**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA SCRANTON DIVISION**

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| UNITED STATES OF AMERICA,<br>Plaintiff | ) | |
| | ) | No. 3:16-cr-00122-MEM |
| vs. | ) | |
| | ) | (Judge Mannion) |
| ANTHONY DIAZ,<br>Defendant. | ) | |

**SENTENCING MEMORANDUM**

Mr. ANTHONY DIAZ, by and through undersigned counsel, respectfully submits the following sentencing memorandum:

**I. Sentencing Guidelines**

Base Offense Level:

Mr. Diaz does not dispute the applicable base offense level of 7.

Stipulation to Loss Amount:

The parties have stipulated that the actual and intended losses caused by Mr. Diaz to the victims named in the superseding indictment were between $1,500,000 and $3,500,000, resulting in a 16-level enhancement under U.S.S.G. §2B1.1(b)(1)(I). (*See* Sentencing Stipulation, ECF No.187.) Thus, the Pre-Sentence Report's application of the 18-level increase under USSG §2B1.1(b)(1)(G) should not apply.

Financial Hardship to Victims:

Mr. Diaz objects to the PSR's application of a six-level increase for 25 or more victims who experienced financial hardship under USSG §2B1.1(b)(2)(C).(PSR, ¶¶16, 26.) Specifically, Application Note 4(F) to §2B1.1 provides for six specific methods to determine a victim's financial hardship. However, the PSR applied none of the six methods.

In its Sentencing Memorandum, the Government focuses on that the victims "reported substantial financial losses." (Government's Sentencing Memo., at 13.) Mr. Diaz submits that, absent further factual basis, in no way could the alleged "substantial financial loss" automatically constitute "financial hardship" in the context of USSG §2B1.1(b)(2)(C).

Moreover, the Government's position is belied by its own summary of victim impact statements, because some identified victims did not report financial hardship or loss, as specifically demonstrated herein below (*See* Excerpt of Ex.6 to Gov't Sentencing Memo., ECF No.188-6):

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| Hoffert, Judith and Jeffry | • Invested all of their money with Diaz. Wanted low risk investments with monthly income.<br>• Diaz said they would earn an 8-9% return and that the investments were low risk.<br>• Diaz inflated their net worth after they signed blank forms.<br>• Diaz invested them in ICON 14, Landmark Apt. & Allianz<br>• Diaz never told them he was fired. |

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| Johnson, Bruce & Sally | • Bruce worked 35 years at PP&L, Sally 28 years in manufacturing.<br>• Signed blank or incomplete forms.<br>• Invested $400K with Diaz. Diaz convinced Bruce to cash out PP&L stock to invest.<br>• Oct 2013 – Bruce invested $50K in NY REIT. Diaz said would double their money, but it only earned 3%.<br>• Feb 2013 – Sally invested $25K in Ameritech. Diaz said 25% return in 2 years. Still no money from Ameritech.<br>• Diaz said switching firms was for their benefit.<br>• Johnsons had IRS tax problems from liquidating some older investments to put money into Diaz investments. |
| Kilby, Bruce J | • Wanted conservative investments, needed access to his money.<br>• Diaz asked Kilby to sign blank documents, stating details would be filled in later, and inflated Kilby ‘s income and net worth to get him into ICON and Inland. Diaz also put Kilby’s 90-year-old mother into alternative investments.<br>• Diaz promised 9.6% returns and never said the investments were illiquid.<br>• Diaz never divulged that he was fired from prior firms. |
| Johnson, Bruce & Sally | • Bruce worked 35 years at PP&L, Sally 28 years in manufacturing.<br>• Signed blank or incomplete forms.<br>• Invested $400K with Diaz. Diaz convinced Bruce to cash out PP&L stock to invest.<br>• Oct 2013 – Bruce invested $50K in NY REIT. Diaz said would double their money, but it only earned 3%.<br>• Feb 2013 – Sally invested $25K in Ameritech. Diaz said 25% return in 2 years. Still no money from Ameritech.<br>• Diaz said switching firms was for their benefit.<br>• Johnsons had IRS tax problems from liquidating some older investments to put money into Diaz investments. |
| Kilby, Bruce J | • Wanted conservative investments, needed access to his money.<br>• Diaz asked Kilby to sign blank documents, stating details would be filled in later, and inflated Kilby ‘s income and net worth to get him into ICON and Inland. Diaz also put Kilby’s 90-year-old mother into alternative investments.<br>• Diaz promised 9.6% returns and never said the investments were illiquid.<br>• Diaz never divulged that he was fired from prior firms. |
| Malocheski, Joseph & Gail | • Joseph worked as electrician and later as a school music teacher. Gail worked in same school.<br>• Emphasized to Diaz that they wanted conservative investments, and to preserve their capital. Diaz insisted the investments were safe.<br>• Signed blank or incomplete forms at Diaz’s urging. Diaz inflated the net worth on forms.<br>• $20K was invested in Landmark REIT and Joseph did not want any additional REIT investments. Diaz later sold them Lightstone and Artermis, which Joseph subsequently found were REITs.<br>• The Malocheskis are in their mid-70s and counted on investment returns for retirement. |

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| May, Debra | • Worked at Fernwood Resort with her husband.<br>• They told Diaz they wanted low risk investments. Diaz falsely promised better rates and convinced May to invest.<br>• Signed blank for incomplete forms; felt rushed. Net worth inflated on documents. Diaz said necessary to get her into investments.<br>• Heather Viera came to home with papers, implied if May did not sign, she would lose investment returns. |

Furthermore, the following victims, testified at trial that they did not suffer any loss or even admitted that they profited from their investments with Mr. Diaz: Ms. Montalvo, stated to the F.B.I. that she could not file a civil lawsuit against Mr. Diaz because "there's no way to prove that [she] lost anything." (Ex.A, Trial Tr. 1/15/2020, ECF No.170 at 83.) Another client, Ms. Rincon, also testified that "I didn't lose the principal, but I didn't make anything." (Ex.A, Trial Tr. 1/15/2020, ECF No.170 at 137.) Mr. and Ms. Colvin both testified that they received dividends from some investment they invested with Mr. Diaz and that they were able to cash out another investment. (Ex.B, Trial Tr. 1/23/2020, ECF No.173 at 122-123; Ex.C, 1/24/2020, ECF No.186 at 38-39.) Ms. Donna Keim, when telephonically interviewed by FBI, stated that she didn't lose any money on HPI Investment and that she actually made a small profit. (Ex.C, Trial Tr. 1/24/2020, ECF No.186 at 159.)

Sophisticated Means:

Mr. Diaz contends that the offenses of Wire Fraud and Mail Fraud did not involve a sophisticated means; nor did he intentionally engaged in the

conduct. As a result, the PSR's application of a two-level increase is not appropriate under USSG §2B1.1(b)(10)(C).

In the Government's Sentencing Memo, it contends that Mr. Diaz used sophisticated means because this offense involves "complex, high-risk alternative investments with little transparency." (*See* Gov't Sentencing Memo., ECF No.188 at 16.) However, this holds true regardless of whether a financial advisor defrauded his clients. Thus, the Government's contention in this regard is of no consequence, because the alleged "complexity" is inherent to any alternative investments and therefore cannot count as sophisticated means in the context of §2B1.1(b)(10)(C).

Violation of Securities Law:

Mr. Diaz objects to the PSR's application of the four-level enhancement for violation of securities law under USSG §2B1.1(b)(20)(A)(iii). (*See* PSR, ¶28.) First, neither the Superseding Indictment nor the PSR identifies the specific securities law provision that was allegedly violated. Thus, the PSR fails to allege the factual basis to support this increase.

Moreover, Application Note 16(A) to §2B1.1 defines that " '[s]ecurities law' (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued ***by*** the Securities and Exchange Commission pursuant to the provisions of law referred to in

such section." (Emphasis added.) Here, while Mr. Diaz violated the FINRA Rules and NASD Rules, those rules are not issues by the SEC and therefore do not constitute "securities law" under §2B1.1(b)(20)(A)(iii). *See Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 259 (6th Cir. 1994) ("A breach of the NASD rules does not present a question that arises under the laws of the United States within the meaning of 28 U.S.C. § 1331 ...."); *Kenosha Unified Sch. Dist. v. Stifel Nicolaus & Co.*, 607 F.Supp.2d 967, 977–78 (E.D. Wis. 2009) (FINRA rules are not "rules" or "regulations" for purposes of section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.)

In its Sentencing Memorandum, the Government focuses on that the Mr. Diaz qualifies as a broker dealer and/or an investment advisor. (*See* Gov't Sentencing Memo., ECF No.188 at 18-19.) However, the Government completely ignores that the increase under §2B1.1(b)(20)(A)(iii) requires not only that the defendant is a broker dealer/investment advisor, but also a violation of securities law which is lacking in this case as demonstrated herein above. Although the Government contends that Mr. Diaz's conduct violated Rule 10b-5 (*id* at 22), none of the previous investigations by FINRA or CFP Board concluded so. Thus, the Government is effectively inviting this Court to simply assume that Mr. Diaz violated securities law without affording him the procedural safeguards set out in the securities law, which could result in potential Due Process violations.

Vulnerable Victims:

Notably, the PSR does not apply an increase based on vulnerable victims under U.S.S.G. § 3A1.1(b)(1). However, the Government request a two-level increase in this regard in its Sentencing Memorandum. (*See* Gov't Sentencing Memo., ECF No.188 at 23.)

Mr. Diaz submits that the two-level enhancement on grounds of vulnerable victims should not apply. Specifically, Mr. Diaz provided his clients paperwork which emphasize, in capital letters or in bold, that the profit on their investment is not guaranteed and/or high risk is involved. (Ex.D, Trial Tr. 1/22/2020, ECF No.172 at 26-27; Ex.C, 1/24/2020, ECF No.186 at 34). Regardless of their age or investment experience, the clients all testified at trial that they read English and understand the meanings of those provisions, although they did not read them before signing. Thus, in no way could the victims' alleged vulnerability justify the two-level increase requested by the Government.

Aggravating Role:

Mr. Diaz objects to the PSR's imposition of the two-level enhancement for role adjustment under USSG §3B1.1(c). (*See* PSR, ¶30.) In its Sentencing Memorandum, the Government heavily relied on the testimony of Mr. Diaz's former employee, Ms. Heather Viera.

In this regard, this Court should consider that Ms. Viera told different stories at different times. Several days into the jury trial, Ms. Viera testified that after FINRA investigation Mr. Diaz and she "doctored" documents, which, curiously, was not included to her previous statements to the investigating FBI agents and was completely a surprise at trial. (Ex.B, Trial Tr. 1/23/2020, ECF No.173 at 126-129.) Moreover, it is noteworthy that Ms. Viera admitted having physical relationship with Mr. Diaz, but they had a falling out when Mr. Diaz was trying to reconcile with his wife, and Ms. Viera would be calling her (Ms. Diaz) up and threatening her. (*Id*. at 191; Ex.E, Excerpt of Trial Tr. 1/24/2020, ECF No.148 at 161.) Thus, Mr. Viera's personal issues with Mr. Diaz, combined with her changed story, render the trustworthiness of her testimony in doubt.

Obstruction of Justice:

Mr. Diaz objects to the two-level increase for obstruction of justice under USSG §3C1.1. (*See* PSR, ¶¶18, 19, 31.) Specifically, Application Note 2 to §3C1.1 provides that:

> Limitations on Applicability of Adjustment.—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all

> inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

The circumstances contemplated in the above Application Note are precisely what happened here - Mr. Diaz should not be punished under §3C1.1 for denying guilt or exercising his constitutional right at trial.

As such, Mr. Diaz submits that, his Total Offense Level should be 19, that his Criminal History Category is I, and that the resultant applicable advisory guidelines range should be 30 to 37 months of imprisonment.

**II. 18 U.S.C. § 3553(a)**

The Court must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)," which are "the need for the sentence imposed—

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2). In "determining the particular sentence to be imposed," the Court must consider these purposes, the nature and circumstances of the offense and the history and characteristics of the defendant, the need to avoid unwarranted disparities, and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(1)–(7).

"While the fraud guideline focuses primarily on aggregate monetary loss and victimization, it fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment, in a particular case." Allan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011); *see also United States v. Ovid*, 2010 WL 3940724, *1 (E.D.N.Y. Oct. 1, 2010) ("[T]he fraud guideline, despite its excessive complexity, still does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so.")

Here, Mr. Diaz submits that the following mitigating factors are highly relevant to the purposes of sentencing, but none of which is taken into account by the guideline range.

**A. Just Punishment in Light of the Seriousness of the Offense**

The need for retribution is measured by the degree of "blameworthiness," which "is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity." Richard S. Frase, E*xcessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005).

Here, the PSR suggests an imprisonment of 324-405 months, which exceeds the statutory maximum of 20 years. The guidelines calculation include none of the factors bearing on Mr. Diaz's degree of culpability, as specifically demonstrated as follows:

First and foremost, this is not a case where the defendant promoted worthless securities in a "sham" company that does not legally exist or has no activities, assets, facilities, or any other source of value. Rather, there is no doubt that all investment products that Mr. Diaz recommended to his clients are legitimately approved by their issuers. As reflected by an audit letter issued to Mr. Diaz by his former employer SII investments, the audit indicated that generally Mr. Diaz's office operated in a manner consistent with SII's written supervisory policies. (Ex.F, Trial Tr. 1/14/2020, ECF No.183 at 218.) More specifically, among the 800-1,000 clients that Mr. Diaz had (Ex.G, Trial Tr. - Jennifer Lynne Mulhall's testimony, ECF No.117 at 22), only twelve (or 1.2%) testified as to his fraudulent representations. Indeed, Mr. Diaz himself invested in the same products that he put his clients into. (Ex.H, Trial Tr. 1/27/2020, ECF No.174 at 92.)

Moreover, the sentence suggested by the Probation (324 to 405 months) or by the Government (216 to 240 months) significantly overstates Mr. Diaz's personal criminal culpability. A client, Ms. Montalvo, stated to the F.B.I. that she could not file a civil lawsuit against Mr. Diaz because "there's no way to

prove that [she] lost anything." (Ex.A, Trial Tr. 1/15/2020, ECF No.170 at 83.) Another client, Ms. Rincon, also testified that "I didn't lose the principal, but I didn't make anything." (Ex.A, Trial Tr. 1/15/2020, ECF No.170 at 137.) Mr. and Ms. Colvin both testified that they received dividends from some investment they invested with Mr. Diaz and that they were able to cash out another investment. (Ex.B, Trial Tr. 1/23/2020, ECF No.173 at 122-123; Ex.C, 1/24/2020, ECF No.186 at 38-39.) Ms. Donna Keim, when telephonically interviewed by FBI, stated that she didn't lose any money on HPI Investment and that she actually made a small profit. (Ex.A, Trial Tr. 1/24/2020, ECF No.186 at 159.) Besides, it is worth noting that the documents Mr. Diaz provided his clients contain provisions emphasizing, in capital letters or in bold, that the profit on their investment is not guaranteed and/or high risk is involved. (Ex.D, Trial Tr. 1/22/2020, ECF No.172 at 26-27; Ex.C, 1/24/2020, ECF No.186 at 34). Some clients testified at trial that it was "[t]he wholesalers" that "definitely gave [him] the impression that the investments were risk free." (Ex.F, Trial Tr. 1/14/2020, ECF No.183 at 196.)

Furthermore, Mr. Diaz has already been collaterally punished as a result of his conduct. He has been permanently barred by FINRA and suspended by the Pennsylvania Certified Financial Planners Board, lost his professional reputation and his ability to work in the securities industries. (Ex.F, Trial Tr. 1/14/2020, ECF No.183 at 66; Ex.D, 1/22/2020, ECF No.172 at

71; Ex.H, 1/27/2020, ECF No.174 at 61.) He has also been emotionally punished by the widespread media coverage on his case and the emotional toll of lengthy public trial. *See, e.g., United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y. 1993) (granting downward departure where defendant was punished by the loss of his business); *United States v. Vigil*, 476 F. Supp. 2d 1231, 1235 (D.N.M. 2007) (finding variance appropriate where defendant was collaterally punished by loss of his position and reputation, widespread media coverage, and emotional toll of two lengthy public trials); *United States v. Samaras*, 390 F. Supp. 2d 805, 809 (E.D. Wis. 2005) (granting variance in part because defendant lost a good public sector job as a result of his conviction).

**B. Need for Deterrence**

Research has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006).

Here, Mr. Diaz lived a law-abiding life until the instant offense began in his mid 40s. He was an active member of the community and a dedicated husband and father. He did not engage in criminal conduct before. His offense is completely uncharacteristic when viewed in the context of his entire productive adult life. The aberrant nature of his conduct is certainly a

mitigating factor under Section 3553. It also suggests that the severe punishment as suggested in the PSR would not yield significant deterrent effects. *See United States v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (variance based on "isolated mistake" in otherwise long and entirely upstanding life).

**C. Need to Protect the Public**

First, due to his voluntary debarment from the securities industry, Mr. Diaz will be unable to commit a similar offense in the future.

Moreover, Mr. Diaz has an exceptionally low risk of recidivism. He is 53 years old, a first offender, a college graduate, a father of three children, was employed throughout his adult life, and has no history of drug or alcohol abuse. For all male offenders in Criminal History Category I, the recidivism rate is 15.2%. For those over age 50 at the time of sentencing, however, the rate in Category I is only 6.2%. For those who are college graduates, the rate in CHC I is just 7.1%; for those who have been employed, the rate is 12.7%; and for those who were ever married, the rate is 9.8%. For those with no history of illicit drug use, the recidivism rate is half that of those who do have a drug history. For those like Mr. Diaz who are educated, have been employed, have been married, are drug free and over 50, the recidivism rate is certainly much lower. *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at Ex. 9, at 28; Ex. 10, at 29 (May 2004), available at https://www.ussc.gov/research/

research-publications/measuring-recidivism-criminal-history-computation-federal-sentencing-guidelines. For all Category I defendants convicted of fraud, the recidivism rate is just 9.3%, the lowest of any offense category, which is 45% below the rate for all fraud offenders. *Id.*, Ex. 11, at 30. Finally, offenders like Mr. Diaz with zero criminal history points have a rate of recidivism half that of offenders with one criminal history point. *See* Sent'g Comm'n, *Recidivism and the "First Offender,"* at 13-14 (May 2004), available at https://www.ussc.gov/research/research-publications/recidivism-and-first-offender.

**D. Needed Medical Treatment in the Most Effective Manner**

The sentence imposed must ensure that "needed . . . medical care" is provided "in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). The Commission recognizes that "[p]hysical condition . . . may be relevant in determining whether a departure is warranted." USSG § 5H1.4.

Mr. Diaz is 53 years old. He is diagnosed with Wolf Parkinson White Syndrome as a child and had preventive surgery. He is prescribed Metoprolol daily. He is also diagnosed with anxiety for approximately three years and was prescribed Paroxetine daily. (PSR at ¶¶ 55-56.) Considering Mr. Diaz's age and health conditions, the long prison term suggested in the PSR certainly does not help Mr. Diaz to receive medical care in the most effective manner.

**E. Need to Provide Restitution to Victims of the Offense**

In determining the appropriate sentence, this Court must consider "the need to provide restitution to any victims of the offense." 18 U.S.C. §3553(a)(7).

The victims in this case have stressed the need for restitution, and Mr. Diaz wishes to provide it. He is college-educated, hardworking, and a particularly talented professional. He was highly successful in his career for a long time. There is every reason to believe that he can obtain a reasonably well-paying job once he is released. If Mr. Diaz were sentenced within the advisory guideline range (capped by the statutory maximum), he would not be released until his early seventies. At that point, his age, health problems, and life expectancy would make it nearly impossible for him to make any restitution. This Court should seek to maximize, rather than eliminate, Mr. Diaz's ability to make the restitution the victims.

**III. Conclusion**

Based on the foregoing, Mr. Diaz respectfully presents the foregoing sentencing memorandum for this Court's consideration.

Date: March 23, 2021

Respectfully Submitted,

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| ANTHONY DIAZ,<br>Defendant. | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2021, I electronically filed the foregoing SENTENCING MEMORANDUM with the Clerk of the United States District Court for the Middle District of Pennsylvania by way of the CM/ECF system, which automatically will serve this document on the attorneys of record for the parties in this case by electronic mail.

Date: March 23, 2021.

Respectfully submitted,

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