

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA

v.

EDWARD W. WITHROW III

Defendant.

CRIMINAL NO. 15-CR-10261-PBS

GOVERNMENT’S SENTENCING MEMORANDUM

The government submits this memorandum in advance of the sentencing of the defendant, Edward Withrow (“Withrow” or the “defendant”). As set forth further below, the government believes that the applicable United States Sentencing Guidelines (the “Guidelines” or “USSG”) level in this case is 12, with acceptance of responsibility. Based on the defendant’s criminal history category of I, the Guidelines Sentencing Range (“GSR”) would be 10 to 16 months when applying an offense conduct level of 12. For the reasons detailed below and based on the factors described in 18 U.S.C. § 3553(a), the government respectfully submits that a sentence comprised of incarceration for a period of five months and home confinement for a period of five months, 36 months of supervised release, and a fine within the GSR is reasonable and appropriate.

BACKGROUND

On September 10, 2015, a grand jury returned a six-count Indictment charging the defendant with conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. § 1349 (Count One); securities fraud, in violation of 18 U.S.C. § 1348 (Count Two); wire fraud,

in violation of 18 U.S.C. § 1343 (Counts Three and Four); and two counts of false statements, in violation of 18 U.S.C. § 1001 (Counts Five and Six), primarily in connection with his role in Endeavor Power Corp. (“Endeavor”). Presentence Investigation Report (“PSR”), ¶ 1. Trial commenced in December 2017 on Counts One through Five.¹ The trial ended in a hung jury. Id., ¶ 4.

On May 23, 2018, the government filed a Superseding Information charging the defendant with one count of making false statements, in violation of 18 U.S.C. § 1001. Dkt. No. 191 (Information). That day, the defendant pled guilty to the count in the Superseding Information.² Dkt. No. 192.

FACTS

In or about November 2012, Withrow’s company, Parallax Diagnostics, Inc., merged with a publicly traded company called Endeavor, which was controlled by Marco Babini. PSR, ¶ 13. Following the merger, the newly formed company continued to operate and trade in the securities markets under Endeavor’s name. Id. The defendant assumed the role of Chairman. Id. In March 2013, the United States Securities and Exchange Commission (the “SEC”) suspended trading in the securities of Endeavor (the “Trading Suspension”). Id.

On August 15, 2013, Withrow provided sworn testimony to the SEC in connection with its investigation. Id., ¶ 20. The SEC had been investigating, among other things, manipulative trading in the securities of Endeavor shortly after Endeavor’s merger—that is, before the Trading Suspension—and Withrow’s and Babini’s involvement in any such trading. Id. To that end, the SEC asked questions of Withrow during his testimony about who owned approximately 40

¹ Count Six was severed prior to trial. PSR, ¶ 4.

² The government will dismiss all counts in the Indictment against Withrow after he is sentenced in connection with the Superseding Information. See Dkt. No. 194 (Plea Agreement).

million unrestricted shares of Endeavor’s stock (i.e., shares that can be freely bought and sold in the securities markets) (the “Unrestricted Shares”), and whether Withrow ever tried to determine who owned those shares.³ Id. In response, Withrow made false statements to the SEC by testifying, in sum and substance, that, because of actions he took after the Trading Suspension, he first learned that nearly all of the Unrestricted Shares were associated with Babini and held in Swiss-based accounts. Id. In fact, Withrow had already known about the location of, and Babini’s association with, these Unrestricted Shares prior to the Trading Suspension. Id.

THE GOVERNMENT’S SENTENCING RECOMMENDATION

Pursuant to 18 U.S.C. § 3553(a), the sentence imposed should be sufficient, but not greater than necessary, to achieve the purposes set forth in that statute. See 18 U.S.C. § 3553(a); see, e.g., Kimbrough v. United States, 552 U.S. 85, 101 (2007). In fashioning a sentence, the Court is to consider the advisory Guidelines range, and then proceed to review the factors set forth in Section 3553(a)(2), although the “weighting of those factors is largely within the court’s informed discretion.” United States v. Gallardo-Ortiz, 666 F.3d 808, 811 (1st Cir. 2012) (internal marks and citations omitted). 18 U.S.C. § 3553(a) also “invite[s] the district court to consider, broadly, the nature and circumstances of the offense and the history and characteristics of the defendant and the need for the sentence imposed . . . to protect the public from further crimes of the defendant.” United States v. Politano, 522 F.3d 69, 74 (1st Cir. 2008) (internal marks omitted). The statute also expressly calls for consideration of general deterrence. See id. The resulting sentence must be reasonable. Kimbrough, 552 U.S. at 111. Here, a sentence comprised of incarceration for a period of five months and home confinement for a period of five months is both reasonable and necessary to effectuate the purposes of 18 U.S.C. § 3553(a).

³ Certain shareholders, including Withrow, were obligated to publicly disclose their Endeavor securities holdings. See 15 U.S.C. § 78m; 17 C.F.R. § 240.13d-1.

I. Advisory Guidelines Range

The United States Probation Office has concluded that the offense conduct level is 8, and that the GSR is 0 – 6. PSR, ¶¶ 25 – 34, 91. The government respectfully disagrees with this calculation for the reasons set forth below.

Although the Guidelines for 18 U.S.C. § 1001 is initially found in USSG § 2B1.1, subsection (c)(3) thereunder states, in pertinent part, that “[i]f . . . (B) the defendant was convicted under a statute proscribing false, fictitious or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001 . . .); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.” USSG § 2B1.1(c)(3); see § 2B1.1 at Application Note 17.

The conduct to which the defendant pled guilty establishes a violation of obstruction of justice, 18 U.S.C. § 1505. Generally, a defendant may be found guilty under section 1505 if the government proves that (1) there was a proceeding pending before a government agency; (2) the defendant knew that the proceeding was pending; and (3) “the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending.” See United States v. Sprecher, 783 F. Supp. 133, 163 (S.D.N.Y. 1992). “Corruptly,” in this context, “means acting with an improper purpose, personally or by influencing another, including making a **false or misleading statement**” See 18 U.S.C. § 1515(b) (defining “corruptly” as used in section 1505) (emphasis added).

In this case, (1) there was a proceeding pending before the SEC;⁴ (2) the defendant testified in connection with the pending SEC proceeding and, therefore, knew about it; and (3)

⁴ The SEC is a government agency for purposes of 18 U.S.C. § 1505. See Sprecher, 783 F.

the defendant made false statements to the SEC (see Dkt. No. 191 (Information) and Dkt. No. 194 (plea agreement)). The government, therefore, believes that USSG § 2J1.2 applies pursuant to the cross-reference provision of USSG § 2B1.1(c)(3), and that the base offense level is 14 as a result. See USSG § 2J1.2 (obstruction of justice).

After applying the Acceptance of Responsibility Guideline (USSG § 3E1.1(a)), the government calculates the total offense level to be 12, which leads to a GSR of 10 – 16.⁵ See United States v. Hawkins, 185 F. Supp. 3d 114, 124 (D.D.C. 2016) (applying USSG § 2J1.2 in a § 1001 case because the offense conduct also established violations 18 U.S.C. §§ 1503, 1512(b)(3), and 1512(c)(2)); but see United States v. Scungio, 255 F.3d 11, 16 (1st Cir. 2001) (suggesting that 18 U.S.C. § 1503 is not “more specific” than 18 U.S.C. § 1001 when analyzing the Guidelines’ cross-reference provision in a § 1001 case).

II. The Requested Sentence is an Appropriate Sentence for the Defendant

A total offense level of 12 falls within a “Zone C” GSR. A Zone C sentence “may be satisfied by . . . a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention . . . provided that at least one-half of the minimum term is satisfied by imprisonment.” USSG § 5C1.1(d)(2). The government respectfully requests that the Court impose a sentence comprised of incarceration for a period of five months and home confinement for a period of five months, 36 months of supervised release, and a fine within the GSR. See id. There are several reasons underlying this recommendation.

Supp. at 164.

⁵ Accordingly, the government calculates the fine range to be \$3,000 to \$30,000 pursuant to USSG §§ 5E1.2(c)(3) and (h)(1). Compare with paragraph 102 of the PSR.

First, the defendant knowingly provided false and misleading testimony to the SEC, while under oath, during the course of an SEC investigation. It is critically important for a public company official to be honest with the SEC, the agency responsible for regulating public companies and protecting their investors. The government's requested sentence is both reasonable and necessary to reflect the seriousness of this offense, to promote respect for the law—indeed, the importance of telling the truth when questioned under oath by a federal agency—and to provide a just punishment for the offense. See 18 U.S.C. § 3553(a)(2)(A).

Similarly, general deterrence is an important and relevant consideration. See 18 U.S.C. § 3553(a)(2)(B). The SEC, and other federal agencies such as the FBI, routinely interview individuals in positions of trust and confidence, like the chairman of a public company. The need for people in the same or similar shoes as the defendant to be honest when questioned by law enforcement and/or regulators cannot be overstated. False statements can and do obstruct investigations by making it incredibly difficult for the SEC, FBI, and similarly situated agencies to effectively root out misconduct and prevent, identify, and/or protect victims. The government's requested sentence sends a strong message that the consequences of providing false statements are severe.

That said, the government is asking for a sentence at the low-end of the GSR (as calculated by the government) and that part of the sentence be served in home detention because the defendant has taken responsibility for his actions by pleading guilty shortly after the first trial concluded (i.e., before the government expended significant additional resources preparing for a second trial).

For these reasons, the requested sentence strikes an appropriate balance between the importance of demonstrating accountability and deterrence, while also serving the ends of justice

by communicating to wrongdoers that if they have engaged in crime the appropriate response is to accept responsibility.

CONCLUSION

For the reasons set forth above, the government respectfully requests that the Court impose a sentence comprised of incarceration for a period of five months and home confinement for a period of five months, 36 months of supervised release, and a fine within the GSR.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: /s/ Eric A. Forni
Eric A. Forni
Special Assistant United States Attorney

Dated: November 29, 2018

CERTIFICATE OF SERVICE

I certify that on November 29, 2018, this document was filed through the ECF system, which will provide electronic notice to counsel as identified on the Notice of Electronic Filing.

/s/ Eric A. Forni
Eric A. Forni