IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**DOCKET NO. 3:16-cr-221-MOC**
ROBERT LESLIE STENCIL (1),	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM

The government, through its undersigned counsel, hereby submits its position with respect to defendant Robert Leslie Stencil's sentencing. For the reasons that follow, the government respectfully requests that this Court sentence defendant to a Guidelines sentence of 168 months in prison; together with restitution to his victims in the amount of $2,745,239, to be paid jointly and severally with his co-conspirators; forfeiture in the amount of $463,221; three years of supervised release; and a special assessment in the amount of $3,100. This sentence would appropriately account for the magnitude of defendant's criminal activity, provide just punishment for the offense, protect the public from his further wrongdoing, and reflect a powerful deterrent to anyone contemplating similar conduct.

I. THE PSR CORRECTLY CALCULATES DEFENDANT'S GUIDELINES RANGE AS 135 TO 168 MONTHS IN PRISON

A. The PSR Properly Applies a 16-Level Enhancement for Defendant's Loss

The PSR properly applies a 16-level enhancement for defendant's loss of more than $1.5 million (Dkt. # 366, PSR ¶ 36), because he participated in a long-standing conspiracy in which he furthered a massive fraud by deceiving victims, helped his co-conspirators to do so, and never withdrew.

In the case of a conspiracy, loss is attributable to a defendant "if it results from the conduct of others so long as the conduct was in furtherance of, and reasonably foreseeable in connection with, the criminal activity." *United States v. Otuya*, 720 F.3d 183, 191 (4th Cir. 2013) (internal quotation marks omitted); *see also* U.S.S.G. § 1B1.3, App. Note 3. Moreover, "[a] defendant's membership in a conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action. Withdrawal must be shown by evidence that the defendant acted to defeat or disavow the purposes of the conspiracy." *United States v. Allmendinger*, 706 F.3d 330, 341 (4th Cir. 2013) (internal quotation marks omitted). "[M]ere cessation of activity in furtherance of the conspiracy is insufficient," *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986), and a defendant must point to "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978).

According to the evidence presented at trial, the defendant's participation in the Niyato investment scheme dated back to at least April 5, 2012, when the government's financial analysis shows that Niyato first received a direct wire transfer from victim MG into an account controlled exclusively by Stencil. (Tr. Ex. 67, Sch. 5, Ln. 1.) As the evidence at trial demonstrated, defendant organized the Niyato high-yield investment offering with numerous other co-conspirators, received victim funds and disbursed the proceeds of the fraud to co-conspirators. Defendant knew that the Niyato investment had no possibility of success, because he knew how he and his co-conspirators were spending the money for their own personal benefit and not to reinvest in the business and operations of an actual company. Defendant therefore also knew that Niyato's only objective was to generate money through fraudulently marketing the investment. Defendant provided his co-conspirators with a steady stream of "press releases" to

use as an excuse to reach out to new victims and repeatedly contact old victims, and helped his co-conspirators to defraud victims over the phone, As a result, defendant could reasonably foresee that his and his co-conspirators' collective telemarketing and email marketing efforts would continue bearing fruit.

There was no evidence that defendant at any time acted to defeat or disavow the purpose of the conspiracy. Accordingly, the conspiracy continued until May of 2016, when the government froze the Niyato bank account and the conspiracy finally ended.

The Court is required to make only a "reasonable estimate of the loss." U.S.S.G. § 2B1.1, App. Note 3(C). Defendant, knowing the nature and scope of the conspiracy, initiated the fraudulent scheme and participated in the scheme together with his co-conspirators for a common gain and over a lengthy period of time—for a minimum of approximately four years. Accordingly, he should be held responsible for the entire amount of loss caused by the conspiracy.

B. The PSR Properly applied a 2-Level Enhancement for 10 or More Victims

The financial report of Christopher Green which analyzed the source of funds deposited into the Niyato bank account identified over 140 victims who made, and lost, their investments in Niyato. (Tr. Ex. 67, Sch. 1).

C. The PSR Properly Applied a 2-Level Enhancement for Sophisticated Means

The PSR correctly recognizes that an additional two point enhancement should be applied pursuant to U.S.S.G. § 2B1.1(b)(10)(C) for Stencil's use of sophisticated means in furtherance of the scheme. The Application Notes of the Sentencing Guidelines state that, "in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means." U.S.S.G. § 2B1.1

cmt. n.9(B). Stencil did exactly that. Stencil located Niyato's main office in North Carolina; however, the salespeople who Stencil recruited to sell Niyato stock were located in other jurisdictions, including California, Florida and Texas. Additionally, several of these salespeople concealed their true identity from victim investors by using aliases and corporate shells to receive the payment of their commissions, which Stencil knew because he was copied on the emails that the salespeople sent to their victims, participated alongside salespeople when they were pitching victims on the telephone, and arranged payment of the commissions to the salespeople corporate shells. These are classic examples of sophisticated means and warrant the enhancement.

D. The PSR Properly Applied a 4-Level Enhancement for Defendant's Role in the Offense

Stencil was the leader in an investment fraud scheme that involved more than five participants. Stencil was Niyato's founder and self-designated president and CEO. Stencil recruited all of the participants (or co-conspirators) in the scheme, including Daniel Thomas Broyles, Sr., Scott Dearborn, Michael Allen Duke ("Duke"), Nicholas Fleming, Martin Delaine Lewis, Paula Saccomanno, Kristian F. Sierp, and Dennis Swerdlen. Stencil organized and maintained regular communications with all of his co-conspirators, including by email and telephone. For example, Stencil held conference calls during which he communicated false and misleading information to his co-conspirators for his co-conspirators to use when selling Niyato stock. Stencil also developed and disseminated written materials – containing numerous false representations about Niyato – for his co-conspirators to use when pitching Niyato stock, including a Private Placement Memorandum, press releases, and email pitches, among other written materials. All of these written materials were created by, or at the direction of, Stencil acting as Niyato's founder, president and CEO. Stencil also negotiated the amount of

commission and coordinated the payment of the commission to his co-conspirators. For any or all of these reasons, Stencil was no doubt the leader in the fraudulent scheme and his offense level is adjusted accordingly to reflect his leadership role.

In light of the evidence demonstrating that Stencil regularly directed the activities of the salesman and distributed the investment promotional material to them to facilitate further victim investments, the role enhancement for organizer or leader is proper. *See United States v. Ray*, No. 16-10054, 2018 WL 2355119, at *4 (9th Cir. May 24, 2018) (holding that the defendant was an organizer or leader because he exercised decision-making authority over the scheme, coordinated cash withdrawals, and divided the scheme's proceeds such that accomplices received substantially smaller payouts); *United States v. Bush*, 663 F. App'x 791, 793 (11th Cir. 2016) (holding that the defendant was an organizer or leader because he received a greater portion of the proceeds and runners reported to him for their assignments).

E. The PSR Properly Applied the Vulnerable-Victim Enhancement

The Sentencing Guidelines mandate a two-level enhancement "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1). A vulnerable victim is a person "(A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable ... and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 cmt. n.2.

The practice of telemarketer "reloading" involves targeting people who have already fallen victim to the scheme at least once, if not repeatedly. In *United States v. Shephard*, the Fourth Circuit found that in telemarketing schemes, the reloading process alone was sufficient to

support a finding that the victims were unusually vulnerable and that the defendants targeted them because of their vulnerability. 892 F.3d 666, 671 (4th Cir. 2018).

At trial, several of the salespeople who worked for Stencil testified about how they repeatedly targeted certain victim investors. See Testimony of Nicholas Fleming on January 10, 2019 P.M.; Testimony of Dennis Swerdlen on January 16, 2019 P.M.; Testimony of Martin Delaine Lewis on January 17, 2019 P.M. The salespeople further testified that Stencil created and provided new information, like press releases, for the salespeople to use as an excuse to reach out to these victims and pitch them to buy additional shares of Niyato stock.

At trial, victims who were repeatedly targeted also testified, including William Grasfeder and Marshal Gunder. Both testified that Michael Allen Duke – one of Stencil's top salespeople – initially sold them Niyato stock and then subsequently sold them additional Niyato stock (i.e., reloaded them) on numerous occasions. See Testimony of William Grasfeder on January 14, 2019 A.M. and Testimony of Marshal Gunder on January 17, 2019 P.M. Grasfeder purchased Niyato stock from Duke on two occasions for a total of $25,000. Gunder purchased Niyato stock from Duke on at least seven occasions for a total of $225,000. The repeated targeting of a victim in connection with a telemarketing scheme is sufficient to support a finding that the victims were unusually vulnerable and targeted for their vulnerability. Therefore, this reloading conduct supports the two point enhancement under U.S.S.G § 3B1.1(b)(1) for targeting vulnerable victims applied in the PSR.

II. THE FACTORS IN 3553(a) WARRANT A SENTENCE WITHIN THE APPLICABLE GUIDELINES RANGE OF 135 TO 168 MONTHS IN PRISON

As this Court is aware, the United States Sentencing Guidelines are advisory only, but they remain "the starting point and the initial benchmark" in sentencing. *Gall v. United States*,

552 U.S. 38, 49-50 (2007). The Guidelines must be properly calculated and considered, but the Court ultimately must craft a sentence that adequately accounts for the sentencing factors and objectives outlined in 18 U.S.C. § 3553(a). *Id.* "[I]n many cases the district court's individualized sentencing determination and the Guidelines recommendation will overlap." *United States v. Haigler*, 329 Fed. App'x 791, 793 (10th Cir. 2009) (internal quotation marks omitted).

In formulating its sentence, the Court must consider the nature and circumstances of the offense of conviction and defendant's history and characteristics. 18 U.S.C. § 3553(a)(1). The sentence imposed must sufficiently reflect the seriousness of defendant's crime, promote respect for the law, and provide just punishment. 18 U.S.C. § 3553(a)(2)(A). The sentence also should deter criminal conduct, protect the public from further crimes of defendant, and provide any necessary education, training, or treatment, in the most effective manner. 18 U.S.C. § 3553(a)(2)(B)-(D). In its analysis, the Court should consider the types of sentences available, the applicable Guidelines range, and any pertinent policy statement issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(5). The Court also should consider the need to avoid unwarranted sentencing disparities among similarly situated defendants. 18 U.S.C. § 3553(a)(6). Finally, the Court must consider the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(7). After determining the appropriate sentence based upon these factors, the Court should adequately explain its rationale to "allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50.

Because each crime is unique, the facts and circumstances of a particular case will control the Court's determination of a just sentence. Here, the government submits that a Guidelines sentence of 168 months in prison is appropriate in this case. But the government

does not request a mere mechanical application of the Guidelines in that recommendation. Rather, as demonstrated below, a Guidelines sentence is appropriate in light of defendant's conduct in this scheme based upon an application of the individualized sentencing factors in § 3553(a).

A. Nature and Circumstances of the Offense

Defendant's convictions of the conspiracy, mail-fraud, wire-fraud, and money-laundering statutes in this case permit maximum terms of incarceration of 20 years per count for the fraud and conspiracy counts and up to 10 years for money the laundering count. *See* 18 U.S.C. §§ 1341, 1343, 1349 and 1957. In addition, in connection with the conspiracy to commit wire fraud, and the substantive mail-fraud and wire-fraud counts, because defendant victimized 10 or more persons over age 55, a statutory enhancement of 10 years applies in addition to any term of imprisonment imposed. *See* 18 U.S.C. § 2326(2). These statutorily allowable penalties reflect the serious nature of defendant's offenses. Overwhelming evidence at trial established defendant's reprehensible conduct in this case, demonstrating that he, together with his co-conspirators, perpetrated an extensive fraud scheme in which they repeated the same lies to steal money from vulnerable victims over the course of several years. The evidence at trial showed that defendant actively engaged in—and often times led the charge on—fraudulent activities that included promoting Niyato as a highly profitable and commercially viable investment, directly participated in closing victims, falsely claimed to victims that Niyato was awarded a contract tor tens of millions of dollars by a worthless entity, American General LNG, which he failed to disclose that he owned and controlled, and assisted in convincing victims to purchase additional stock and send more money. Either standing alone or in combination, these factors weigh heavily in favor of a lengthy prison sentence here.

The law punishes offenses like the ones committed by defendant because they are serious. Defendant, during the course of this scheme, repeatedly made a conscious decision to cheat, lie, and steal. The government submits that all of these are important facts for the Court to consider in evaluating the nature and circumstances of defendant's offense. Defendant's crime had real consequences, and he should be held to account.

B. History and Characteristics of Defendant, Including his Lack of Respect for the Law and the Need to Deter His Criminal Conduct

Defendant had no doubt that he was committing fraud. Stencil initiated the scheme and continued making false representations about the future success of the investment while he knew the majority of the investors funds were being diverted for the co-conspirators personal benefit making success an impossibility. These facts weigh heavily in favor a lengthy sentence, because they demonstrate that defendant lacks respect for the law and requires meaningful deterrence.

The legislative history of § 3553 reflects that Congress "viewed deterrence as particularly important in the area of white collar crime." *United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009). Indeed, because "economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence. Defendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime therefore can be affected and reduced with serious punishment." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006); *see also United States v. Edwards*, 595 F.3d 1004, 1021 (9th Cir. 2010) (Bea, J., concurring in part and dissenting in part) ("White collar crime, especially bank fraud, usually requires a well-schooled, intelligent criminal, capable of gauging the upside of how others will be gulled by his well-honed fables. This ability to foresee extends also to the possible downside of his fraud: apprehension, conviction, and punishment."). As one district court noted, "Persons who commit white-collar

crimes like defendant's are capable of calculating the costs and benefits of their illegal activities relative to the severity of the punishments that may be imposed. A serious sentence is required to discourage such crimes." *United States v. Stein*, No. 09-CR-377, 2010 WL 678122, at *3 (E.D.N.Y. Feb. 25, 2010), *corrected*, No. CR. 09-CR-0377 (JBW), 2010 WL 3023527 (E.D.N.Y. July 27, 2010).

The government respectfully submits that a substantial term of incarceration at the top end of the applicable Guidelines range would send a strong message to other would-be fraudsters that conduct like this is unacceptable and will be met with serious punishment. General deterrence is especially necessary in telemarketing and email marketing cases like this one because the barrier to entry is extremely low, requiring only access to a telephone or an email account; the manner and means of the crime allow criminal activities to be conducted from a distance under the shroud of anonymity; and the potential proceeds can be significant, ranging from tens of thousands of dollars to millions of dollars. In these circumstances, any sentence other than a lengthy one simply would incentivize others to commit financial crimes.

In addition to general deterrence, § 3553(a)(2)(C) also requires the Court to consider the need to protect the public from further crimes of the defendant—that is, specific deterrence. The PSR notes that defendant has no significant assets, nor the ability to make an immediate monetary payment. Stencil failed to provide financial information to the Probation Officer and therefore, the Probation Officer was required to rely exclusively on a credit report to determine Stencil's financial status which indicated a negative net worth. With no identified means to care for himself the defendant is a risk to offend in the future and poses a serious risk of economic danger to the community. Such considerations are appropriately and routinely considered in the

context of sentencing. *See United States v. Smith*, 424 F.3d 992, 1016-17 (9th Cir. 2005); *see also United States v. Chi*, 616 Fed. App'x 950, 955 (11th Cir. 2015) (unpublished).

C. Need for the Sentence to Reflect the Seriousness of the Offense, Provide Just Punishment, and Protect the Public

While defendant's crimes were not violent in nature, they were nonetheless damaging and destructive to the victims whom he defrauded, many of whom were vulnerable. Numerous victims testified at trial as to the substantial financial loss they suffered as a result of their Niyato investments. Financial-Impact Statements filed in this case also offer proof of the significant harm that defendant caused.

The significant impact of defendant's crimes warrants a Guidelines sentence here.

D. The Kinds of Sentences Available

The maximum statutory penalty for each of the charged offenses is 20 years of imprisonment for all offenses other than money laundering which is 10 years of imprisonment (plus 10 years for the statutory enhancement that applies to telemarketing frauds targeting the elderly); 3 years of supervised release; a special assessment of $100 on each count; and a variety of fines, as detailed in the PSR.

E. Defendant's Sentencing Guidelines Range

The PSR correctly calculates defendant's offense level as 33 and his Criminal History as Category I, yielding a Guidelines range of 135 to 168 months in prison. (PSR ¶ 77.) Notably, the Probation Officer determined that there appears to be no circumstance or combination of circumstances that warrant a departure from the prescribed sentencing guidelines.

F. Any Pertinent Policy Statement Issued by the Sentencing Commission

The government is not aware of any pertinent policy statements issued by the Commission.

G. The Need to Avoid Unwarranted Sentencing Disparities Among Defendants With Similar Records

A sentence of 168 months is consistent with sentences imposed for leaders of criminal fraud schemes spanning multiple years and causing millions of dollars in losses, particularly for defendants who show any lack of remorse.

H. The Need to Provide Restitution to Victims of Defendant's Offense

Finally, restitution must be ordered in this case in accordance with 18 U.S.C. § 3663A and U.S.S.G. § 5E1.1. The government disagrees with the PSR's calculation of restitution in the amount of $1,635,753.75. The government's position is that the defendant is jointly liable for the entire victim loss of $2,745,239 as traced by Financial Analysist Christopher Green. (See Tr. Ex. 67, Sch. 1.) The government established the losses for these victims, some of whom testified at trial, through summary exhibits offered through its financial analyst documenting the victim deposits into the Niyato bank account. (*Id.*) The Victim-Impact Statements previously submitted to the Court also partially corroborate the loss and validate Christopher Green's loss analysis.

The government also seeks forfeiture in the amount of $485,514, which represents the sum of the proceeds defendant received through the commission of Counts 1-6, 8-21, and 23-29. (Tr. Ex. 67 Sch. 4.)

CONCLUSION

For the reasons set forth above, the government respectfully requests that this Court sentence defendant to 168 months in prison, together with restitution to his victims in the amount of $2,745,239, to be paid jointly and severally with his co-conspirators; forfeiture in the amount of $485,514; three years of supervised release; and a special assessment in the amount of $3,100.

Dated: August 12, 2019

Respectfully submitted,

R. ANDREW MURRAY
United States Attorney

ROBERT ZINK
Chief
Fraud Section, Criminal Division
United States Department of Justice

By:_____ /s/_____
WILLIAM H. BOWNE
CHRISTOPHER FENTON
Fraud Section, Criminal Division
Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 514-0660
Email: William.Bowne2@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned certifies that on August 12, 2019, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record.

By: _____/s/_____
WILLIAM H. BOWNE

Fraud Section, Criminal Division
United States Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 514-0660
Email: William.Bowne2@usdoj.gov