UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CRIMINAL NO. 3:18-CR-28 (JAM)
vs.	:	
BARTON STUCK	:	February 21, 2019

RESPONSE TO GOVERNMENT MEMORANDUM REGARDING RELEVANT CONDUCT

In anticipation of sentencing in this matter, Defendant submits the following brief response to the Government's January 31, 2019, memorandum. The Government claims that Mr. Stuck's activities while operating an active venture capital fund between 2006 and 2011 qualify as "relevant conduct" for purposes of calculating the Sentencing Guidelines applicable to Mr. Stuck's offense conduct in 2015 and 2016. The Government's claim would stretch the definition of "relevant conduct" beyond recognition and finds no support in the relevant caselaw. Indeed, the Government's submission ignores well and widely established limitations on the scope of U.S.S.G. § 1B1.3(a)(2). The facts of this case fall far outside the outer bounds of those limits. For the reasons below, the Court should therefore hold that Mr. Stuck's alleged conduct from 2006 to 2011 is categorically beyond the scope of § 1B1.3(a)(2).

Additionally, Defendant at this time does not concede the factual accuracy of the Government's claims regarding the nature of Mr. Stuck's conduct from 2006 to 2011. Should the Court disagree with Defendant regarding the scope of § 1B1.3(a)(2)., he invokes his right to a *Fatico* hearing on the issue of loss.

BACKGROUND

Mr. Barton Stuck is awaiting sentencing related to fraud and false statement offenses during 2015 and 2016 resulting in a loss of $50,000. In 2015, Mr. Stuck was the manager of—and largest single investor in—a defunct venture capital fund.[1] Since the late 1990s (starting inauspiciously just before the first tech bubble burst) the fund had been providing seed money to fledgling technology companies. Over time the fund raised approximately $100 million dollars (including millions of dollars of Mr. Stuck's own money, making him the single largest investor) and invested it in a number of early-stage tech startups. But by 2011 the last company in the fund's portfolio, InPhase Technologies, had failed. The fund was out of money and stopped soliciting investments.

Four years after the fund's last trickle of investments came in, a disgruntled investor coordinated with the Federal Bureau of Investigation to manufacture an elaborate sting operation. The operation, of course, could not involve an ersatz "new investor" who would be similarly situated to other prior investors because fund had long since stopped soliciting (or making) investments. So agents created a set of *sui generis* circumstances: the disgruntled investor pretended to want to sell his $500,000 investment share to a third person. That person would buy into the fund not by investing new money into the fund, but by buying out the existing investor.

In the course of a video-recorded meeting on an FBI-owned yacht regarding this transaction, Mr. Stuck made an outlandish and untrue claim: the fund, he said, had $200 million in the bank, which would be disbursed to shareholders. Mr. Stuck did not profit from this false representation directly through the investment transfer to which he was merely a third party. Instead, as

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[1] Technically several related funds existed as separate entities managed by Mr. Stuck.

consideration for his approval of the transfer, Mr. Stuck required that the substitute investor lend the fund $50,000. Put simply, Mr. Stuck imposed a transaction cost on a standalone transaction between a fund investor and a third party.

LEGAL STANDARD

The Government bears the burden of demonstrating the applicability of any Guidelines enhancement. *United States v. Archer*, 671 F.3d 149, 161 (2d Cir.2011). Here, the Government claims that Mr. Stuck's course of conduct soliciting investments and communicating with investors from a period from 2006 to 2011 should be treated as "relevant conduct" for purposes of sentencing the present case under U.S.S.G. § 1B1.3(a)(2).

For purposes of the Guidelines, relevant conduct extends to conduct that is part of a "common scheme or plan." "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." U.S.S.G. 1B1.3 cmt 5.

Similarly, the "closely related" "same course of conduct" concept extends relevant conduct to acts that "are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id*. The Guidelines commentary further explains:

> Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. *Id*.

Addressing the similarity of offenses factor, courts have recognized the "important limiting principle" that not every offense of a similar kind "is necessarily linked in a meaningful sense." *United States v. Bryant*, 571 F.3d 147, 160 (1st Cir. 2009) (stating specifically that "not every drug transaction undertaken by every drug trafficker is necessarily linked in a meaningful sense"). Rather, for the similarity requirement to be met, "[t]he sentencing judge must find a sufficient link between the acts charged and those included for sentencing purposes. If the district court cannot find a sufficient link, offenses of the same kind, but not encompassed in the same course of conduct or plan, are excluded." *Id*. (citations and internal quotation marks omitted). *Accord United States v. Damato*, 672 F.3d 832, 840 (10th Cir. 2012); *United States v. Gooden*, 892 F.2d 725, 730 (8th Cir. 1989); *United States v. White*, 888 F.2d 490, 500 (7th Cir.1989) (leading case).

With respect to the question of temporal proximity, the Second Circuit has stated that it is "difficult to see how the court could reasonably have found . . . sufficient proximity" where there was a 14-month gap between the present offense and the claimed relevant conduct. *United States v. Mack*, 524 F. App'x 756, 757 (2d Cir. 2013). In so stating, the *Mack* court looked to the Second Circuit's earlier characterization of an 8 – 14-month gap as "considerably longer than the periods involved in most of our prior cases construing the Guidelines, especially those focusing on offenses other than conspiracy." *United States v. Santiago*, 906 F.2d 867, 872 (2d Cir. 1990).

The Second Circuit has on at least one occasion considered as relevant conduct drug activity up to two years prior to the charged conduct, but only where the defendant "engaged in the same course of conduct-cocaine distribution-for a period of years without significant interruption" and "[h]is methods of distribution remained virtually unchanged over this time." *United States v. Cousineau*, 929 F.2d 64, 68 (2d Cir. 1991). The Second Circuit subsequently characterized this holding as one that stressed the presence of continuity and the high degree of similarity and held

that the application of the relevant conduct provision to five-year-old conduct was improper. *United States v. Fermin*, 32 F.3d 674, 681 (2d Cir. 1994) (overruled on other grounds by *Bailey v. United States*, 516 U.S. 137 (1995)).

Beyond the Second Circuit, the 10th Circuit in 2012 surveyed cases spanning the preceding two decades and concluded that "[t]he Fifth Circuit accurately summarized the bulk of the case law in stating: 'Various courts have found that a period of separation of over one year negated or weighed against [a finding of] temporal proximity.'" *United States v. Damato*, 672 F.3d 832, 841 (10th Cir. 2012) (collecting cases;[2] quoting *United States v. Wall*, 180 F.3d 641, 646 (5th Cir.1999)).

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[2] The full survey is as follows:

> The largest time difference we have observed in the case law is the five-year interval at issue in [*United States v. Roederer*, 11 F.3d 973 (10th Cir. 1993)].
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> Further, the five-year delay in *Roederer* appears to be an outlier. We have described a "fifteen month interval" as "temporally distant." *United States v. Clark*, 415 F.3d 1234, 1242 (10th Cir.2005). Other circuits have held that temporal gaps as brief as five months cut against a finding that an activity was part of the same course of conduct as the offense of conviction. *See United States v. Hahn*, 960 F.2d 903, 910–11 (9th Cir.1992) (five-month gap is "relatively remote"); *See also United States v. McGowan*, 478 F.3d 800, 802 (7th Cir.2007) (eight-month "gap is long enough to cast doubt on the relevance of the earlier conduct"); *United States v. Ortiz*, 431 F.3d 1035, 1041 (7th Cir.2005) (ten-month "gap suggests the lack of a common plan or course of conduct"); *United States v. Mullins*, 971 F.2d 1138, 1144 (4th Cir.1992) (temporal proximity factor "extremely weak ... if present at all, as the uncharged conduct took place over six months prior to the two phone calls underlying the offense of conviction"). And courts have repeatedly held that temporal proximity is lacking or that conduct is very remote when the interval exceeds one year. *See United States v. Kulick*, 629 F.3d 165, 171, 172 (3d Cir.2010) (twenty-seven month interval is "substantial" and "temporally remote"); *841 *Hill*, 79 F.3d at 1484 ("[W]e find that temporal proximity is extremely weak in that nineteen months is an exceedingly long lapse between offenses."); *United States v. Sykes*, 7 F.3d 1331, 1337 (7th Cir.1993) (temporal gap of fourteen months "tends to indicate conduct that can easily be separated into

ARGUMENT

The following discussion addresses the legal question of whether Mr. Stuck's conduct from 2006 to 2011 can qualify as "relevant conduct" under § 1B1.3(a)(2) for purposes of calculating the Sentencing Guidelines in the present case.[3] For the reasons below, the Government's claimed "relevant conduct" falls so far outside the bounds of § 1B1.3(a)(2) that the Court should hold, as a matter of law, that these allegations do not so qualify for purposes of calculating the Guidelines.

The first and most glaring flaw in the Government's analysis is the temporal disconnect between the offense and the claimed relevant conduct. The Government concedes that the loss associated with Mr. Stuck's conduct during the 2015 to 2016 period charged in the indictment is exactly $50,000. This loss figure relates specifically to a sum of money that the FBI transferred to Mr. Stuck in a sting operation initiated and orchestrated by law enforcement in order to induce a financial transaction that would not have otherwise occurred. The Government identifies zero losses to actual investors during the charged period. Nor does the Government point to a single dollar of claimed loss to investors in in the four years leading up to the time period at issue in the indictment.

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discrete, identifiable units rather than behavior that is part of the same course of conduct" (quotation omitted)).

United States v. Damato, 672 F.3d 832, 840–41 (10th Cir. 2012) (footnote omitted).

[3] The Government's allegations are factually far afield from the issues raised by the indictment in this matter and involve many factual assertions that Defendant does not concede are accurate. The present memo does not address these factual disputes, and at this stage of the proceedings Defendant leaves the Government to its burden of showing, at a *Fatico* hearing, the factual accuracy of its claims should the Court determine that these claims, if shown to be true, would constitute relevant conduct for sentencing purposes.

In claiming that § 1B1.3(a)(2) applies to alleged misrepresentations that Mr. Stuck made to induce investments between 2006 and 2011, the Government blithely elides this fatal temporal fissure. But the court cannot do likewise. As discussed above, courts around the country have expressed serious reservations about applying § 1B1.3(a)(2) where the claimed relevant conduct is even one year stale. The four- to nine-year gap between the offense and the claimed relevant conduct would make this case an extreme outlier. The Government, which nowhere even acknowledges the significance of temporal distance, does not identify a single case involving a similar timeline in which a court has properly applied § 1B1.3(a)(2).

Of particular note, the Government does not identify (and Defendant is not aware of) circumstances in which a court has applied § 1B1.3(a)(2) in the face of such a long multi-year *discontinuity* between the claimed prior misconduct and the actual charged offense. Even *Roederer*, an extreme outlying case applying § 1B1.3(a)(2) to conduct up to five years from the offense of conviction, involved extensive evidence showing that the defendant had consistently and continuously distributed cocaine during the entire period from the beginning of the relevant conduct through the time of the offense of conviction.[4] *Roederer*, 11 F.3d at 980 ("We hold that the evidence, when viewed in its entirety, establishes that Roederer was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992"). Likewise the Second Circuit in *Cousineau* emphasized the "virtually unchanged" continuous pattern of conduct

[4] In *Roederer* the defendant was also convicted of the earlier conduct, but since the conduct pre-dated the enactment of the Sentencing Guidelines the drug quantity attributable to this older conduct was not automatically included in the Guidelines calculation.

over time in treating conduct two years prior to the offense as relevant conduct. *Cousineau*, 929 F.2d at 68.

No such virtually unchanged pattern can be discerned here. To the contrary, this case involves a significant—indeed decisive—turning point in the 2011 – 2012 time period. During this time, InPhase Technologies, the last remaining solvent company that Mr. Stuck's fund had invested in, filed for bankruptcy and was shuttered. **Exhibit 1**. This event brought to a close Mr. Stuck's efforts to raise capital to keep the company (which was by then 10 years old and with 60 employees) viable. This event brought to a close Mr. Stuck's solicitation of investments and with it any pattern of misrepresentations about the health of InPhase that the Government alleges. This is notably not a case in which the Government alleges that Mr. Stuck peddled fake investments as a means of running a Ponzi scheme. Mr. Stuck ran a real investment fund that invested in real companies. When the last of those companies failed, Mr. Stuck stopped seeking investors.

The temporal and practical rifts between 2011 and 2015 also defeat claims of "regularity" or "similarity" between the offense in this case and the claimed relevant conduct. During the period of claimed relevant conduct, Mr. Stuck was in the business of managing an active investment fund. That activity, which Defendant does not concede was unlawful, ended. When, four years later, the Government orchestrated a "new" investment, it was hardly of a piece with prior investments. When approached by the FBI, Mr. Stuck did not make claims about InPhase or any other technology company. He instead made a very different claim: that his fund was flush with cash from a billionaire investor and that the cash would be paid out to the fund's stakeholders.

The Government claims that the two claimed falsehoods are similar because in each instance Mr. Stuck "misrepresented material facts regarding the financial health and anticipated returns of the Signal Lake entities and their portfolio companies." Document 50 at 5. As discussed in the

preceding paragraph, Mr. Stuck's prior representations and his lie to the FBI agent were not closely similar either in their contextual circumstances or factual content. Just as not every drug transaction by a drug dealer is automatically relevant conduct, it is likewise the case that not every financial lie by a financier is related. Again, the Government points to no case where a court has applied § 1B1.3(a)(2) under similar circumstances.

The Government also claims that Mr. Stuck's conduct from 2006 to 2011 constitutes

> a "common scheme or plan" with Count One, in that those crimes were "substantially connected to each other" by "common victims" (i.e., Signal Lake investors), "common purpose" (i.e., to profit Stuck and lull his victims), and "similar modus operandi" (i.e., misrepresenting facts about Signal Lake and the portfolio companies).

Document 50 at 5. At the level of specifics, the Governments' factual assertions are incorrect. The "victim" of the offense of conviction was not an investor in the venture fund—he was someone who posed as an outside profiteer looking to exploit an actual investor's need for capital by buying him out at a discount. Had this profiteer been real, his actions would actually have enriched the actual signal lake investor by providing him money in exchange for a stake in a fund with no assets. The profiteer was under no illusion that he was investing in a promising (if risky) tech company. But earlier investors were—correctly—under that impression.

Similarly, the purpose of Mr. Stuck's activity (honest or otherwise) from 2006 to 2011 was to raise capital for a technology company. That company genuinely created a promising product, a holographic storage medium that really was used by Turner Media. **Exhibit 2**. Over time the company struggled and ultimately failed, but the reason for Mr. Stuck's fundraising efforts was to prevent this outcome. By sharp contrast, the reason Mr. Stuck obtained $50,000 from the FBI agent was to pay his own expenses and to provide money to another person (Mr. Stuck sent over half of the money to a person who claimed to be a billionaire investor).

Finally, the claimed "modus operandi" of Mr. Stuck's prior interactions with investors from 2006 to 2011 hardly resembles his interactions with the undercover profiteer. At no time in the course of the charged conduct did Mr. Stuck claim he would match the profiteer's investment; he did not talk about promising product developments or the prospect of future profits. Instead, he told the profiteer that there was $200 million sitting in a bank account and that, short of the collapse of the international banking system, it would be paid out.

CONCLUSION

For the reasons above, the Court should hold that Mr. Stuck's alleged conduct from 2006 to 2011 is not relevant conduct for purposes of the Sentencing Guidelines and that the Guidelines loss amount is $50,000.

Respectfully submitted,

THE DEFENDANT,
Barton Stuck

OFFICE OF THE FEDERAL DEFENDER

Dated: February 21, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 21, 2019, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

s/ James P. Maguire
James P. Maguire

EXHIBIT

1

News

InPhase Technologies files Chapter 11

Oct 18, 2011, 10:01am MDT **Updated** Oct 19, 2011, 3:38pm EDT

IN THIS ARTICLE

InPhase Technologies Inc. of Longmont filed for Chapter 11 bankruptcy protection Tuesday.

The filing in U.S. Bankruptcy Court in Denver is the latest chapter for the 10-year-old company, which laid off its 60 employees and shut down in February 2010 before resuming operations later in the year.

InPhase, which was spun out of Bell Laboratories in December 2000, is working on holographic storage. The company raised more than $94 million through five rounds of funding and produced the first working prototype holographic storage system, called Tapestry.

The company reported estimated assets of $50 million to $100 million and estimated liabilities of $10 million to $50 million in its bankruptcy filing.

InPhase reported it owes its 20 largest creditors a combined $2.08 million. The largest creditor – owed $422,987 – is the Denver law firm Morrison & Foerster LLP.

The company is entirely owned by Signal Lake, an investment company based in Westport, Conn. Signal Lake was the founding lead investor of InPhase when the company was emerging from Bell Labs, and bought InPhase early last year.

--denvernews@bizjournals.com

EXHIBIT

2

Turner Switches on Holography

By: David Spark (/Authors/david-spark) | January 29, 2007

Case Study: The broadcasting group integrates a prototype disk system with its multitiered storage.

On Oct. 21, 2005, turner entertainment networks, a division of the Turner Broadcasting System, ran a very special promotion for the National Basketball Association on TNT, or Turner Network Television. To viewers, the promotion didnt look any different.

But to broadcasters, it was quite unusual in that the video was loaded from a holographic disk and then broadcast through Turner Entertainments multitiered

storage-to-air system. It was a first for the broadcast industry, said Ron Tarasoff, vice president of broadcast technology and engineering at Turner Entertainment.

"A lot of the storage para-digms in the computer industry and data industry are now being ported over to broadcast because everybody is going digital," said Bill Wilson, chief scientist for InPhase Technologies, in Longmont, Colo., the manufacturer of the holographic read/write drives and media that were responsible for the successful test at Turner Entertainment.

Further reading

Why Dell EMC May Move into Storage Acquisition Mode (/storage/why-dell-emc-may-move-into-storage-acquisition-mode)

Samsung Starts Making First 1TB Flash Storage for Phones (/storage/samsung-starts-making-first-1tb-flash-storage-for-phones)

The concept of holographic storage was developed 30 years ago. And according to storage analyst Tom Coughlin, president of Coughlin Associates, in Atascadero, Calif., and organizer of the annual conference Storage Visions, InPhase is the first company to bring a reliable holographic storage solution to market.

In October 2005, Wilson flew to Atlanta with the companys prototype drive to see how holographic storage could work with Turner Entertainments highly controlled five-tiered video content storage system. At the time, he admitted the proto-type was just a bit bucket with no application software to manage the content. Wilson was there to understand how the broadcast industry stored and moved content. He wanted to learn how his storage device could best be configured to work with a broadcast system.

Tarasoff was eager to see if the drives could operate as an added tier of storage attached to his five-tiered storage system. He explained the configuration in great detail.

At the top are the Turner Entertainment networks Pinnacle MediaStream edge servers, with a current storage capacity of 87TB, that play the programs out to air across the various networks. Any content Turner Entertainment receives on videotape is first loaded into the system as a digital file.

The second tier consists of EMC Clariion Fibre Channel disks, with a storage capacity of 22TB, that hold all broadcast programming needed for the next seven to 10 days.

The third tier of drives, consisting of EMC Serial ATA models with 4TB of storage capacity, is used for program prestaging. Content that will be needed in about a month is pulled out of deeper storage and placed on spinning disks. All active short-length material, such as Turner Entertainments 26,000 commercials and 29,000 promotions, is held in this tier of memory for its entire broadcast cycle.

The fourth tier comprises ASACA TeraCart DVD-RAM disks from Shibasoku Corporation of America that have a current storage capacity of 22TB and act as backup storage for all the active commercials and promotions.

The fifth tier, consisting of Sun Microsystems Storage-Tek data tape robots and drives with a storage capacity of 1.3 to 8.86 peta-bytes, acts as the long-term storage tier for programs and movies.

While Turner Entertainment still receives plenty of content via videotape, more and more content starts as a digital file. For example, about 85 percent of the 26,000 commercials in Turner Entertainments active library arrive as digital files, Tarasoff said.

Storage is slowly growing as well. "Anytime a program is aired successfully, it is scavenged back from the play-to-air server as a file and then archived onto data tape. So that each day that goes by, more and more content is being archived [digitally] onto data tape," Tarasoff said.

InPhases optical disks have some obvious benefits for digital video storage. They deliver random access, high storage capacity (300GB) and high throughput (160M bps). Currently, those numbers are still below the storage capacity of data tape (500GB) and its throughput (960M bps), said Tom Inglefield, media and entertainment solutions manager for the Data Management Group at Sun Microsystems. Inglefield said, though, that there soon will be a crossover point when holographic technology surpasses tape in storage and throughput.

InPhase said it believes that will be sometime around 2010. The company predicts storage on a single piece of holographic media will rise to 1.6TB, with throughput reaching 960M bps.

Although Turner Entertainments data tape media library currently can handle its long-term storage demands, Tarasoff always is keeping his eye on the next big thing in storage and is willing and eager to test.

The reason holographic disks are able to pull off these amazing feats of high storage and fast transmission speeds is their ability to hold more than one piece of information in a single location. A DVD is a series of mirrors, each representing a single bit. At that same location, a holographic disk holds a series of checkerboard patterns of information that change depending on the angle that its read. Its just like how the image of a hologram changes as you look at it from different angles, Wilson said.

There are some additional, less obvious benefits to holographic storage. As the networks move to dealing with more high- definition content, with a holographic disk, Tarasoff said, theyll be able to store a 3-hour movie easily on a single piece of random access media rather than dividing it up across multiple media. Plus, he said, a holographic disk will be easier to ship than a videotape or hard disk drive.

Coughlin said he believes there are some psychological and sociological reasons the broadcast industry is finding holographic optical disks an attractive option. "There is a certain bias against using tape, even though its digital. There is a natural inclination by many people because of that history to look at nontape options," Coughlin said. In addition, Tarasoff fears that tape wont last as long as optical, which, he said, has a rated shelf life of up to 100 years.

Turner Entertainment has ordered four drives from InPhase and plans to test them as an added sixth layer to its five-tiered storage system. Tarasoff said he has no immediate plans to phase out the fifth tier, data tape storage.

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