UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	21 Cr. 154 (JGK)
JAMES JEREMY BARBERA,	:	
Defendant.	:	

THE GOVERNMENT'S SENTENCING MEMORANDUM

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INTRODUCTION

The Government respectfully submits this memorandum in connection with the sentencing of defendant James Jeremy Barbera ("Barbera" or the "defendant"), which is scheduled for November 21, 2022 at 10:00 a.m. Following a jury trial, Barbera was convicted of one count of conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. § 371; one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b-5; and one count of wire fraud, in violation of 18 U.S.C. § 1343.

As set forth in the Presentence Investigation Report issued by the United States Probation Office dated October 25, 2022 ("PSR"), the applicable advisory Guidelines range under the United States Sentencing Guidelines (the "Guidelines Range") is 87 to 108 months' imprisonment. (PSR ¶ 137). The Probation Office recommends that the Court sentence Barbera to a Guidelines-sentence of 87 months' imprisonment. (*See* PSR at pp. 36). Given the serious nature of the defendant's criminal conduct, his lack of remorse and responsibility for his actions, the need for general and specific deterrence, to promote respect for the law, and for just punishment, the Government believes that a substantial sentence of imprisonment within the applicable Guidelines Range would be sufficient but not greater than necessary in this case.

FACTUAL BACKGROUND

I. Background on Nanobeak and Barbera's Other Companies

Beginning in at least 2013, Barbera engaged in a calculated and brazen scheme to defraud investors and induce them to invest in a series of companies he led that purported to have developed revolutionary breathalyzer technology in conjunction with the National Aeronautics and Space Administration ("NASA"), to detect cancer and narcotics in human breath. Not only had

his companies not achieved the scientific development, but Barbera spent years misappropriating investor funds that were intended for research and development and diverting those funds to fund his lifestyle, including by buying a Manhattan apartment, paying his childrens' private school tuition, and buying expensive jewelry. To get investors to part with their money, Barbera knowingly made false and misleading statements regarding his academic and professional credentials, the status of his breathalyzer, his readiness to take his company public, and his ability to lead the public company (the latter of which was impossible given that Barbera was subject to a consent order from the Securities and Exchange Commission ("SEC") following an earlier securities fraud investigation, pursuant to which he was permanently barred from acting as an officer or director of a public company or from participating in a penny stock offering). (PSR ¶ 10).

During the relevant period, Barbera incorporated or controlled five companies: (i) MSGI, Inc. ("MSGI"); (ii) Nanobeak, Inc. ("Nanobeak"); (iii) Nanobeak Biotech Inc. ("Nanobeak Biotech"); (iv) Animal Breath Analytics; and (v) Go Blue Biotech Inc. ("Go Blue"). At various times during the relevant period, these companies had intertwined and overlapping relationships. From 1997 through July 2014, Barbera was the chairman and CEO of MSGI, a publicly-traded company based in Manhattan, that purported to be, among other things, a nanotechnology company. MSGI's common stock traded on the OTC Bulletin Board, an over-the-counter securities market located in Manhattan. (*Id.* ¶¶ 11-12).

On August 19, 2009, MSGI publicly announced that it had formed Nanobeak as a purported subsidiary that, using NASA technology, focused on carbon-based chemical sensing for gas and organic vapor detection in human breath. On November 9, 2009, Barbera incorporated Nanobeak in California. Contrary to MSGI's public statements, Nanobeak's incorporation documents

reflected that he owned Nanobeak. (*Id.* ¶ 13).

On June 7, 2011, the SEC announced that it had suspended trading in MSGI's stock, along with the stock of 16 other companies, as part of a "broad effort to combat microcap stock fraud." The SEC's basis for this action was "because of questions regarding the adequacy and accuracy of information about the companies, including their assets, business operations, current financial condition and/or issuances of shares in company stock." (*Id.* ¶ 14).

In November 2013, Barbera became the CEO of Nanobeak Biotech, a publicly traded biotechnology company located in Manhattan, which was founded in 2010. Nanobeak Biotech's common stock traded on the OTCQB (or the "Venture Market"), a middle tier over-the-counter securities market located in Manhattan. In November 2013, Nanobeak Biotech publicly announced in its filings with the SEC that Nanobeak had acquired a controlling interest in Nanobeak Biotech, and that the two companies were working together to develop a breathalyzer sensor technology based on NASA technology. In January 2015, Nanobeak Biotech moved its offices to the same address in Manhattan as Nanobeak's address. In August 2015, Nanobeak Biotech changed its name to one similar to Nanobeak's name (from "Nanobeak, Inc.," to "Nanobeak Biotech Inc."). (*Id.* ¶ 15).

On July 29, 2014, the SEC announced the settlement of securities fraud claims against Barbera and MSGI for making materially false and misleading statements about the true business operations and finances of MSGI (the "SEC Fraud Settlement"). The SEC alleged that, while Barbera had, "portray[ed] [MSGI] as a rapidly growing and hugely promising technology venture, [MSGI] remains essentially dormant with little or no capital." As part of the SEC Fraud Settlement, Barbara consented to entry of a final judgment: (i) permanently enjoining him from future violations of the antifraud provisions of the federal securities laws; (ii) agreed to pay a

$100,000 penalty; and (iii) agreed to be permanently barred from acting as an officer or director of a public company or from participating in a penny stock offering. In July 2014, as a result of the SEC Fraud Settlement and related ban, Barbera stopped serving as the CEO of both MSGI and Nanobeak Biotech. (*Id.* ¶ 16).

A few weeks later, on August 12, 2014, Nanobeak merged into a Delaware limited liability company. Nanobeak represented to investors that it had developed a breathalyzer sensor technology that could detect cancer and narcotics in human breath, based on technology developed by NASA, and that it was also partnered with Johns Hopkins University. From 2009 through October 2019, Barbera was Nanobeak's CEO. (*Id.* ¶ 17).

II. Barbera Defrauded Investors in Nanobeak and Its Related Companies

The evidence presented at trial demonstrated that the Barbera conspired with others to defraud investors of investments in companies that he owned or controlled. In particular, Barbera made material misrepresentations and omissions to investors in order to solicit and maintain their investments in those companies, including Nanobeak, Nanobeak Biotech, Go Blue, and Animal Breath Analytics. At trial, the Government presented evidence that Barbera defrauded multiple individual investors, including Dr. Richard Fried (his dog's veterinarian), Dr. Egidio Farone (his dentist and friend), Tom Joyce, and Charles Bertucio, and that he conspired with Carl Smith to defraud Jaime Pike and Robert Wood, among others.

To take one example, the evidence at trial demonstrated that in 2016, Barbera convinced Dr. Fried to invest in Nanobeak, and offered him "[a] friends and family discount;" which purported to allow Dr. Fried to purchase shares of Nanobeak at a price that made his investment immediately profitable for more than three times his initial investment. (Trial Tr. at 61:13-24; *see also* PSR ¶ 37).

As shown at trial, Barbera sent Dr. Fried several emails in August 2016 with information on Nanobeak and financial projections for the company that suggested the company's breathalyzer product was on the verge of success. The financial projections that Barbera emailed Dr. Fried falsely represented that in 2017, Nanobeak would have "sales of sensors to distributors" of approximately $19,777,074 and total sales of approximately $31,643,319, and that sales were projected to increase every year through 2021. (Trial Tr. at 58:17-59:19; *see also* PSR ¶ 37). Barbera demonstrated the device to Dr. Fried, convincing him the product was ready to manufacture. (Trial Tr. at 55:1-8; *see also id.* at 70:5-10 ("From the very first deck, it appeared to me that that application existed and worked, that it could be used to detect narcotics in breath.")).

Dr. Fried also testified that Barbera's stated plan to take the company public in the near future was a "significant factor" in deciding to invest. (Trial Tr. at 65:3-5). In his words, "[t]he fact that he was planning an IPO in the not distant future to me meant the product was ready to market and they would have income soon and that my investment would pay off hopefully handsomely in a short period of time." (*Id.* at 63:5-9). Dr. Fried's testimony also established that Barbera lied about his credentials. (*Id.* at 49:9-14 ("[Barbera] told me that he had been a research scientist with NASA. He told me that he had gone to MIT.")). Based on the above, Dr. Fried agreed to invest $30,000 on August 30, 2016, to purchase approximately 300,000 shares of Nanobeak's common stock at a price of approximately $0.10 per share. Dr. Fried's agreement to invest stated that Dr. Fried's investment would "be used to further advance the business and the technology of the company as well as for other general corporate purposes," which Dr. Fried took to mean "legitimate business expenses." (Trial Tr. at 69:12-19). However, as demonstrated in Government Exhibit 1009 and through the testimony of Special Agent Kristin Allain of the Federal Bureau of Investigation, Barbera spent Dr. Fried's investment on personal expenses, including

paying Barbera's former landlord, directing Dr. Fried's funds to members of Barbera's family, and cash withdrawals. (Trial Tr. at 956:20-957:6).

Over the next several years, Barbera continued to provide false positive updates to Dr. Fried, but Barbera never came through on his promises. (*See, e.g.,* Trial Tr. 73:2-18). And the testimony of other victim witnesses told a similar story: Barbera falsely inflated his credentials to Dr. Egidio Farone to secure his investment in Nanobeak. (*Id.* at 657:4-18 ("When I first met him … he told me he had worked at NASA, [and] that he had a degree in physics.")). Barbera lied to Dr. Farone, too, about the progress and status of the technology; namely, that the company's prototype has already been built (*id.* at 660:3), that Barbera was taking the company public "immediately" (*id.* at 660:19-20), and that the "minimum" Dr. Farone could expect from his investment was to triple his money (*id.* at 661:11-17).

As with Dr. Fried's, Dr. Farone's investments that were intended for Nanobeak actually went towards Barbera's personal expenses. For example, on November 6, 2017, Dr. Farone invested $20,000, which was sent directly to Nanobeak's main account; however, the funds, along with other funds that came in at the same time, were shown to be used to pay for Barbera's personal expenses. (*Id.* at 809:20-810:17). Barbera's conduct with respect to Dr. Farone's August 20, 2019 investment was even more brazen. At Barbera's direction, Dr. Farone's $10,000 investment was not even sent to Nanobeak's accounts, but to an account Barbera created in the name of Nanobeak Ukraine, of which Barbera's girlfriend was a co-signor. Of the $10,000 Dr. Farone invested, only $1,799 was ever actually transferred to Nanobeak's accounts; the rest was used by Barbera for personal expenses. (*Id.* at 812:9-23). The investments by Bertucio, Pike and Wood followed a similar pattern.

Barbera made the same false representations to an FBI confidential source (the "CS") in late 2019. On November 16, 2019, Barbera and the CS had a phone conversation, during which the CS said "I got the impression watching [the Video of the Nanobeak device Barbera had sent him] that it's ready to go. And does it really work?" Barbera responded, consistent with his lies to actual Nanobeak investors, "Yes, it's ready to go next year." (PSR ¶ 51). Barbera also falsely told the CS that Nanobeak had "contracts" with Florida and Colorado to supply law enforcement departments with Nanobeak's breathalyzer device to test for marijuana, heroin, fentanyl, and cocaine, and was also in discussions with the Los Angeles Police Department to do the same. Barbera further misrepresented to the CS that, "We've actually signed a large agreement in England. We signed it a week ago. It's for basically a $22 million investment that's going to close this year. And that's it, we are done. We are not raising any more money…You may be among the last investors we take." (*Id.* ¶ 52).

Crucially, at the same time that Barbera is telling the CS these lies about Nanobeak's success, he well knew that Nanobeak had not developed a cancer and drug detection device and thus, Nanobeak could not sell any such device to law enforcement. As Joseph Peters testified at trial, throughout his entire time at Nanobeak, the company never developed the technology to detect drugs using breath biomarkers. (*See* Trial Tr. 476:20-477:2; *see also id.* at 488:19-26 (noting that around December 2019, others at the company called Barbera in to answer many questions they had regarding the "lack of progress")). Tom Joyce testified that after becoming chairman of Nanobeak Biotech's Board of Directors in the spring of 2019, he was finally in a position to learn more about the company, he realized the company had "no revenue … basically no employees and the company had no relationship with sales teams and/or manufacturers, so the prospects that six months or a year after I signed on as chairman that we could actually bring a company public

seemed completely and utterly farfetched." (*Id.* at 200:12-18). In other words, when Joyce became interim CEO in the fall of 2019, there was no working prototype, nor were there even any tests of the device for its ability to detect drugs or lunch cancer. (*Id.* at 203:5-204:1). Thus, contrary to what Barbera told investors, Nanobeak never commercialized its breathalyzer device, was never in a position to go public through an IPO, was never able to detect lung cancer, and was never even tested on narcotics.

By October 2019, as described by Joyce and Peters at trial, Barbera's lies began to unravel and he was forced by Nanobeak's Board to resign as CEO and became Nanobeak's chief science officer ("CSO"). At the same time, unbeknownst to Nanobeak's Board, Barbera co-founded Animal Breath Analytics, a company incorporated in Florida, which had purportedly developed a breathalyzer sensor technology that, based on Nanobeak's and NASA's technology, could detect diseases from organic compounds in an animal's breath. (*Id.* ¶ 18). On February 24, 2020, Barbera sent an email to Dr. Fried, in which Barbera falsely represented that he was still Nanobeak's CEO, and attached an investor deck for Animal Breath Analytics that falsely represented that Nanobeak had, "turned NASA state-of-the-art technology into an early-stage cancer and drug detection device," which Animal Breath Analytics had licensed. (*See* Trial Tr. at 91:13-92:7). In fact, neither Joyce nor Peters, both members of Nanobeak's Board in late 2019, had ever heard of Animal Breath Analytics. (*Id*. at 216:2-7, 495:19-23).

A month later, in November 2019, Barbera incorporated Go Blue, which according to Barbera, has since rebranded as "Blu Biotech Inc." (*See* Defense Sentencing Memorandum ("Def. Mem.") at 34). As shown at trial, Barbera and his co-conspirators attempted to convert stock issuances from Nanobeak to Go Blue, without communicating to investors that they had the option to not convert their stock certificates or informing the Nanobeak Board . (*See* Trial Tr. at 298:18-

300:4). In December 2019, Nanobeak's Board suspended Barbera as a member of the Board of Directors, and in April 2020, he was terminated from his position as Nanobeak's CSO. (PSR ¶ 17).

Since March 2020, according to Barbera, Blu Biotech has been working with a lab at the University of Michigan to develop similar technology to detect biomarkers in human breath, with a particular focus on Covid-19. (Def. Mem. at 36). According to Barbera, the company continues to work on breathalyzer technology, Barbera resigned as CEO and Chairman of its board following the guilty verdict in this case. (*Id.* at 37).

III. Barbera's Misappropriation of Nanobeak Investor Funds

At trial, Special Agent Allain's testimony at trial proved that between 2016 and 2020, Barbera solicited approximately $8,413,375 from investors, the majority of which he misappropriated for personal use. (*See* Trial Tr. at 791:10-14). Special Agent Allain's testimony was based on her review of bank records for Barbera, Nanobeak, and related entities. Specifically, Special Agent Allain testified that Barbera misappropriated millions of dollars of the investments raised for Nanobeak for his personal use. In sum, she testified that Barbera spent approximately $3,297,000 on non-business expenses, including as follows:

- Approximately $613,378 of Nanobeak's money was spent on Barbera's mother, two daughters, two ex-wives, and girlfriend (Trial Tr. 803:11);
- Approximately $721,454 was sent from Nanobeak's account into accounts only in Barbera's name (*id.* at 803:18-25);
- Approximately $574,109 was spent on housing and moving costs, which included payments for Barbera's mortgage, co-op maintenance fees, self-storage and moving company expenses, and payments to his former landlord (*id.* at 804:1-8);
- Approximately $207,366 was withdrawn as cash during the relevant timeframe (*id.* at 804:11);

- Approximately $101,555 was used to pay for his daughter's college tuition to the University of Michigan (*id.* at 804:15);

- Approximately $74,318 was spent on vehicles and parking expenses, which included paying for Barbera's monthly parking fees, reserved spots near his home, and payments for his Audi (*id.* at 804:18-805:1);

- Approximately $38,000 was used to pay settlement payments arising from Barbera's personal activities during the time period (*id.* at 805:5);

- Approximately $37,361 was spent on jewelry (*id.* at 805:8);

- Approximately $34,092 was spent on housing in Fresno, California (*id.* at 805:11);

- Approximately $27,480 was spent on dental care (*id.* at 805:14);

- Approximately $27,440 was used to pay for Barbera's daughter's private school tuition (*id.* at 805:21); and

- Approximately $21,908 was spent on accounting and legal fees related to Barbera's personal tax issues (*id.* at 806:4).

Special Agent Allain's testimony also made clear that, during this narrow time period during the fraud, Barbera spent $1,825,107 of investor money repaying merchant cash advance companies that had previously extended credit to Barbera, bringing Barbera's direct theft of Nanobeak investor funds to more than $5 million. (*See* GX 1002, Trial Tr. at 795:9-22).

DISCUSSION

I. The Applicable Guidelines Range and Recommendation of the Probation Department

Consistent with the PSR, the Government submits that the Guidelines Range applicable to Barbera's conduct is calculated as follows:

- Pursuant to U.S.S.G. § 3D1.2(d), Counts One, Two, and Three are grouped together, because the offense level is determined largely on the basis of the total loss caused by the offense.

- Pursuant to U.S.S.G. § 2B1.1(a)(1), the base offense level is 7.

- Pursuant to U.S.S.G. § 2B1.1(b)(1)(L), 18 levels are added because the amount of loss exceeds $3,500,000 but does not exceed $9,500,000.

- Pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(i), 2 levels are added because the offense involved ten or more victims.

- Pursuant to U.S.S.G. § 2B1.1(b)(1)(9)(c), 2 levels are added because the offense involved a violation of a prior judicial order, which permanently restrained and enjoined the defendant from violating § 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 of 17 C.F.R. 240.10b-5.

In sum, Barbera's total offense level is 29. The Probation Office did not find any mitigating factors. (PSR ¶ 58). Accordingly, at Criminal History Category I, Barbera's Guidelines Range is 87 to 108 months' imprisonment. (*Id.* ¶ 137).

The Probation Office recommends the Court sentence Barbera to 87 months' incarceration, citing the length of his criminal conduct, his absence of remorse, and its concern that Barbera continued to commit fraud through Go Blue following his arrest in this case. (*Id.* at pp. 36). Specifically, the Probation Office notes that Barbera "has provided little information concerning the company's funding and if invests [sic] are being solicited, what is being communicated to those investors. Go Blue Biotech is purportedly involved in the development of non-evasive cancer detection and technology, which is similar to the businesses promoted by the companies involved in the instant case. As the founder and chief executive officer of Go Blue Biotech, it is reasonable to believe that Barbera would have control of any financial accounts associated with the company, with no known safeguards currently in place to monitor his use of any company funds." (*Id.*)

II. The Defendant's Submission and Objections to the PSR

The defendant's objections to the PSR and his sentencing submission challenge, among other things: (1) how the PSR characterizes the victims of the defendant's fraud and his representations about his salary from Nanobeak; (2) the appropriate calculation of loss under

U.S.S.G. § 2B1.1(b)(1); and (3) the conclusion that the crime involved 10 or more victims pursuant to U.S.S.G. § 2B1.1(2). To the extent the Government believes resolution of the defense objections is relevant to the Court's sentencing determination, the Government addresses these objections below.[1]

A. Victims of the Defendant's Fraud (PSR ¶¶ 10, 40, 41)

In his sentencing memorandum, Barbera objects to the finding that Barbera defrauded investors in Go Blue and Animal Breath Analytics in addition to Nanobeak. In doing so, he argues, (1) that "Dr. Fried conceded at trial that Mr. Barbera did not try to solicit any investment from him in Animal Breath Analytics, but that he only asked Dr. Fried to be a scientific advisor to that company"; (2) that Barbera sought to purchase Robert Wood's shares in Nanobeak by issuing shares in Go Blue Biotech.; and (3) that with respect to Jaime Pike, it was Carl Smith who contacted her about exchanging her shares of Nanobeak into Go Blue shares. (Def. Mem. at 42-43). As demonstrated by the testimony of Dr. Fried, while Barbera may not have solicited an investment *from* Dr. Fried, the materials Barbera sent Dr. Fried were clearly designed to solicit investments from others, including through the false representation that Nanobeak had licensed its technology to Animal Breath. (Trial Tr. at 88:15-89:15). The materials provided to Pike and Wood made similar false claims that each should convert their Nanobeak investment into shares of Go Blue, because Go Blue was the new company authorized to use Nanobeak's technology. (*Id.* at 298:15-23, 647:2-15). The PSR is therefore correct in its assessment that Barbera sought to

[1] Because the Government does not believe the defense objections to paragraphs 12-16, 18, 22-26, 28-29, 33-36, 43-46 of the PSR bear on the Guidelines Range, or otherwise raise significant issues under Section 3553(a), the Government does not respond to those objections here. The Court should reject the defense objection to paragraphs 17, 37-39, 42, 47, 52, 53-55 based on the jury's verdict, the testimony at trial, and for the reasons set forth above.

defraud investors in Go Blue and Animal Breath Analytics.

While Barbera concedes that he claimed that all funds invested in Nanobeak would be used for research and development or other corporate purposes, (*see* Def. Mem. at 43), Barbera argues that he never lied to investors about his receipt of a salary from Nanobeak. As Barbera acknowledges in his submission, however, the evidence at trial included (1) an email Barbera endorsed as "fine and accurate," which plainly stated that "[e]veryone that works on different aspects of Nanobeak is not paid a salary as there is no money for such. For example, Jeremy, [and others] have never received a salary from Nanobeak" (*see* Trial Tr. at 763:20-25 (modified original for simplification)), and (2) testimony that Barbera sent draft financial statements to the Nanobeak Board that significantly underrepresented the amount of money he personally received from Nanobeak (Trial Tr. 489:24-490:11). This evidence, along with the testimony of Joseph Peters and Tom Joyce, demonstrates that the Nanobeak Board and investors *were* misled about the amount of money Barbera took from Nanobeak. (*Id.* at 210:4-22, 489:24-490:11; *see also* GX 1006 (showing Barbera spent more than $3 million of Nanobeak funds on personal expenses over a period of years).

B. Objections to the Loss Amount Calculation (PSR ¶¶ 11, 57)

Under Section 2B1.1 of the Guidelines, the base offense level is increased by the greater of intended or actual loss caused by the defendant's criminal conduct. (U.S.S.G. § 2B1.1 & app. note 3(A)). Pursuant to Section 2B1.1(b)(1), the court "need only make a reasonable estimate of the loss." (U.S.S.G § 2B1.1(b)(1) app. note 3(C)). Here, Special Agent Allain's testimony conclusively proved that the defendant's scheme defrauded investors out of more than $8 million.

(*See* Trial Tr. at 791:10-14; *see also* Government Exhibit 1001).[2] As such, Barbera is responsible for a total intended and actual loss of more than $3,500,000, but not more than $9,500,000. (PSR ¶ 57). Therefore, pursuant to § 2B1.1(b)(1)(J), an 18-level increase is warranted.

Barbera objects to this calculation on the basis that there was no "intended loss" because he was "genuinely trying to achieve the development and commercialization of the Nanobeak sensor." (Def. Mem. at 49). Because of this, he argues, "actual loss" should be used to quantify the victims' losses, which is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense." (U.S.S.G. Section 2B1.1, cmt. 3(A)(i)). In turn, "reasonably foreseeable pecuniary harm" is the "harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." (*Id.* at cmt.3(A)(iii)). And contrary to Barbera's argument, victims of his crime were harmed to the extent he took their money, not the extent to which he thought they would not be repaid later. *See United States v. Arjoon*, 964 F.2d 167 (2d Cir. 1992) (""Loss" is, therefore, not the ultimate harm suffered by the victim, but is rather

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[2] The defendant suggests that this Court should employ a "clear and convincing" standard of proof as to loss amount, in deference to the Ninth Circuit's occasional view that such a standard should apply where the enhancement in question has a significant impact on the Guidelines range. (Def. Mem. at 46-47). But this is not the Second Circuit's approach. *See United States v. Dixon*, 175 F. App'x 385, 386 (2d Cir. 2006) ("District courts may find facts relevant to sentencing by a preponderance of the evidence, and take into account acquitted conduct when sentencing defendants, without violating the Due Process Clause."); *see also United States v. Moseley*, 980 F.3d 9, 29 (2d Cir. 2020) ("Under the Guidelines, the relevant loss amount must be established by a preponderance of the evidence . . . ."); *United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004) ("It is well-settled that . . . a preponderance of the evidence is all that is required to prove the amount of loss."). And, even if the Ninth Circuit approach that the defendant urges did apply, it would still not counsel in favor of applying a "clear and convincing" standard here, where the loss amount is based on the offenses of conviction. *See United States v. Hymas*, 780 F.3d 1285, 1289 (9th Cir. 2015) (discussing possible application of clear and convincing standard and noting that "[w]e have indicated that, where the sentencing enhancements are based on the offense of conviction, the preponderance of the evidence standard is sufficient" (internal quotation marks, alterations and ellipsis omitted)). In any case, if such a standard did apply, the Government would nonetheless have met this burden through the evidence introduced at trial.

the value of what was taken."); *see also United States v. Lasky*, 25 F. Supp. 125, 126 (E.D.N.Y. 1998).

Moreover, Barbera's argument mischaracterizes the overwhelming evidence presented at trial and the jury's verdict, which found beyond a reasonable doubt that Barbera intended to defraud Nanobeak investors. (*See* Trial Tr. at 1013:9-1014:9). During the trial, investor testimony and contemporaneous bank records proved that Barbera falsely told investors their investments would be directed toward research and development, but in fact he used to pay for his personal expenses. (*Id.* at 674:2-19 (Dr. Farone testifying as to his expectation that his investment would be going toward research and development)); (*id.* at 808:7-810:17 (Special Agent Allain tracing Dr. Farone's 2017 investment to payment of non-business expenses)). This evidence, along with the fact that Barbera followed a similar pattern with investor after investor, and told other lies related to his credentials, a planned IPO, and the state of the Nanobeak technology, collectively show Barbera intended these losses.

Even if this Court were to conclude that it should look to actual loss, it would reach the same result, because the actual loss can easily be determined here. Combining the previous definition of actual loss and its "reasonably foreseeable pecuniary harm" subpart, actual loss can be defined as the loss the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense. (*See* U.S.S.G. § 2B1.1, cmt. 3(A)(i),(iii)). As Special Agent Allain testified at trial, Barbera stole at least $3,297,647 of investor funds to pay personal expenses, another $1,825,107 to repay high interest lenders, $502,275 in other expenses, and $334,968 in travel and dining expenses. (Trial Tr. at 807:6-8). Barbera knew, or at least, reasonably should have known that the funds he took and spent on items that were not what the funds were intended to be used for, *i.e.*, research and development, were going to cause investors

losses. Actual loss would therefore still be between $3,500,000 and $9,500,000, leading to an 18-level increase pursuant to § 2B1.1(b)(1)(J).

Moreover, Barbera's misstatements *were* the proximate cause of the loss. While he attempts to pin the proximate cause of investors' losses on the Board of Nanobeak firing him in 2019, which Barbera argues prevented himself from carrying out the company's mission, the actual proximate cause was Barbera's years-long fraud of taking funds that were intended to develop the product and instead using them to fund his personal life, a fraud that was simply uncovered in late 2019 and led to Barbera's termination. In other words, Barbera caused these losses years before the Board fired him.

Barbera also objects to "gain" being used to calculate loss, but argues, in the alternative, that the "gain" to Barbera was only $1,499,030. (Def. Mem. at 57). This argument is misplaced. Commentary to section 2B1.1 provides that "[t]he court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined" and that "[t]he court need only make a reasonable estimate of the loss." Here, the trial proof provided a reasonable basis for calculating loss and the Court is entitled to rely upon it. Special Agent Allain testified at trial on her tracing analysis of how investors' funds were spent. But even if the Court were to look to gain, the amount Barbera gained from his fraud is nonetheless between $3,500,000 and $9,500,000 based on the testimony at trial.

C. Enhancement for 10 or More Victims (PSR ¶ 57)

The defendant also objects to the victim enhancement, arguing that Barbera's crime affected no victims within the meaning of Section 2B1.1(b)(2). (*See* Def. Mem. at 58). This argument is without merit. The evidence at trial including witness testimony and review of bank records summarized by Special Agent Kristin Allain established that Richard Fried, Egidio Farone,

Jaime Pike, Robert Wood, Tom Joyce, and Charles Bertucio were all victims of the defendant's fraud because they invested based on misrepresentations by the defendant. Though they did not testify at trial, the Government produced 3500 material in this case establishing that Louis Marcais, Stephen Maxey, Joseph Meads, Xavier Mimaud, and many other individuals were also victimized by the defendant's scheme.

In addition, the Government introduced at trial bank records showing Barbera received investor money from more than 50 investors totaling more than $8 million as part of the same scheme. (*See* Trial Tr. 791:10-14). The Government has since provided to the defendant a draft victim list containing these individuals and their respective losses.

III. A Guidelines Sentence Should be Imposed in this Case.

The factors set forth in Title 18, United States Code, Section 3553(a) strongly and unequivocally indicate that a substantial sentence of imprisonment is warranted for Barbera. The Probation Office recommends that the Court sentence Barbera to 87 months' imprisonment. (PSR at pp. 34).

A. Nature and Circumstances of the Offense and Need for Just Punishment

Barbera's offense was extremely serious. In short, he engaged in an approximately seven-year-long scheme to defraud investors, the majority of which Barbera perpetrated after he was investigated by the SEC and permanently barred from leading a publicly-traded company for his involvement with a related company. From that earlier SEC investigation, Barbera well understood the unlawful and harmful nature of his conduct.

Nevertheless, Barbera continued to incorporate companies to perpetuate the scheme, and knowingly and falsely communicated to potential investors and victims of the possibility of the company offering an IPO. Not only did Barbera know that Nanobeak's breathalyzer device was

nowhere near viable, and thus they were not close to taking the company public, Barbera knew he could not continue to stay on as the CEO of a public company. At the same time, Barbera "effectively enrich[ed] himself and his family members" with investors' funds, (PSR at pp. 35), which made the possibility of commercial success even more unlikely than it already was.

In response, Barbera argues that although he was at times "reckless with his statements to investors," he intended to deliver on his promises to investors and his representations were not the proximate cause of investors' losses. (*See* Def Mem. at 64). And with respect to his state of mind, Barbera says that he did not intend to steal from investors; he was not motivated by greed, but rather, "a higher calling: … potentially transform[ing] the state of medical in order to save millions of lives." (*Id.* at 61). He also highlights that he did not target the weak and gullible, and that the overwhelming majority of Nanobeak's investors were high net worth, financially savvy individuals.

Rather than excuse Barbera's conduct, this argument only highlights the defendant's lack of remorse, failure to accept responsibility for his criminal actions, and the need for just punishment in this case. Barbera committed a calculated fraud for several years, he lied to people close to him like Dr. Fried and Dr. Farone, and he lied to unsophisticated investors like Jaime Pike. He stole millions of dollars of investor funds so he could live in a Manhattan apartment, buy jewelry, and send his children to private school. Moreover, as the Probation Office makes clear, both financial and non-financial suffering should be accounted for here, since the victims will likely receive very little in the form of restitution because Barbera is unlikely to satisfy restitution. (*See* PSR at pp. 35). In other words, the Court should consider both the monetary and emotional impact this fraud has had on the victims. Many of the victims may have been affluent, but that fact does not mean that the defendant's victims did suffer both financially and non-financially from the

fraud. The nature and circumstances of the offense and the need to punish the defendant therefore call for a sentence within the Guidelines Range in this case.

B. History and Characteristics of the Defendant and the Need to Promote Respect for the Law

Based on the nature of the circumstances and Barbera's conduct, a significant sentence of imprisonment is also necessary to reflect the history and characteristics of the defendant and promote respect for the law.

Unlike many of the defendants who appear before this Court, Barbera has recently enjoyed a life of material and financial comfort. As shown at trial, "the defendant and his family lived comfortably from the ill-gotten gains Barbera acquired from his involvement in the offense," which included a Central Park apartment, private school and college tuition for his daughters, and nearly $40,000 of jewelry and watches. (PSR at pp. 35).

Barbera, in his sentencing memorandum, states that he has never before run afoul of the criminal laws, and that he has only once before had "any issues" with the SEC (i.e., the 2014 SEC Fraud Settlement). (*See* Def. Mem. at 60). While it is true Barbera does not have a criminal record, his previous settlement with the SEC and the prolonged length of the scheme speaks to his knowledge that his conduct was wrongful and his state of mind in perpetuating the fraud and misleading investors. Barbera's conduct:

> occurred over a lengthy time period of seven years and ceased only as a result of Barbera's arrest. During the early part of the relevant period, the defendant could have halted his criminal conduct, particularly after July 2014, when he was cited by the SEC and permanently barred from acting as an officer or director of a publicly traded company. Instead, Barbera continued to establish and incorporate companies for the purpose of promoting them as invests to victims. While holding a senior management position, usually as CEO, of a company he was promoting, the defendant knowingly and falsely communicated to potential investors and victims of the possibility of the company offering an IPO, when Barbera knew he could not hold a senior management position with the company. Coupled with this

> misleading and false information was the defendant's personal use of investment funds. Barbera effectively used investment funds to enrich himself and his family members.

(PSR at pp. 35). Barbera's emphasis on the absence of upward-varying behavior (i.e., he does not have a criminal history) does not entitle him to a lesser sentence. The Guidelines Range already incorporates the absence of aggravating conduct, and no further variance is warranted here.

C. The Need for Specific and General Deterrence

The need for specific and general deterrence is also important in this case. The testimony at trial demonstrated that his scheme went on for years, despite a prior SEC case, and that his Barbera's victims were individual investors. The Probation Office recommends that:

> Beyond the monetary loss these victims suffered, the anguish, and the mental and emotional toll suffered by the victims should be considered as well. During the relevant period, the defendant and his family lived comfortably from the ill-gotten gains acquired from this scheme. At age 66, the defendant's earnings potential, the likelihood of Barbera working for a company as opposed to running his own business, and the defendant reducing his monthly expenses to live a more modest lifestyle will collectively undermine his ability to satisfy restitution in this case.

(PSR at pp. 35). Barbera argues that there is no additional need for specific deterrence given the impact that the filing of criminal charges and the guilty verdict at trial have had on both his personal and professional lives. (*See* Def. Mem. at 66-67). The Government disagrees. Barbera has already demonstrated he did not learn his lesson following the 2014 SEC Fraud Settlement, that he moved on to Go Blue and Animal Breath Analytics when the Nanobeak fraud was uncovered and thus, a significant sentence is needed to achieve specific deterrence.

With respect to general deterrence, Barbera argues that a non-custodial sentence is sufficient to achieve the objective of general deterrence. (*See* Def. Mem. at 68). The Court should reject this argument in light of the nature of the defendant's criminal conduct, his absence of remorse and the fact that he stole millions of dollars from individual investors. A substantial

sentence of incarceration—one that reflects the seriousness of Barbera's conduct—is needed to deter similarly situated individuals from engaging in fraudulent conduct. It is generally well-settled that "[b]ecause 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." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (internal quotation omitted). Should Barbera receive a light sentence, others may be emboldened to engage in similar crimes, knowing that such schemes are difficult to detect and that, even if they are caught, they will not face significant repercussions. *See, e.g., United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) ("[I]t is difficult to imagine a would-be white-collar criminal being deterred from stealing millions of dollars from his company by the threat of a purely probationary sentence."). A lenient sentence would further erode the public's confidence in the integrity of financial markets by sending the message that corporate executives are only lightly punished when caught engaging in white-collar crimes. To deter criminal conduct by executives like Barbera, and send an appropriate message that this type of fraud will not be tolerated, a significant sentence is warranted.

D. Forfeiture

The Government requests that, at sentencing, the Court order forfeiture in the amount of $8,413,375.

E. Restitution

Pursuant to 18 U.S.C. § 3664(d)(5), the Court has 90 days from the date of sentencing to resolve restitution issues. The Government is in the process of identifying individual victims and restitution sums, and recently provided the defendant with a draft victim schedule that would support restitution in the amount of $9,315,875. The Government is still considering restitution-related issues and respectfully requests that the Court and the parties resolve any restitution issues

within 90 days after the sentencing with the benefit of the Court's ruling on the loss amount objections raised by the defendant and in accordance with Section 3664(d)(5). If amenable to the Court, at or shortly after the sentencing, the Government will ask the Court to set a schedule for submissions relating to restitution that would enable the Court to resolve any disputed restitution issues within the 90-day time period.

Respectfully submitted,

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