IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. 15-212 |
| | ) | Criminal No. 16-132 |
| ABIGALE LEE MILLER | ) | |

UNITED STATES' SUPPLEMENTAL SENTENCING MEMORANDUM

AND NOW comes the United States of America by Soo C. Song, Acting United States Attorney for the Western District of Pennsylvania, and Gregory C. Melucci, Assistant United States Attorney for said district, hereby submits the following Supplemental Sentencing Memorandum addressing the impact of the resentencing in U.S. v. Michael Free, Criminal No. 14-19, and this Court Order of May 3, 2017 (Doc. No. 93).

I. The impact of the Free resentencing on January 26, 2017

On January 26, 2017, the U.S. District Court in U.S. v. Michael J. Free, Criminal No. 14-19, reconvened for the purpose of determining the fate of bankruptcy fraudster Michael J. Free. As this Court might recall, Free was granted re-sentencing by the Third Circuit following a successful challenge to the District Court's original sentence. Free argued that even though he concealed assets from creditors and the bankruptcy court, ultimately those creditors were "paid in full" and therefore, there was no "loss" as understood by USSG 2B1.1. See Government Sentencing Memorandum, pp 7-9. The Circuit Court remanded the sentencing to the District Court to make specific findings on how it would determine the actual or intended economic harm to creditors of Free.

On the eve of the resentencing, Judge Hornak issued Tentative Findings. See Govt. Ex. 1 (hereafter, Tentative Findings). In his Tentative Findings, Judge Hornak ignored the absence of an actual loss to creditors as a bar to loss, and found that Free "purposely intended and sought to inflict pecuniary harm in an amount of at least $400,000 on the bankruptcy estate by his active

concealment of multiple assets…" Tentative Findings, p. 3 (emphasis added).[1] Judge Hornak emphasized that Free "would go to, and intended to go to any length necessary to protect his concealed assets from any possibility of Trustee liquidation." Id., p. 3. From this, Judge Hornak stated that he could readily find a "fair and reasonable inference" from the facts that Free believed his assets were at risk, thereby intending to cause pecuniary harm to his creditors. Id., p. 4.

The Court readily drew several reasonable inferences from Free's behavior revealing his intent to harm creditors:

> *"…even if the Defendant believed that the possibility of pecuniary harm to those legally-cognizable interests was remote given the initial surplus of assets over debts in his initial bankruptcy schedules, his actions, as persistent as they were, strongly demonstrate that it was both this intention to take no chances, and his purpose to cause the above described harm in the event that any such assets were necessary to satisfy his creditors…"* Id., p.5

For Free, the significant asset which he sought to keep from creditors was a historic and valuable WWII gun collection. These guns were valued by the PSR officer at approximately $1,000,000 million dollars, and certainly within the USSG range for an additional 14 levels.[2]

The Court determined that the combination of Free's sizeable concealment of assets and accompanying false statements to conceal the guns revealed Free's true intent to deprive creditors of assets, and to cause pecuniary harm. The Court stated at sentencing:

> "*I base this conclusion principally…and perhaps more singularly, [on] the volume of the assets that were concealed, the persistency of the efforts to conceal those assets and to deceive the Bankruptcy Court and the trustee even after clear, unequivocal and direct admonitions from the bankruptcy trustee and the Bankruptcy Court*." See Govt. Ex. 2, Sentencing Hearing Transcript, p. 51. (hereafter, "Sent. Tx.")

[1] Free claimed approximately $671,000 in liabilities on his schedules. Judge Hornak calculated the USSG based upon the 2014 USSG loss schedules.

[2] The Court felt confident that the requisite level of evidentiary confidence for the "top number" in the loss calculation was $1,000,000 dollars. Id. p. 6.

Judge Hornak "schooled" Free at resentencing that despite that he received "plain instructions" not to hide assets:

> *"You received a fair, clear, plain English warning from the bankruptcy trustee in this case and then ultimately the bankruptcy Judge as to what you were and weren't allowed to do." … "You then engaged in a course of conduct that was marked by your blatant deception and your disregard for those directions." … "You engaged in concealment and deception after you received fair warning."*

Id., Sent Tx., p. 57.

And, Judge Hornak correctly noted that the "natural and probable consequence" of Free's efforts to conceal his gun collection "whether it actually occurred or not, was that the creditors would be harmed." Id., p. 23 (emphasis supplied).

From this, Judge Hornak reached the intended fraud loss range of an additional 14 levels under the pre-2016 USSG Section 2B1.1 loss range ($400,000 to $1,000,000), and properly found that the intended loss figure in this range could be proven either of two ways: one, that the intended loss is at least "the amount of the debt" plus administrative expenses, or second, by the value of the concealed guns which Free secretly sold, i.e., the "financial gain" directly resulting from the concealment and sale of the guns. Id., p. 48-49.

Like Bankruptcy Court Judge Thomas P. Agresti, Judge Hornak was equally perturbed by Free's mendacity in concealing assets. *"What your conduct did do, however, is violence to the system of justice that we have in the United States. People are expected to come into court and tell the truth. You can't be compelled to talk. But if you do, you have to tell the truth…As I indicated at the first sentencing, we in essence don't have a cavalry that rides around and verifies what people tell Judges or bankruptcy trustees or judicial officers. We have to rely on the truth. Otherwise, the system breaks down. We can't operate*." Id., p. 59.

In imposing sentence, Judge Hornak indicated that if [he] did not include a period of custody with the United States Bureau of Prisons, "*I would fail as a judge to set a sentence that*

*fulfills the purposes of sentencing*." Id. Judge Hornak then, after considering the 18 U.S.C. Section 3553 factors, imposed a sentence in which he granted a variance to 24 months incarceration from the USSG range of 41 to 51 months incarceration, which he calculated, beginning with the base offense level of 6, as follows: 14 additional levels for loss, 2 additional levels for fraud during the course of a bankruptcy proceeding, and 2 levels for fraud in violation of specific judicial and administrate orders. See USSG sections 2B1.1(a)(2); (b)(1)(h); and (b)(9)B).

Clearly, the guidance by Judge Hornak in the resentencing of Michael J. Free is of real benefit to this Court because of the similarity in behavior by both the debtors which caused their respective convictions. The Free court recognized two behaviors from which it drew reasonable inferences of an intent to cause pecuniary harm creditors: first, the mere financial value/volume of the concealed assets, and second, the "take no chances" approach steps by the debtor to conceal the assets. While the following comparisons were summarized in the Government's Sentencing Memorandum, they are briefly recounted here:

A. Both Free and Miller concealed massive and valuable assets belonging to creditors.

Free maintained a unique and extraordinary collection of WWII guns. The appraised value was upwards of $1,000,000. Equally, Miller concealed over $755,000 in TV show, merchandise and "Masterclass" dance show income.

B. Both debtors seemingly took extraordinary steps to conceal assets.

Free hid guns, going to the extent of concealing them in a separate room in his home to avoid detection by the Westmoreland County. He was also accused of selling guns and keeping the cash without court approval. Miller created undisclosed bank accounts at Wells Fargo to divert and deposit Masterclass and merchandise income, and retained lawyers to create subchapter S corporations to funnel TV show and other revenue. In multiple emails in 2012 and 2013, Miller

directed others to not put money in the bank, or scheming to divert revenue from the bankruptcy court.

C. Both debtors ignored instructions and warnings from the Trustee to disclose all assets.

Free lied to the Trustee about the value of the guns, and their location, which invoked the ire of Judge Hornak. Sent. Tx. pp 54-57. Meanwhile, as explained in the Government's Sentencing Memorandum and attachments, Miller and her attorneys were repeatedly admonished as early as December, 2012, by Judge Agresti that Miller wasn't fully disclosing all revenue, but she nevertheless persisted in diverting and concealing Masterclass and merchandise revenue.

The similarities between Free's bankruptcy behavior and that of Miller is strikingly similar, such that it would be difficult to ignore the useful formula in calculating the USSG range of 24-30 months incarceration as determined in the Miller PSR. More importantly, Judge Hornak's findings of reasonable inferences of Free's intent to cause economic harm are equally applicable to Miller, who engaged in the same pattern of deceit and lies to conceal increasingly higher income generated from her to protect TV show assets and dance programs. Indeed, the United States has written evidence of her intent as shown through multiple incriminating emails. See Government's Sentencing Hrg. Exhibits 29-45.

II. The Court must consider all intended economic harm caused by Miller under principles of relevant conduct.

The Court has asked the parties to brief the question of whether the intended loss under USSG Section 2B1.1 is limited by the intended loss associated solely with the count of conviction, here Count 5. Indeed, it is certainly not, and the entire economic harm Miller intended to cause to creditors by concealing assets should be considered as 'relevant conduct' under USSG 1B1.3.

In the 34 page, multi-count Indictment, the defendant was charged in a scheme to defraud the bankruptcy court and creditors out of approximately $755,000 dollars chiefly by concealing assets from the bankruptcy court and creditors, here income and revenue she earned from several different sources during her Chapter 11 bankruptcy Petition, including revenue she earned from her Lifetime Network TV show entitled "Dance Moms"; ticket sale revenue from and off "Masterclass" Dance programs she earned through ticket retailer "Showclix"; and, both on site internet sales of Abby Lee Dance Co. merchandise, in violation of 18 U.S.C. Section 152(1). See Indictment, Counts 1-7.

In Count One, she was charged with a scheme to defraud the bankruptcy court and creditors by specifically concealing certain Dance Moms TV revenue she earned between 2010 and December, 2012, which totaled approximately $288,000. In Count Two, she engaged in another concealment scheme in which she concealed primarily Masterclass and Abby Lee Dance Company income earned between October, 2012 and the conclusion of the bankruptcy in October, 2013, both Counts in violation of Title 18, U.S.C. Section 152(7).

In Counts 8 through 20, Miller was charged with separate counts of false declarations Miller swore to in Amended Monthly Operating Reports she filed between October, 2012, and October, 2013, in which she failed to report the same income she concealed as alleged in Counts One through Seven, each in violation of 18 U.S.C. Section 152(3).

The aim of Miller's concealment fraud schemes was of course her singular plan and purpose to conceal income from the bankruptcy court, and common victims, and with the intent to deprive her creditors of potential assets to repay her debts. In the written Plea Agreement, she agreed to plead to Count 5, the concealment of assets of the estate of a bankruptcy debtor, which detailed her concealment of "same day" Masterclass ticket and apparel sales revenue she earned between January and October, 2013. She also agreed to acknowledge responsibility for her

conduct as alleged in the remaining counts, and stipulated that those counts would be considered by the Probation Office and the Court in calculating the sentencing guideline range and in imposing sentence. See Plea Agreement, p. 4. In doing so, Miller expressly accepted that all harms, and specifically, the economic harms which resulted from her commission of other counts, i.e., the "relevant conduct" would be considered by the Office of Probation and the Court in the USSG calculation. Indeed, Miller admitted the government's recitation of the factual basis at the change of plea hearing that she schemed to defraud and conceal income from the bankruptcy court. See attached, G.P. Colloquy Hrg. Tx. pp. 37-42

"Relevant Conduct" as defined by the USSG under Section 1B1.3 instructs sentencing courts that a defendant is accountable for all harms caused by a defendant - both charged and uncharged conduct, and even acquitted conduct, as long as the conduct fits within any of the conduct fitting subsections 1B1.3. Initially, the Guidelines instruct that here, the count of conviction under 18 U.S.C. 152(1) is calculated under Guidelines Chapter 2, commonly referred to as Section 2B.1 "Fraud and Deceit." See USSG Appendix A.

In relevant part, USSG 1B1.3 states as follows:

> (a)(1)(A) **all acts and omissions** committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and…(emphasis supplied)
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, **all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; or** (emphasis supplied)
>
> (3) **all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions**; (emphasis supplied)
>
> See 18 U.S.C. Section 1B1.3 "Relevant Conduct (Factors that Determine the Guideline Range)

Section 1B1.3 also recognizes that a defendant's accountability for relevant conduct may be considered under more than one subsection of Section 1B1.3. If in fact a defendant's

accountability can be established under any one provision of this guideline, it is not necessary to review alternative provisions. See USSG § 1B1. Comment (n.2).

Relevant conduct for which Ms. Miller is accountable is provable under any of three available subsections of 1B1.3: Section (a)(1)(A), which includes all "acts and omissions committed, aided,…or willfully caused by the defendant; or under subsection (a)(2) "all acts and omissions described in subdivisions (1)(A) and (a)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; or under subsection (a)(3), "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions. See USSG § 1B1.3.

The Application Notes for subsection (a)(2) is the most compatible subsection to Miller's concealment scheme. According to the Application Note for "course of conduct" or "Common scheme or plan" the guidance suggests that the offenses should be "substantially connected to each other by at least one common factor, such as common victims, or common accomplices, or a common purpose, or a similar *modus operandi*." Clearly, any or all of these "commonalities" is readily apparent in Miller's scheme to defraud. Count 5 is just one count among many counts which are substantially connected by common victims-the creditors and the bankruptcy court; or substantially connected by a "common purpose", that is, to conceal assets and deprive creditors of funds which could have been used to satisfy the full debt owed by Miller, or of course, connected by the same "*modus operandi*" scheming by Miller to both conceal and divert assets as more fully detailed in Counts 1 and 2.

Additionally, the comment to Application of subsection (a)(3) instructs that "harm" includes "monetary loss" which is the precise harm caused by Miller's scheme.

The comment to Section 1B1.3(a)(2) further summarizes "common scheme or plan" as not only covering conduct "substantially connected by at least one common factor, including common

victims, common accomplices, common purpose, or similar *modus operandi*," but construes "same course of conduct" to mean actions "sufficiently connected or related to each other," and involving factors such as "the degree of similarity in offenses, the regularity or number of repetitions, and the time interval between offenses." USSG § 1B1.3(a)(2) cmt. 9.

A plain reading of the Indictment demonstrates that Count 5 is "inextricably intertwined" with all the remaining counts charged in the Indictment, because of the similarity of offenses (concealing revenue), the regularity of the crimes (the concealments and false statements occur repeatedly through the bankruptcy) as well as the time interval between the offenses (all the charged crimes occur in a relatively narrow window of time between 2010 and 2013).

Similarly, the PSR also correctly determined that based upon the offense conduct in Count 5 and related counts, the controlling guideline for calculating the Guideline Range was § 2B1.1. See PSR paras. 54 and 55. The PSR officer summarized in great detail ongoing offense conduct and a scheme by Miller to both conceal and divert assets away from the attention of creditors and the bankruptcy trustee. The PSR officer concluded that Miller concealed approximately $755,492.85 from the bankruptcy court. See PSR paras. 13-41. The total harm of course was not limited to Count 5, which was only a small portion of the total fraud loss. The PSR officers calculation properly reflected all the harm that was part of the same course of conduct and common scheme by Miller to conceal revenue and deprive creditors of rightful assets.

The application of § 1B1.3 is not novel to ordinary fraud cases, nor to bankruptcy fraud concealment cases. Relevant conduct for purposes of calculating loss includes any fraudulent acts that were part of same course of conduct or common scheme in any fraud scheme. See, for example: United States v Brennan, 326 F3d 176 (3d Cir. 2003) cert. den. (2003) 540 US 898. (Even if $18,000,000 in profits in proceeds from sale of bonds were not considered actual loss

from defendant's continuing fraud on the bankruptcy court, defendant's concealment of them was at least uncharged relevant conduct the district court was entitled to consider under USSG §1B1.3.) Accord, United States v Waldner, 564 F. Supp. 2d 911 (ND Iowa, 2008). (Defendant's bankruptcy fraud and federal criminal contempt offenses were part of the same course of conduct, in that they constituted repeated patterns of similar criminal acts which involved concealing, laundering, investing, and using defendant's assets for his own purposes without knowledge or consent of bankruptcy estate or his judgment creditors). And, in United States v Brennan, 395 F3d 59 (2d Cir. 2005). (Where defendant was convicted of making false statements in bankruptcy proceedings of company controlled by defendant, and the defendant funneled assets of the company to shell entities created and controlled by defendant, an upward adjustment of 16 levels to defendant's advisory sentencing range under Sentencing Guidelines was warranted based on intended loss of over $1 million. Even though defendant pleaded guilty only with regard to false statements concerning two entities, evidence indicated that payments totaling approximately $1.8 million were made to all of entities, and payments to all of entities were properly considered as relevant conduct in determining amount of intended loss.)

The Third Circuit Brennan opinion case is instructive, since it specifically disavowed the "overly simplistic" approach of using actual loss to measure the fraud loss in bankruptcy concealment cases. It stated:

> "*we conclude that limiting Brennan's sentence to the $4 million he concealed from the Bankruptcy Court in August of 1995 would be an overly simplistic application of the Guidelines. Due to the continuing nature of Brennan's offense, the amount of loss that the defendant intended to inflict on the victim was $22 million. Id. The bankruptcy estate was not only entitled to the bearer bonds, but all of their proceeds. 11 U.S.C. § 541(a)(6). Brennan's concealment was of this total amount, and not simply the value of the bearer bonds.*" Brennan, supra at 195.

The Brennan court continued:

> *Even if these profits were not considered actual loss from the continuing fraud on the Bankruptcy Court, Brennan's concealment of them was at least uncharged relevant conduct the District Court was entitled to consider. Under U.S. Sentencing Guidelines Manual § 1B1.3(a) (2000), specific offense characteristics, such as the amount of loss, are "determined on the basis of . . . all acts . . . committed . . . by the defendant . . . that occurred during commission of the offense of conviction" and "all harm that results from [such] acts." As Brennan's concealment of the $18 million profit occurred during the continued concealment of the bearer bonds, the District Court could also consider the profits' concealment in Brennan's sentence.* Brennan, supra.

See also, U.S. v. David McCloskey, (unpublished), No. 14-1517 (3d Cir. 4/8/15 Conti, J.) (district court properly considered relevant conduct to include all acts and omissions described in subdivisions (1)(A) and (1)(3)… that were part of the same course of conduct or common scheme or plan).

Clearly, based upon the §1B1.3 subsections, Miller is accountable for the harm she intended to cause under all counts charged in the Indictment.

III. How much money would the defendant have "saved" under the three plans of reorganization?

Finally, the Court has asked the United States to provide it with a detailed breakdown of the cost savings to the debtor under the Original, Amended and Second Amended Plans of Reorganization. In response, the United States has attached a detailed breakdown of the enormous cost savings to Ms. Miller, principally on 3 secured mortgages which compromised the vast majority of her stated debt. Although her claimed or "stated liabilities" totaled $356,466.52, (see Petition in Bankruptcy, "Summary of Schedules", Sentencing Ex. 3), the actual debt reflected from the proofs of claims filed by claimholders for both secured and unsecured debt actually totaled $452,813. See attached "Claims Spreadsheet", Govt. Ex. 3.

As a result of the benefits afforded debtors in bankruptcy, Ms. Miller was able to simultaneously shield herself from lawsuits by creditors trying to recover their debt, while negotiating more favorable repayment terms, all of course while she was perpetrating a fraud upon the creditors. Nevertheless, she refinanced her secured debt, which had both the result of saving her money, and effectuating a financial "gain."

The "Cost Savings" to Ms. Miller are detailed in the attached three spreadsheets, each reflecting the breakdown of the financial savings to Ms. Miller for each of the three secured mortgages held by lenders Chase Bank and PNC Bank for the respective Plans of Reorganization. The financial breakdown for each lender reflects that with each proposed successive Plan of Reorganization, Miller proposed more progressively "creditor friendly" repayment terms, particularly noticeable in the Second Amended Plan filed in January, 2013, immediately after Judge Agresti uncovered the massive concealment in December, 2012. See "Cost Savings" spreadsheets, Govt. Exs. 4a, 4b, and 4c.

As argued in its Sentencing Memorandum, the United States' will contend that these total savings, albeit in the form of both principal, interest, and fees, created a determinable and provable "gain" for Ms. Miller. The financial "gain" to a defendant caused by fraud is an accepted alternative to proving loss under § 2B1.1. The Guidelines instruct courts that "Gain" shall be used "as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." See USSG § 2B1.1 Application Note 3(B).

As noted by the Third Circuit in United States v. Feldman, 338 F.3d 212 (3d Cir. 2003), and in the context of bankruptcy fraud, the court may consider the potential gain that resulted from the offense as an alternative measure of loss only if there is a loss but it cannot be determined. In Free, Judge Hornak considered this alternative measure of loss as appropriate based upon the clear evidence of Free's active concealment of the guns, which he later sold, the proceeds of which he

used to buy other assets in the bankruptcy estate. As such, Hornak stated Free received "a direct pecuniary gain in an amount well in excess of $550,000.00." See Tentative Findings, p. 7.

**CONCLUSION**

For the aforesaid reasons, the United States believes that reasonable inferences deduced from the sentencing exhibits previously offered, and testimony of witnesses, that the defendant intended to cause an economic harm to creditors of at least the stated liability debt of $356,466.52, or, as an alternative, that she obtained a financial gain by the principle and interest savings which resulted from refinanced loans. At a minimum, the 'cost savings' to Miller which she would have earned if not for the Court's uncovering the concealment, was potentially as high as $367,969 as the First Amended Plan filed in August, 2012, before the fraud was uncovered.

With respect to items "1" and "2" as requested by the Court, Miller is responsible for all the economic harm identified in the charged counts as per the PSR, under § 1B1.3, and, that a financial gain is an alternatively provable theory of intended loss.

Respectfully submitted,

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