IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	Criminal No. 1:19-CR-43
v.	)	
	)	Honorable Leonie M. Brinkema
TODD ELLIOTT HITT,	)	
	)	Sentencing Hearing: June 21, 2019;
	)	11:00 a.m.
Defendant.	)	

POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING

The United States of America, by through undersigned counsel, in accord with 18 U.S.C. § 3553(a) and the United States Sentencing Commission, Guidelines Manual ("Guidelines"), § 6A1.2, files this Position with Respect to Sentencing of Todd Elliott Hitt (also referred to as "defendant" or "Hitt").

The Probation Office's Sentencing Guidelines calculations conclude that the defendant's total offense level is 32 – after an acceptance of responsibility reduction – and the defendant's criminal history is category I, which results in a final guidelines range recommendation of 121 to 151 months. For the reasons discussed in more detail below, the government contests the application of a four (4) level increase pursuant to U.S.S.G. §2B1.1 (20) finding that the defendant was an "investment advisor" as that term is defined pursuant to 15 U.S.C. § 80b-2(a)(11). The government believes that the appropriate guidelines range to be applied under these facts should include a total offense level of 30 (97-121 months). Taking into account the factors to be considered under 18 U.S.C. §3553(a) and the extraordinary restitution payment of $20 million already made by the defendant's family to the Special Master in this case, the

government and the defendant have agreed to jointly recommend a sentence of 78 months of incarceration for the defendant.

BACKGROUND

On February 13, 2019, the defendant appeared in U.S. District Court and pleaded guilty to a one-count criminal information charging him with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2. The charges stem from the defendant's actions, taken between 2014 and 2018 in Falls Church, Virginia and elsewhere, wherein the defendant solicited approximately $30 million from investors for a variety of real estate and venture capital investments. The defendant's fraud schemes included his making material misrepresentations and omissions to victim investors concerning, among other things, the nature of the investments, the amount of money the defendant was personally investing, the identities of and total number of investors involved, the defendant's commingling and personal use of investor funds, and the defendant's use of new investor funds to pay off old investors in a Ponzi-like scheme. The defendant's fraudulent conduct resulted in investor losses of approximately $20 million.

At the time of the entry of his guilty plea, the defendant had admitted to a pattern of fraudulent behavior as described in the Statement of Facts. Dkt. 26. The multiple fraud schemes demonstrated that in the matter of a few short years, the defendant committed a pattern of outlandish misrepresentations, material omissions, and misappropriation of investor funds that fueled a lavish personal life style and left victims to struggle with significant losses after the defendant's schemes collapsed and were discovered by regulators and the FBI.

1. Kiddar Capital

In approximately 2015, the defendant formed Kiddar Capital LLC (aka "Kiddar Capital"). Through 2018, the defendant was offering various investments to the general public by and through certain funds that the defendant claimed to be operating at Kiddar Capital. However, the defendant frequently lied about the amount of money he had raised from investors. For instance, in a February 2017 press release, the defendant falsely claimed that Kiddar Capital had $600 million in assets under management.[1] By December 2017, the defendant continued to build on the fraud, falsely claiming that "Kiddar Capital had initiated $500 million in real estate projects in 2017." The defendant's lies continued to grow over time. By February 2018, the defendant falsely claimed that Kiddar Capital had "more than $1 billion in assets and investments" and by June 2018, that the firm managed "$1.4 billion across established and emerging assets."[2] Meanwhile, employees with knowledge of the books and records of Kiddar Capital, claimed that the firm had no more than $27 million in assets.

2. The Herndon Station Property Fraud

In 2017, the defendant began negotiations to purchase a five-story commercial building located next to a planned future stop on the Silver Line of the Washington Metropolitan Area Transit Authority's Washington, DC Metrorail, located in Herndon, Virginia ("the Herndon Station property"). The defendant estimated the total purchase price (with project costs) to be approximately $36 million. The defendant told potential investors that he would obtain lender financing in the amount of approximately $24 million, leaving $12 million to be covered by

[1] In that same press release, the defendant attempted to lull investors with another lie, that is his claim that: "We contribute 10% of the total fund from our own capital so we have skin in the game and are right alongside our limited partners."

[2] At the same time, the defendant falsely claimed on the Kiddar Capital website that the company had offices in "Houston, Palm Springs and London, England."

equity investments. The defendant then misled investors by telling them that he would contribute half of the equity or $6 million. The defendant went ahead and raised approximately $16.9 million from approximately 30 investors. The defendant's false representations that he would invest $6 million to the project was important and material to the 30 investors and the bank that provided the $24 million in financing, in that they relied on the defendant's personal vouching for the project by representing that the defendant had "skin in the game." One investor was also influenced by the defendant's lies about having an interest in the Hitt Family construction business – a company with which the defendant had no role in running.

The defendant's scheme went even farther when he created a fake email address in the name of another investor without that investor's knowledge or consent, to raise approximately $1 million. The defendant fabricated emails in the name of that investor and used that investor's persona to raise additional funds from other potential investors.

After the Herndon Station Property had closed and the transaction financing was completed through the bank, the defendant continued to raise funds from investors for a post-closing investment in the defendant's company that ran the Herndon Station Property. Without notifying the victim investors, the defendant diverted approximately $8 million of these post-closing investments to other projects unrelated to the Herndon Station Project. Some of these funds were misappropriated by the defendant to support his lavish lifestyle. For instance, the defendant used the funds, in part, for the payment of credit card debt which included the following charges from approximately February to March 2018:

"NBA – Washington Wizards"	$7,791
"USA Livery Inc."	$7,065
"Canyon Ranch Resort"	$26,910
"Bulgari"	$59,220

"Cartier"	$5,241
"Denise Betesh"	$6,840
"Chantilly Air"	$52,997
"Ultimate Jet Vacations"	$33,110

In July 2018, the defendant used additional funds – this time, money received by Herndon Station investor, VR, to pay additional non-business credit card debt, including:

5/24/18	"NHL-Washington Capitals"	$ 3,240
5/24/18	"NBA-Washington Wizards"	$ 8,250
5/24/18	"NBA-Washington Wizards"	$59,500
5/28/18	"Mercedes-Benz"	$10,000
6/02/18	"Four Seasons Bourbon"	$ 2,897
6/7/18	"Four Seasons Baltimore"	$ 3,083
6/10/18	"The Inn at Perry Cabin"	$11,462
6/11/18	"NHL-Washington Capitals"	$ 2,704
6/15/18	"NBA-Washington Wizards"	$25,500
6/15/18	"NHL-Washington Capitals"	$ 4,166
6/15/18	"BB*PHILLIPS COLLECTION Blackbaud, Inc."	$35,370

3. The Pattern Repeats Itself, then the Collapsing Ponzi Scheme

The defendant's extravagant lifestyle and inability to efficiently manage his business was unsupportable by any one tranche of funds raised from investors. To make matters worse, the defendant would often falsely claim to be putting his own "skin in the game," thereby giving the victims added confidence in the project. When one investment would fail, the defendant routinely turned to another scheme to raise money from and, if needed, took the newly raised funds from a more recent investment and applied those funds to the aged, failing scheme, and contrary to what he told those investors. This had the unfortunate effect of lulling investor-victims into a sense of complacency. While it delayed the ultimate collapse of all of his

endeavors, the defendant's continuing Ponzi-like scheme simultaneously increased the gravity and effect on losses to all of the investors.

For instance, in July 2016, the defendant raised approximately $1.2 million from two investors who were told they would be partnering with him on the purchase of a bowling alley and a theatre located in Falls Church, Virginia. The defendant lied when he told the investors he was also putting up $1.2 million for the purchases. The defendant also falsified purchase documents and forged the sellers' signatures in order to mislead the investors into believing the properties had actually been purchased. They were not. Then the defendant diverted the investors' money into another unrelated project without their knowledge.

In February 2016, the defendant solicited investors to pool their money together in order to purchase stock in a local technology company. The defendant formed Kiddar AQ to receive the $2 million he raised. Only $1 million was put towards the purchase of the tech stock. The defendant diverted the other $1 million raised to other projects unrelated to the tech company and contrary to his representations to investors. Moreover, the defendant never matched the investors' funds with his own funds as he had specifically represented.

This pattern of defrauding investors repeated itself time and again. The defendant misappropriated $1 million from three investors who were misled into believing that the defendant would co-invest with them in the purchase of two office buildings located at the corner of Broad Street and Washington Street in Falls Church, Virginia. The defendant never put any money into the project and used the $1 million for another unrelated investment. The defendant also operated an enterprise he named the Kiddar Homebuilding Fund ("HBF"). Hitt raised approximately $4.5 million from 15 investors to help fund the purchase and development of select single-family homes located in Northern Virginia. The defendant subsequently

commingled and misappropriated at least approximately $1.8 million in funds raised from the HBF investors. These funds were diverted by HITT to other unrelated business projects or directly into HITT's personal bank accounts contrary to representations to the HBF investors that returns on the investment would be paid back to them.

ARGUMENT

Sentencing Guidelines

As discussed above, the Probation Officer has recommended a four (4) level enhancement pursuant to U.S.S.G. §2B11(b)(20)(A)(iii) because "the offense involved a violation of securities law and, at the time of the offense, the defendant was . . . an investment adviser."[3] For purposes of this enhancement, the term, "Investment Adviser" is given the same definition as that contained in the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)). *See* USSG §2B1.1, comment. (n16(A)). That definition provides, in pertinent part, that the term "Investment Adviser" means "any person who, for compensation, engages in the business of advising others . . . as to the value of securities . . ." *Id*.

In *Securities and Exchange Commission v. Todd Elliott Hitt, et al*, Civil No. 1:18-cv-01262 (E.D.Va.), the SEC alleged, among other federal securities law violations, that the defendant had acted as an investment adviser in connection with the Kiddar AQ scheme. Dkt. 1 (SEC Civil Complaint, Counts VII and VIII). The defendant consented to the relief that the

[3] In the Plea Agreement, the defendant and the government have agreed to a two-level increase in the base offense level pursuant to U.S.S.G. § 3B1.3 because the defendant abused his position of trust. *See* Dkt. 24 Par. 4.e. Should the Court determine that the four (4) level "Investment Adviser" enhancement applies under these facts, then the two-level enhancement for abuse of a position of trust would drop away. *See* USSG §2B1.1, comment. (n.16(C))("If subsection (b)(20) applies, do not apply §3B1.3."). This would result in a net gain of two levels from the range agreed upon by both the government and the defendant. i.e., level 30(97-121 months).

SEC requested – a permanent injunction against future violations of the federal securities laws – "without admitting or denying the allegations of the Complaint . . ." Dkt. 2-1.

While reviewing the facts of this case, the initial impression of the government was that the defendant, while having committed an enormous fraud, misappropriation and Ponzi scheme on a number of levels and a massive scale, was not a person who "for compensation, engages in the business of advising others . . . as to the value of securities." The defendant did not charge a fee to his victims that was dedicated to compensating the defendant for his investment advice. The defendant did not author a regular news letter or otherwise conduct a business that solely was dedicated to advising others on the value of securities.[4]

However, in *In the Matter of Alexander V. Stein*, 1995 SEC LEXIS 3628; 52 S.E.C. 296 (June 8, 1995)(Appeal from SEC Administrative Law Judge), the SEC was faced with a defendant who had been criminally convicted of thirty-five counts of securities fraud, mail fraud, wire fraud and money laundering in connection with a scheme that defrauded victims of approximately $6 million. In that case, Stein sold interests in what he misrepresented to be a "fully-hedged arbitrage program." Stein sent forged account statements and false letters to victims misrepresenting that the victims' money had been invested as represented when in fact it had not been so invested. In that matter, the SEC determined that Stein had, among other things, acted as an investment adviser while conducting his fraud. In that case, the Commission held that Stein had acted as an investment adviser because "[Stein] received the requisite compensation for his services when he subsequently diverted certain of th[o]se funds for his

[4] The defendant did certainly engage in the fraudulent sale of securities and other investment vehicles to his victims. Inherent in the defendant's conduct were the defendant's material misrepresentations about the use of the money raised, and whether the defendant himself had "skin in the game." However, the sentencing guidelines imply that something more than just a securities law violation will suffice to result in the four-level enhancement found in U.S.S.G. § 2B1.1(b)(20)(The enhancement applies if the offense involved "a violation of securities law *and*, at the time of the offense, the defendant was . . .(iii) an investment adviser."

personal use." *Id*. at 299-300. The Commission cited also to Advisers Act Rel. No. 1092, 39 SEC Docket at 661-62 ("compensation element [of definition of investment advisor] is satisfied by the receipt of any economic benefit") to support its determination.

The SEC precedent may support a determination that defendant Hitt acted as an investment adviser with regard to the Kiddar AQ fraud scheme. However, the government believes that it would be disproportionate to apply a four-level "investment adviser" enhancement under these circumstances. The Kiddar AQ fraud resulted in losses to those investors of approximately $1 million. That loss was less than 1/20th of the total losses in the defendant's overall fraud scheme. And the defendant certainly appeared not to be in the business of being an investment adviser with regard to all of the other securities that are the subject of the defendant's guilty plea.

A 78-Month Sentence of Incarceration would Serve the Factors Set Forth in § 3553(a)

After calculating the appropriate guidelines range, "the court must determine whether a sentence within that range . . . serves the factors set forth in §3553(a) and, if not, select a sentence [within the statutory limits] that does serve those factors." *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006). Section 3553(a) states that a sentencing court should consider the nature and circumstances of the offense and the history and characteristics of the defendant. In addition, it states that the Court should take into account the need for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense" and to "afford adequate deterrence to criminal conduct." 18 U.S.C. 3553(a)(2)(A) and (B). The sentence should also be fashioned in light of the need to protect the public from further crimes of the defendant and to provide the defendant with needed correctional treatment. 18 U.S.C. § 3553(a)(2)(C) & (D).

The United States submits that a sentence of imprisonment of 78 months is appropriate in this case in light of the Section 3553(a) factors. Defendant Hitt was engaged in a serious crime that harmed more than 40 victim investors to the staggering tune of $20 million in losses. The defendant and the government agreed to jointly recommend a 78-month sentence for the defendant which amounted to a two-level decrease from what the government calculated as the applicable guidelines range. As the Court is aware, the defendant's family has paid $20 million to the Special Master with the intent of making the victims of Todd Hitt's crimes entirely whole again. Such a payment is unique and unprecedented. In the same token, the government firmly believes that no defendants should be allowed to purchase their way out of jail. *United States v. Stall*, 581 F.3d 276, 286 (6th Cir. 2009)("[w]e do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose."). However, the Fourth Circuit has supported as an appropriate ground for departure from the guidelines when there is extraordinary restitution that reflects extraordinary acceptance of responsibility by the defendant. Since the Guidelines consider restitution a form of "acceptance of responsibility," extraordinary restitution should provide a ground for departure when it indicates an extraordinary acceptance of responsibility. *United States v. Hairston*, 96 F.3d 102, 109 (4th Cir. 1996) *See United States v. Weinberger*, 91 F.3d 642, 1996 WL 431811, *3 (4th Cir.1996) ("extraordinary restitution ... is a basis for downward departure only to the extent that it shows a 'degree of acceptance of responsibility that is truly extraordinary and substantially in excess of that which is ordinarily present' ") (quoting *Hendrickson*, 22 F.3d at 176); *see also United States v. Crook*, 9 F.3d 1422, 1426 (9th Cir.1993) ("extraordinary restitution is a basis for downward

departure only to the extent it shows acceptance of responsibility") (quotation omitted), *cert. denied*, 511 U.S. 1086, 114 S.Ct. 1841, 128 L.Ed.2d 467 (1994).[5]

In this case, the government believes that the payment of nearly 100% of the victims' losses of $20 million is extraordinary and unprecedented and deserving of At least a slight (2 level) reduction of the defendant's sentencing guidelines.[6] Defendant Hitt's lawyers approached the government shortly after they learned of the criminal investigation. Defendant Hitt met with FBI agents soon thereafter to answer questions concerning the extensive fraud he had committed. Agents determined that the defendant had been forthright and answered all of the questions put to him during that initial meeting. Hitt had follow up meetings with the case agents and later, with the Special Master, once he had been appointed. Hitt also provided all assets of any worth, both personal and real estate, to the Special Master, negating the need for the government to seize such property and work through the forfeiture and subsequent restoration process in order to deliver the proceeds of the sale of such assets to the victims in this case.

CONCLUSION

The defendant's criminal conduct was reprehensible. His crimes were not a rash or foolhardy act of someone that could not appreciate the consequences of his actions – rather, the defendant deliberately plotted his path and stayed with it. Defendant Hitt chose this course again and again over the course of more than four (4) years.

[5] The government seeks to allow additional time for the Special Master to submit a proposed restitution order to the Court. In the Plea Agreement, the defendant acknowledged that the determination of restitution could be complicated and time consuming process in this case. Dkt. 24, Par. 8. To that end, the defendant has agreed to waive the 90 day provision found at 18 U.S.C. § 3664(d)(5) and consents to the entry of any orders pertaining to restitution after sentencing without limitation. *Id*.

[6] The government acknowledges that the defendant, himself, was not responsible for making the extraordinary restitution payment in this matter. The government additionally recognizes this as a factor in limiting the downward departure agreed to in the plea agreement to two levels, along with requiring a joint recommendation for 78 months incarceration.

Yet, the United States has also considered the extraordinary restitution made in this case and the acceptance of responsibility shown by the defendant in view of his cooperation with the investigating agents from an early stage in the investigation and, later, with the Special Master, to ensure that all possible assets could be recovered, liquidated, and applied towards any outstanding restitution to criminal victims in this case. Accordingly, the United States recommends a sentence of 78 months of incarceration that will accomplish the needed punishment and deterrence required by 18 U.S.C. § 3553(a).

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

By: _____s/_____
Mark D. Lytle
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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