideline ranges were calculated pursuant to the fraud guidelines set out in U.S. Sentencing Guidelines Manual §2B1.1. Fewer than half of all these cases (4,077) resulted in a sentence imposed within the calculated guideline range. In about 40% of these other cases, the government requested a below guideline sentence based on the defendant's cooperation or other factors and in well over 2,000 cases judge on their own initiative determined they should depart or vary downward from the sentenced recommended by §2B1.1.

In the many cases in which the government had recommended, or a judge has independently determined, that a sentence below the Guideline range is appropriate, the actual imposed sentence is often far below the sentence recommended by the Guidelines. In the more than 1300 cases from Fiscal Year 2013 involving 5K1.1 substantial assistance motions in which the government recommended a below-Guideline sentence, the median sentence actually imposed was twelve months, a full 18 months less than the average calculated guideline minimum (or a median percent decrease of 70%). Similarly, in the more than 1,500 cases involving sentences below

the guideline range as a result of a judicial judgment based on *Booker*, the median sentence was also 12 months, a full 12 months below the average calculated guideline minimum (or a median percent decrease of 53%).

These data demonstrate widespread judicial disaffinity for the extreme sentences often produced under the Guidelines, and they are supported by a recent sophisticated empirical analysis of sentences imposed by federal judges in fraud cases that has documented the role loss plays in fraud cases. This analysis found, not surprisingly, that "judges are more likely to disagree with Guideline recommendations in fraud cases that are driven substantially by loss." Mark H. Allenbaugh, "*Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 Federal Sentencing Reporter 19, 26 (2013)

FEDERAL JUDGES HAVE PERSUASIVELY EXPLAINED WHY THE LOSS TABLE IS PROBLEMATIC

Days after the Supreme Court rendered the Guidelines advisory through its *Booker* decision, U.S. District Judge Lynn Adelman in *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005), provided a thorough explanation for why sentencing factors beyond "loss" should and must take on a greater role in light of the statutory instructions Congress set forth in 18 U.S.C. § 3553(a). The defendant in *Ranum* was a bank official who made unauthorized loans to a start-up corporation, GLC, and lied to the bank about it. He did not act out of a desire for personal profit. Due to the role of loss in the Guideline calculation, the Guidelines called for a sentence of more than 3 to 4 years of imprisonment. The defendant

argued for a period of home confinement, and Judge Adelman decided that the appropriate sentence was imprisonment for a year and a day.

Judge Adelman explained his sentence as follows based on the §3553(a) factors stressed by Congress in its instructions to sentencing judges:

> I determined that the factors set forth in § 3553(a) fell into three general categories: the nature of the offense, the history and character of the defendant, and the needs of the public and the victims of the offense. I analyzed each category and in so doing considered the specific statutory factors under § 3553(a), including the advisory guidelines.
>
> First, I considered the nature of the offense. The offense was serious for several reasons, the primary one being the amount of the loss. * * *
>
> However, defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another. * * *
>
> * * *
>
> I then considered the second general category -- the history and character of defendant. The factors in this category weighed heavily in defendant's favor. He is fifty years old, had no prior record, a solid employment history, and is a devoted family man. He has two children, one of whom is still in school. * * *
>
> * * *
>
> I also noted that defendant's conviction had significant collateral effects on him. After his termination by State Financial Bank, defendant obtained a good job at Anchor Bank. As a result of the conviction he lost that job and will be unable to work in banking again.
>
> **Under all of the circumstances, I concluded that defendant is not a danger to society and is highly unlikely to reoffend**.
>
> Finally, I considered the needs of the public and the victim. Because the case was so unusual, **I doubted whether a prison sentence**

would have much value as a deterrent. * * *

Id. at 989-91 (footnotes omitted and emphasis added). *See also United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (complaining that the "[Sentencing] Guidelines place undue weight on the amount of loss involved in the fraud" given that often "the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

Similarly, in *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), U.S. District Judge Jed Rakoff stressed the limited import and value of loss metrics when he sentenced the Chief Operating Officer and President of Impath, Inc. — a public company specializing in cancer diagnosis testing. The charges against the defendant involved a scheme to inflate Impath's stock, and the government argued, based on loss calculations, that the Guidelines called for a sentence of life imprisonment.

Judge Rakoff imposed a non-guideline sentence of 42 months' imprisonment, plus restitution, forfeiture, supervised release and a lifetime ban being an officer or director of a public company. Judge Rakoff explained why an inordinate emphasis on loss should not drive the sentence that he imposed:

> * * * The offense here was egregious: an accounting fraud extending over several years that had an intended loss of more than $ 50 million. But, as the Government conceded, Adelson was not the originator of the fraud, and, as the jury found in effect, Adelson did not participate in the fraudulent conspiracy until its final months. During the time of his participation, the price of Impath's stock was not further inflated. * * *
>
> * * *

> As for "the history and characteristics of the defendant," it was undisputed at the time of sentencing that Adelson's past history was exemplary. * * *
>
> * * *
>
> **What drove the Government's calculation in this case, more than any other single factor, was the inordinate emphasis that the Sentencing Guidelines place in fraud cases on the amount of actual or intended financial loss.** As many have noted, the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear "objective," tend to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors. * * *

Id. at 509, 512-13 (emphasis added).

Judge Rakoff had more to say about loss in *United States v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012), in which Gupta was convicted of one count of conspiracy and three counts of substantive securities fraud for providing material non-public information to Raj Rajaratnam:

> It may be worth remembering that the Sentencing Guidelines were originally designed to moderate unwarranted disparities in federal sentencing by enacting a set of complicated rules that, it was hypothesized, would cause federal judges to impose for any given crime a sentence approximately equal to what empirical data showed was the average sentence previously imposed by federal judges for that crime. * * * From almost the outset, however, the Guidelines deviated from this goal. * * *
>
> * * * [T]he numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology -- thus maximizing the risk of injustice.

* * *

> In fairness, this vast increase in white collar sentencing was partly mandated by Congress, reacting in turn to public outcry over such massive frauds as Enron and WorldCom. **But in implementing the Congressional mandate, the Sentencing Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss or gain occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, *see* 18 U.S.C. § 3553(a), and, by contrast, effectively guaranteed that many such sentences would be irrational on their face**.

Id. at 350-51 (emphasis added).

In *United States v. Corsey*, 723 F.3d 366 (2d Cir. 2013), the Second Circuit examined the sentences imposed on three defendants involved in a conspiracy to defraud a non-existent investor of three billion dollars. The court of appeals remanded for re-sentencing because of procedural error, and District Judge Stefan Underhill concurred to add these words:

> **In my view, the loss guideline is fundamentally flawed, and those flaws are magnified where, as here, the entire loss amount consists of intended loss. Even if it were perfect, the loss guideline would prove valueless in this case, because the conduct underlying these convictions is more farcical than dangerous. * * * The widespread perception that the loss guideline is broken leaves district judges without meaningful guidance in high-loss cases.**

Id. at 377-78 (emphasis added).

A BETTER WAY TO APPROACH SENTENCING IN FRAUD CASES

The Sentencing Commission itself has expressed concern about the way loss

drives sentences under the Guidelines. It invited a number of individuals to join a discussion about sentencing in economic crimes cases in October 2013. In preparation for that meeting, a Task Force assembled by the American Bar Association Criminal Justice Section drafted an alternative approach that judges could use in sentencing defendants in fraud cases and the Commission could use as a model to improve Guidelines for economic crime cases. The Task Force presented the draft to the Commission during the October discussion.[2] Amici believe that it is more consistent with the requirements of 18 U.S.C. § 3553 (a) than the current Guidelines.

The Task Force focused on the structural framework of the Guidelines and opined as follows:

> This structural framework is not ideal because it can be unduly rigid and lead to the arbitrary assignment of values and the overemphasis of considerations that are more easily quantified to the detriment of equally relevant considerations that are less easily quantified. There is also a risk under the current structural framework that a guideline will appear to carry more empirical or scientific basis than is present.

The ABA Task Force focused its proposed alternative Guideline on more dynamic substantive considerations and on measures of "culpability" that are more consistent with the §3553(a) factors:

> The Guideline has 5 levels of culpability that range from lowest to highest. The appropriate culpability level for any given case will depend on an array of factors. These include, but are not limited to: the defendant's motive (including the general nature of the offense); the correlation between the amount of loss and the amount of the defendant's gain; the degree to which

[2]http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Plenary_Session_III_Report.pdf

> the offense and the defendant's contribution to it was sophisticated or organized; the duration of the offense; extenuating circumstances in connection with the offense; whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The list is not exclusive. Other factors may also bear on the culpability level.

CONCLUSION

The data gathered by the Sentencing Commission demonstrate that federal judges throughout the country recognize that reliance on loss drives sentences to extreme and inappropriate highs and to levels that fail to take account of all of the 18 U.S.C. § 3553(a) factors; these judges are choosing to impose sentences that consider loss but that do not permit loss alone (and in conjunction with other problematic upward adjustments) in the Guidelines to result in unreasonably high sentences. The Sentencing Commission itself has recognized that there are problems how the Guidelines operate in economic crime cases, but formally changing the Guidelines is a slow process that can take years to complete.

Fortunately, since *Booker,* federal courts have not only the discretion, but also an obligation, to impose sentences that are consistent with_18 U.S.C. § 3553(a) and that are "sufficient, but not greater than necessary," to promote the sentencing purposes set forth in the statute. Your Honor does not have to wait for the Guidelines to be revamped, and, indeed, amici respectfully suggest you cannot wait if you are to meet the responsibilities imposed upon you by 18 U.S.C. § 3553(a). Your Honor has full authority to do justice and to consider loss as a factor in sentencing but not as

the most important factor in every case, including this case.

Accordingly, amici urge that the court give appropriate consideration to the amount of the loss in this case, but not permit loss to drive the defendants' sentences to levels that are unreasonable when considered in connection with all of the factors set forth in 18 U.S.C. § 3553 (a). In sum, amici suggest that a below-guidelines sentence is appropriate in this case, as is many cases in which the loss table, in combination with other enhancements, greatly overstates the culpability of the defendants.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May 2014, I caused a copy of the foregoing Motion for Leave to File "Brief of Professors and Practitioners as *Amici* in Support of Defendants" to be served on the following via the Court's electronic filing system:

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