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March 10, 2020

By ECF

Honorable Kiyo A. Matsumoto
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. Panayiotis Kyriacou*, No. (S1) 18 Cr. 102

Dear Judge Matsumoto:

On behalf of Peter Kyriacou, we respectfully submit this reply letter in response to the Government's March 3, 2020 sentencing submission (ECF No. 105, "Gov't Letter"). Mr. Kyriacou appreciates the Government's position that a sentence below the Government's calculated Sentencing Guidelines range is warranted here, but maintains that the Government's calculated Guidelines range, and thus its starting point, is incorrect.

I. The Government's Proposed Enhancements Do Not Apply

Prior to considering each of the proposed sentencing enhancements, it is worth noting that, similar to the PSR, the Government begins its sentencing letter discussing alleged pump-and-dump schemes at Beaufort Securities in which Mr. Kyriacou did not participate. This is in fact illustrated by the Government's reference to the involvement of a Beaufort executive during an initial meeting between the undercover agent and Mr. Kyriacou at Beaufort's London office—when the undercover agent explains to the executive that the agent is interested in trading in U.S. over-the-counter stocks, the executive directs Mr. Kyriacou to introduce the agent to two Beaufort traders who had experience in that market. (Gov't Letter at 4.) The reason for this instruction is simple—Mr. Kyriacou himself had no such experience.

A. The Government Cannot Establish With Reasonable Certainty That Mr. Kyriacou Specifically Intended to Cause Millions of Dollars of Losses

The Government agrees that Guidelines Section 2X1.1 applies, and that any enhancement for loss amount must be established with "reasonable certainty." (Gov't Letter at 12.) The Government also does not dispute that there was no actual loss here, and thus the loss amount must be based on loss that Mr. Kyriacou specifically intended, which it contends is more than $1.5 million. (Gov't Letter at 8.) The Government cannot satisfy its burden.

To place the discussion in context, one must consider what Mr. Kyriacou stood to gain from intentionally causing millions of dollars of stock losses. Typically, when someone specifically intends to cause losses of such magnitude, the person is motivated by the receipt of some portion of the proceeds. In pump-and-dump schemes, the success fee usually arrives in the form of shares of the stock to be inflated (thus earning by helping inflate the price of the shares and then dumping the shares on the market at that inflated price), a percentage of the proceeds in cash, or a lump sum payment commensurate with the risk involved. Nothing of the sort exists here. Of course, it is the Government's burden to establish that financial motive, but the Government does not attempt to do so and, in fact, acknowledges that it has no such evidence that Mr. Kyriacou was financially motivated. (Gov't Letter at 14.)[1] Absent any financial incentive to engage in a large-scale stock manipulation, there can be no reasonable certainty that Mr. Kyriacou specifically intended to cause losses of the magnitude that the Government proposes.

Next, one would expect the Government to proffer facts that Mr. Kyriacou repeatedly stated that he intended to manipulate U.S. over-the-counter stocks to the tune of millions of dollars and, consistent with such an expressed intent, that he suggested to the undercover agent certain stocks as prime candidates, offered mechanisms to effectuate the manipulation of certain stocks, and proposed amounts by which particular stocks could be inflated. Once again, nothing of the sort exists here. Indeed, this is why *United States v. Altomare*, 673 Fed. Appx. 956 (11th Cir. 2016), is instructive. As even the Government acknowledges (*see* Gov't Letter at 11), the district court in *Altomare* based its loss calculation on the defendant's own stated intention of inflating the price of a particular stock by at least $1 per share. 673 Fed. Appx. at 964. Moreover, the defendant in *Altomare* designed and executed mechanisms to cause the intended price inflation. We agree that, from such evidence, a court can determine with reasonable certainty that the defendant specifically intended that loss amount. However, such evidence simply does not exist here.

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1. In our February 18, 2020 letter setting forth Mr. Kyriacou's objections to the PSR, in response to ¶ 75, we noted that in addition to his base salary, Mr. Kyriacou earned commissions on a quarterly basis, which amount was equal to 1% of the trade amount. Such a commission rate is standard. Here, in connection with the four HD View trades, that would amount to approximately $30. Significantly, that amount is earned regardless of the intent behind or success of any particular stock trade, and was not offered by the undercover agent as an incentive to engage in millions of dollars of criminal conduct.

Lacking evidence of Mr. Kyriacou's specific intent, the Government relies primarily on the undercover agent's statements about the agent's purported activities, which purportedly generated millions of dollars for the agent. (*See, e.g.*, Gov't Letter at 5, 10.) Mr. Kyriacou did not participate in or have any personal knowledge of these non-existent deals. Thus, the fact that the agent claimed to have participated in such conduct does not indicate that Mr. Kyriacou specifically intended to cause losses of the same magnitude, much less with respect to any specific stock deal.

The Government also points to trades executed by Beaufort for the agent on the London Stock Exchange using money that the agent claimed to have generated from illicit stock deals. (*See, e.g.*, Gov't Letter at 5, 10.) This trading, however, is not the trading encompassed by the securities fraud charge, and itself was not intended to manipulate or inflate any stock price. Consequently, it has no bearing on the loss amount calculation. The only relevant evidence of Mr. Kyriacou's intent with respect to participating in pump-and-dump schemes is the HD View trading itself which, as noted, was *de minimis* and had little, if any, impact on the market and could hardly be indicative of a large-scale scheme.

Finally, the Government points to meetings that Mr. Kyriacou helped facilitate between the undercover agent and people in the real estate and art world, for potential investments by the undercover agent. (Gov't Letter at 6-8.) Mr. Kyriacou did not operate in either sphere. He made the introductions in a misguided effort to help foster business deals (and again without remuneration), albeit without sufficient sensitivity to the purported source of the money.[2] At times, the undercover agent undoubtedly described his money as dirty, and at other times, claimed to be a successful businessman with lots of money to invest and deals to make. Mr. Kyriacou, having been wined and dined at expensive restaurants and impressed with the agent's purported business success, tried to be something bigger than he was (an entry-level stock advisor). Indeed, Mr. Kyriacou himself was boasting with statements such as "we do a lot of business together," when in fact he had never done business with the people he introduced.

While nobody disputes that Mr. Kyriacou's conduct is not justified, it does not translate into a specific intent to cause millions of dollars of losses in unidentified stock deals. The Government lacks evidence that Mr. Kyriacou had the specific intent to cause such losses, and cannot fill the gap with references to other alleged conduct unrelated to as-yet-unknown future stock deals.

Nor does the scenario described in Application Note 2 to Section 2X1.1 support the Government's position. (*See* Gov't Letter at 12.) Note 2 provides that, where two defendants

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2. The Government does not dispute that there is no dual criminality permitting extradition from England on the money laundering charges. Had Mr. Kyriacou exercised his right to challenge extradition, the U.K. courts would not have permitted extradition on those charges. In such circumstances, courts have rejected consideration of offense conduct for non-extraditable charges at sentencing. *See, e.g.*, *United States v. Bakhtiar*, 964 F. Supp. 112 (S.D.N.Y. 1997) (refusing to consider for sentencing purposes the money laundering object of the charged conspiracy where money laundering was not extraditable under the treaty). Mr. Kyriacou should not be in a worse sentencing position based on his willingness to appear voluntarily rather than requiring the Government to seek, and then challenging, extradition.

are arrested in the conspiratorial stage of planning an armed bank robbery, enhancements for possible injury to others, hostage taking, discharge of a weapon, or obtaining large sums of money should not be applied as "such factors would be speculative." U.S.S.G. § 2X1.1, Application Note 2. On the other hand, where the conspirators planned to rob a specific bank, and the plans proceeded to the point where the government could establish that the defendants "actually intended" to physically restrain the bank teller during the planned robbery, the enhancement for physical restraint would apply. *Id.* The instant case is not remotely similar to the latter scenario. Other than the minor trading in HD View, there was no specific plan to manipulate the price of any particular stock, by any particular means, and for any particular amount. Any intended loss beyond the executed HD View trades would be speculative, analogous to the conspiratorial discussions of "obtaining large sums of money" described in the first scenario in Application Note 2.[3]

B. An Enhancement for Foreign Conduct Should Not Apply

The Government cites two cases, *United States v. Hussain*, 2019 WL 1995764 (N.D. Cal. May 5, 2019), and *United States v. O'Keefe*, 208 Fed. Appx. 126 (3d Cir. 2006), which rejected arguments that Section 2B1.1(b)(10)(B) should not apply for foreigners who live and work abroad. (Gov't Letter at 13.) Mr. Kyriacou's argument, however, is not that the enhancement should not apply simply because he lived and worked abroad. Rather, it's that Guidelines enhancements generally, and Section 2B1.1(b)(10) specifically, are enacted for a purpose—to capture and punish certain offense conduct that is not necessarily encompassed in a run-of-the-mill criminal offense, and which warrants greater sentencing exposure. Sentencing enhancements are not meant to punish a defendant more harshly merely due to the defendant's status, such as his/her gender, religion, or place of residence/work. As set forth in Mr. Kyriacou's opening brief, this particular enhancement was enacted to cover conduct designed by the defendant to occur abroad for the purpose of concealing the activity from law enforcement. Here, ironically, it was law enforcement, not the defendant, who designed and exported the scheme to foreign shores.

As for the two cases cited by the Government, *O'Keefe* says nothing more than that a defendant's foreign residence "does not except him from" the enhancement, a simple proposition that is undoubtedly true. 208 Fed. Appx. at 130. As the case provides no analysis or explanation, it is not instructive as to whether the enhancement should apply here. In *Hussain*, the Court rejected the foreign defendant's argument that the enhancement only applied to domestic defendants who purposely moved the activity abroad to avoid detection, concluding, much like in *O'Keefe*, that the provision does not exclude foreign defendants. 2019 WL 1995764 at *2. But the Court also recognized that the "overarching purpose" of the enhancement is to "penalize conduct that is done in such a way that inhibits the ability of law enforcement to discover the crime or apprehend the defendant." *Id.* at *3. Accordingly, for the

3. Application Note 3(A)(ii) to Section 2B1.1(b)(1), cited by the Government, is beside the point. We do not contend that intended pecuniary harm that cannot actually occur because it was part of a government sting operation must be excluded from loss consideration. Rather, the Government cannot establish that Mr. Kyriacou specifically intended to cause millions of dollars in losses, as required under Section 2X1.1.

enhancement to apply, a court must find that the offense was done "in such a way." *Id.* The fact that a defendant lives or works abroad cannot itself be the basis for the enhancement or else the Guidelines would more simply state that to be the case. Here, Mr. Kyriacou lived and worked abroad when the undercover agent came calling, and had no intention to do anything in the United States, much less commit crimes associated with the United States. The enhancement should not be applied to these circumstances.

II. A Non-Custodial Sentence Is Warranted Under Section 3553(a)

The Government posits that a custodial sentence, albeit one below its calculated guidelines range, is warranted primarily for general deterrence purposes because sophisticated fraud schemes with international actors are difficult to detect and prosecute. (Gov't Letter at 15.) The "sophisticated fraud" label does not accurately describe this case. Mr. Kyriacou was far from sophisticated, and he did not bring any sophisticated methods to the scheme. Rather, to the extent one can describe any aspect of the scheme as sophisticated, it was so only because the undercover agent directed the steps to be taken. Sophisticated defendants and financial crimes appear in this Court routinely—this is not a sophisticated accounting fraud scheme; it is not a sophisticated insider trading scheme; and the scheme did not involve trading algorithms, high-tech computer programs, or nuanced and coordinated action among various financial institutions to manipulate exchange rates to the fourth decimal point. Rather, this scheme was as basic a securities fraud scheme as one can execute, with a small amount of trading in the market. The fact that the undercover agent's name was not on the account neither makes the case sophisticated, nor makes the nature of the pump-and-dump scheme any harder to detect.

The Government further argues that, because of the limited number of tax prosecutions, a custodial sentence is required in this case to deter tax offenses. (Gov't Letter at 15.) Mr. Kyriacou is not the candidate to make an example of for those seeking to evade taxes—he himself did not seek to evade taxes; nor did his work relate to aiding taxpayers to evade taxes. Rather, his role with respect to the undercover agent's avoidance of taxes was solely to introduce the agent to Mr. Canaye, with whom Mr. Kyriacou had never before worked, and has not worked since.[4] To the extent that there is a need to deter tax offenders through this case, Mr. Baron's sentence, which was based solely on the FATCA charge, sent that message. Moreover, the additional deterrent message that will resonate from this case for those operating abroad is that nobody should take comfort from engaging in misconduct beyond this country's borders, because the FBI or other U.S. law enforcement might be operating in their backyard to sniff out misconduct. General deterrence has been adequately advanced by the prosecution of this case.

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4. The Government takes issue with the statement in our Opening Brief that Mr. Kyriacou, after introducing the agent to Mr. Canaye in July 2017 "did not know if Mr. Canaye had done anything for the undercover agent, and did not follow up with Mr. Canaye to find out." (Gov't Letter at 14 n.10.) Specifically, the Government cites two WhatsApp communications in late November 2017. Those messages, however, occurred only after the agent informed Mr. Kyriacou, at a meeting in London in late October 2017, that the agent had advanced things with Mr. Canaye in the preceding months. Mr. Kyriacou had not done anything to advance things with Mr. Canaye between July 2017 and November 2017, and was not aware of any interactions between them.

Indeed, this Court has recognized that the felony conviction and collateral consequences that Mr. Kyriacou has endured because of his conduct are sufficient to deter individuals from engaging in similar behavior. *See, e.g.*, *United States v. Schulman*, No. 16 Cr. 442 (E.D.N.Y.) (Azrack, J.), Sentencing Tr., Sept. 26, 2017, ECF No. 155, at 39:12-18 ("Thus, although I recognize the need for a sentence imposed here to serve as a deterrence against future white collar criminals, I disagree with the government's position that a custodial sentence is required. Indeed, I believe that the significant collateral effects of the defendant's conviction, including his likely disbarment, have already achieved the goal of deterrence."); *United States v. Matos*, No. 12-CR-219, 2014 WL 4185123, at *3 (E.D.N.Y. Aug. 21, 2014) ("General deterrence is satisfied by the felony conviction and its collateral consequences, including the possibility of his deportation from the United States."). Here, Mr. Kyriacou's career is over at its inception. It should be clear to any young investment advisor or trader that engaging in similar conduct will, among other things, end an investment career before the age of 27, with significant effects lasting an entire lifetime.

Moreover, a non-custodial sentence is particularly appropriate here, in light of the fact that Mr. Kyriacou did not receive any monetary gain[5] or intend to reap substantial profits from his offense conduct. *See, e.g.*, *United States v. Suarez-Reyes*, No. 8:12CR67, 2012 WL 6597814, at *7-9 (D. Neb. Dec. 18, 2012) (finding sentence of one day followed by five years of supervised release, along with collateral consequences, for scheme to defraud a financial institution by check kiting where the defendant did not profit from his actions, sufficient to deter others from engaging in similar criminal conduct); *United States v. Vandebrake*, 771 F. Supp. 2d 961, 1015 (N.D. Iowa 2011) ("[B]ecause the court finds that [the defendant's] crime was not one of pure greed, there is no special need for general deterrence of his crime and the dangers it possess [sic] to our society."), *aff'd*, 679 F.3d 1030 (8th Cir. 2012). *Cf. U.S. v. Martin*, 455 F.3d 1227, 1237-40 (11th Cir. 2006) (finding 7-day sentence insufficient to deter similar conduct in light of the defendant's leadership role in a massive and prolonged fraudulent scheme that resulted in over a billion dollars of loss, and the defendant's substantial financial gain in salary and bonuses).

In addition, Mr. Kyriacou and his family have endured the stress and uncertainty of criminal prosecution and incarceration in a foreign country. Considering the stigma of a felony conviction, loss of one's career, and anxiety and depression of living with a felony conviction, no rational person weighing the benefits of the offense conduct against the likelihood and consequences of prosecution would conclude that the benefits outweighed the risks. Under these circumstances, a custodial sentence is unnecessary to effect general deterrence. *See, e.g.*, *United States v. Musgrave*, 647 F. App'x 529, 533 (6th Cir. 2016) (in affirming the defendant's sentence of one day of imprisonment and five years of supervised release with 24 months of home confinement, despite a Sentencing Guidelines range of 57-71 months' imprisonment for his conviction on four counts of white-collar crimes, the Court approved the district court's explanation that "[t]here is no justice in imposing a sentence merely to make an example out of a defendant" and found that the sentence "afforded adequate general deterrence").

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5. In contrast to the $40,000 Mr. Canaye earned for forming offshore entities for the undercover agent, Mr. Kyriacou earned approximately $30 in commissions for the HD View trading executed on behalf of the agent.

Notably, the Government does not dispute the consequences that Mr. Kyriacou will face if incarcerated given his foreign status—because he has no family in the United States, visitation will be difficult and limited; he will neither be eligible for the type of facility to which a defendant in his circumstances would typically be assigned nor for early release or certain credit against his sentence; and he will be subject to deportation and potential additional detention until that process is complete. A non-custodial sentence will permit Mr. Kyriacou to return home of his own volition, with his family, and with no prospect that he will ever need to appear in a U.S. courtroom again. And it will allow him to continue to rebuild his life as a positive contributor to society.

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Based on the foregoing, and the reasons set forth in our Sentencing Memorandum, we respectfully submit that a non-custodial sentence for Mr. Kyriacou is appropriate.

Respectfully submitted,

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