

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA : CRIMINAL NO. 3:18-CR-28 (JAM)
vs. :
BARTON STUCK : March 29, 2019

DEFENDANT'S SUR-REPLY REGARDING CLAIMED RELEVANT CONDUCT

On January 31, 2019, the Government submitted a lengthy submission outlining alleged conduct by Mr. Stuck from 2006 to 2011 that it claimed resulted in losses to investors that should be considered relevant conduct for purposes of the United States Sentencing Guidelines following Mr. Stuck's plea to conduct in 2015 and 2016. In response, Defendant pointed out that the Government's claim of relevant conduct in this case falls far outside the outer limits of what courts around the country have recognized to be the proper temporal and factual scope of "relevant conduct" for Guidelines purposes. Collecting cases in support of this observation, Defendant articulated that the Government had pointed to not a single instance in which a court had applied § 1B1.3(a)(2) under circumstances similar to this case.

The Government's reply submission remains tellingly bereft of citation to legal authority in support of its position. Although the Government has added 100 pages of additional exhibits, its reply memorandum of law references only a single case, *United States v. Skys*, 637 F.3d 146, 148 (2d Cir. 2011). And the specifics of that case only further accentuate the legal problems with the Government's claim here.

In *Skys*, the defendant was convicted of attempting to defraud a bank by claiming, beginning in August of 2007, that he was the CEO of a company, Kaiser–Himmel (“K–H”) that “owned approximately 13.4 million shares of stock in Sprint Nextel Corp. (‘Sprint’) that K–H had received as payment for an anti-virus computer program called ‘Aedan,’” and producing forged documents to this effect. *Id.* at 149. For relevant conduct purposes,

The presentence report (“PSR”) prepared on *Skys* described the following additional fraudulent conduct in which *Skys* had engaged but which was not charged in the present case. From January 2006 through March 2007, *Skys* solicited investments in a company he called Backspace2—a predecessor of Kaiser–Himmel—representing that he had become a multimillionaire by developing the “Aedan” anti-virus program and that he had existing contractual relationships with several large corporations and the United States Department of Defense. In support of these solicitations, *Skys* distributed documents that were fabrications or forgeries.

In addition, the PSR described *Skys*'s receipt of \$300,000 from a Florida dentist in 2008 in exchange for a false promise to develop dental imaging software. *Skys*'s sales pitch had included representations as to his ownership of 13.4 million shares of Sprint stock.

Id. at 149–50.

Put simply, *Skys* was a case in which the defendant, over a roughly two-year period, engaged in a pattern of soliciting loans and investments in a set of fraudulent companies perpetrated at least in part by false and forged representations of wealth arising from invention of a fictitious anti-virus program. The claimed relevant conduct occurred in two windows of time, the first 5 to 19 months before the charged offense and the second occurring at some point no more than 9 months after the charged offense. *See id.* at 149–50. The Court’s decision, which does not address the issue of temporal proximity, does not make clear when within these windows actual losses occurred.

On the issue of temporal proximity, *Skys* thus provides no support for the Government’s position, and Defendant remains unaware of any case in which a Court has found relevant conduct under factual circumstances similar to this case. *Skys*, however, also raises another point of important contrast with the present case. Unlike in *Skys* (and the many similar cases), Mr. Stuck’s

investment vehicle, Signal Lake, was real. It raised real money and in turn invested in real companies that produced real products. Mr. Stuck's fundamental lie to the FBI agent (regarding \$200 million dollars sitting in a Wells Fargo account) was by contrast a complete fabrication. This lie, told many years after Mr. Stuck had stopped soliciting investments, resembled the conduct of Mr. Skys (whose real name was Eric Smith) and, thanks to that resemblance, properly forms the basis of the fraud conviction in this case. But unlike Mr. Skys, Mr. Stuck was not in the business of soliciting investments by claiming to be worth hundreds of millions of dollars. Unlike Mr. Skys, Mr. Stuck was not even in the business of soliciting investments at the time of his offense. And unlike Mr. Skys, when Mr. Stuck had solicited investments—years earlier—they had been real investments in real companies.

The Government's reply submission does nothing to change these basic facts. Nor does the Government's reply narrow the time window between the last claimed loss and Mr. Stuck's actual offense of conviction. Instead, the Government in its reply attempts to introduce a set of factual claims, which it had not previously included in its relevant conduct analysis, that amount to a claim that Bart Stuck told lies to investors between 2011 and 2015.

The Government cannot claim that these purported lies were intended to induce investments because Mr. Stuck stopped soliciting investments when InPhase failed.¹ Instead, the Government

¹ InPhase filed for bankruptcy on October 18, 2011. *See* InPhase Technologies, Inc. a Delaware Corporation, Bankruptcy Petition #: 11-34489-MER (D. CO). As Government's Exhibit 2 reflects, Mr. Stuck discussed attempting to buy InPhase out of bankruptcy. The Government correctly points out that these final efforts to save the investment in InPhase continued into early 2012. These efforts ended when the bankruptcy court rejected Signal Lake's proposed reorganization plan in April of 2012. This timeline is not inconsistent with Defendant's representation that the bankruptcy of InPhase brought to a close the soliciting of new Signal Lake investments. Unlike in the case of a typical investment fraud scheme, when there was no real company to invest in, Signal Lake stopped

claims that the new facts it puts forward consist of efforts to “lull” investors. The Government has never charged Mr. Stuck with any crime relating to this claimed “lulling,” and even now at sentencing the Government does not claim any investor lost money in connection with Mr. Stuck’s conduct after the failure of InPhase (excluding the \$50,000 in FBI funds). The Government nonetheless suggests that Mr. Stuck’s statements in this period somehow tie together his statements to the FBI undercover in 2015 and his statements to solicit investments from 2006 to 2011 into a single “scheme.”

Even accepting the Government’s various individual assertions,² the facts of this case cannot be neatly woven into a coherent scheme as the Government claims. The claimed common thread—that Mr. Stuck told financial lies—is simply too common to do the work. Just as not every heroin sale by a heroin dealer is relevant conduct in a heroin sentencing, not all lies are relevant conduct in a fraud sentencing. As discussed in Defendant’s principal memorandum, more must be shown. And the more time that passes, the greater the need for an ever more robust showing of commonality.

That requisite commonality is lacking here. Unlike would be the case in an ongoing and consistent scheme, the claimed misrepresentations in the Government’s submissions are (1) not the same over time, and (2) not even closely related to each other. With respect to the first point, the collapse of InPhase in 2011 marks a shift from assertions about the health of a specific company that were intended to solicit investments in that company to a different set of assertions about the

soliciting investments. Moreover, while the Government appears to hold out Mr. Stuck’s statements as misrepresentations, InPhase did hold valuable assets and patents.

² Defendant reserves the right to contest the accuracy of these assertions in the context of sentencing should the Court determine they are relevant for calculation of the Sentencing Guidelines.

ability of Signal Lake to return investors' money despite the failure of InPhase (statements, again, that were not intended to solicit investment).

With respect to the second point, it is worth reiterating that this case is not about an inherently fraudulent Ponzi scheme or fictitious investment of the sort at issue in *Skys*. The \$8.7 million figure that the Government purports to be fraud loss represents only a small fraction of the total investment in and by Signal Lake. Whatever Bart Stuck's reasons for telling investors they had a chance of getting a return on their investment even after 2011, it was not because the entire investment vehicle had been a sham and he wanted to hide that fact. Even accepting the Government's assertions, in other words, there is not evidence supporting the notion that Bart Stuck lied from 2011 to 2015 *because* he had lied from 2006 to 2011. There was not, as in a Ponzi scheme, an inherent need to maintain a deception in order to prevent investors from realizing that the whole affair had been a sham (or at least to maintain the deception long enough for the perpetrator to escape with the investors' money).

Additionally, while the Government points to Mr. Stuck's statements regarding potential returns to investors in this time period as suggesting Mr. Stuck attempted to hide Signal Lake's financial circumstances, the collapse of InPhase (including its public bankruptcy) was hardly a secret. And Mr. Stuck provided investors with documentation in the form of K-1s reflecting the depletion of their investments to nearly worthless status. (Some intellectual property of hypothetical value remained.)³

³ A representative copy of K1 documents (**Exhibit 1**) provided to an investor from 2010 to 2012 reflect the decline and finally bankruptcy of InPhase, leaving a valuation of the investment originally calculated at \$0 and then slightly increased to reflect that Signal Lake possessed some intellectual property unrelated to InPhase.

Signal Lake was not a sham. But it was, ultimately, an unmitigated personal and professional disaster for Mr. Stuck. After 10 years and \$100 million dollars, the capstone of a brilliant finance career was, essentially, nothing. Not all of Bart Stuck's behavior in the face of that failure has been admirable. Not all of it has been particularly rational. But it has not been a decade-long master fraudulent plan.

At the end of the day, the actual crime in this case was an act of opportunism by a man at the end of the tether. By 2015 Bart Stuck was years out from the final collapse of his investments, beset by lawsuits, and no longer wealthy (having personally invested a substantial amount of money in Signal Lake himself).⁴ The Government, years after Mr. Stuck had stopped soliciting investments, presented Mr. Stuck with an opportunity to deceptively profit from the apparent greed of an extremely wealthy outside investor. And Mr. Stuck did so.

Bart Stuck must now face the consequences of that action. And his history and character, including with respect to Signal Lake, will no doubt bear on the Court's sentencing analysis. But as a matter of law, extending the scope of U.S.S.G. § 1B1.3(a)(2) as the Government would take the Court far beyond the established limits of the provision.

⁴ The Government suggests repeatedly in its submissions that Mr. Stuck did not invest his own funds in Signal Lake. Defendant has indicated to the contrary that Mr. Stuck was in fact the single largest investor in Signal Lake. The details of Mr. Stuck's investment history is beyond the scope of the legal issue addressed in this memorandum. A bank statement from 2007 (**Exhibit 2**) reflecting a \$400,000 transfer to Signal Lake from Mr. Stuck, however, is attached as an exemplar of the evidence the Government has not been able to locate.

CONCLUSION

For the reasons above and in Defendant's principal memorandum, 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: March 29, 2019

/s/ James P. Maguire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 29, 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

Schedule K-1 (Form 1065)

2010

Final K-1 Amended K-1 OMB No. 1545-0099

Department of the Treasury Internal Revenue Service

For calendar year 2010, or tax year beginning ending

Partner's Share of Income, Deductions, Credits, etc. See separate instructions.

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items

Part I Information About the Partnership

A Partnership's employer identification number 4
B Partnership's name, address, city, state, and ZIP code SIGNAL LAKE SIDE FUND, L.P. D/B/A SIGNAL LAKE TOP PROSPECTS FUND WESTPORT, CT 06880
C IRS Center where partnership filed return OGDEN, UT
D Check if this is a publicly traded partnership (PTP)

Part II Information About the Partner

E Partner's identifying number
F Partner's name, address, city, state, and ZIP code SIGNAL LAKE TOP PROSPECTS, LLC (OF WISCONSIN); C/O DAVID BRAEGER MEQUON, WI 53092
G General partner or LLC member-manager Limited partner or other LLC member
H Domestic partner Foreign partner
I What type of entity is this partner? PARTNERSHIP
J Partner's share of profit, loss, and capital:
K Partner's share of liabilities at year end:
L Partner's capital account analysis:

Table with 2 columns: Item number and Amount. Items include Ordinary business income (loss) -10,705, Credits, Net rental real estate income (loss), Foreign transactions, Other net rental income (loss), Guaranteed payments, Interest income, Ordinary dividends, Qualified dividends, Royalties, Net short-term capital gain (loss) 3, Net long-term capital gain (loss), Collectibles (28%) gain (loss), Distributions 8,124, Unrecaptured sec 1250 gain, Net section 1231 gain (loss) 2,026, Other income (loss), Section 179 deduction, Other deductions STMT, Self-employment earnings (loss) 0.

*See attached statement for additional information.

For IRS Use Only

Table for Partner's capital account analysis: Beginning capital account \$ 3,163,132, Capital contributed during the year \$, Current year increase (decrease) \$ -12,734, Withdrawals & distributions \$(8,124), Ending capital account \$ 3,142,274.

M Did the partner contribute property with a built-in gain or loss? Yes No
If "Yes", attach statement (see instructions)

Schedule K-1 (Form 1065)

2011

Final K-1 Amended K-1 OMB No. 1545-0099

Department of the Treasury Internal Revenue Service

For calendar year 2011, or tax year beginning ending

Partner's Share of Income, Deductions, Credits, etc. See separate instructions.

Part I Information About the Partnership
Part II Information About the Partner
A Partnership's employer identification number
B Partnership's name, address, city, state, and ZIP code
C IRS Center where partnership filed return
D Check if this is a publicly traded partnership (PTP)
E Partner's identifying number
F Partner's name, address, city, state, and ZIP code
G General partner or LLC member-manager Limited partner or other LLC member
H Domestic partner Foreign partner
I What type of entity is this partner? PARTNERSHIP
J Partner's share of profit, loss, and capital:
K Partner's share of liabilities at year end:
L Partner's capital account analysis:
M Did the partner contribute property with a built-in gain or loss?

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items
1 Ordinary business income (loss) 15 Credits
2 Net rental real estate income (loss) 16 Foreign transactions
3 Other net rental income (loss)
4 Guaranteed payments
5 Interest income
6a Ordinary dividends 17 Alternative min tax (AMT) items
6b Qualified dividends
7 Royalties 18 Tax-exempt income and nondeductible expenses
8 Net short-term capital gain (loss) -9,028.
9a Net long-term capital gain (loss) -2,944,019.
9b Collectibles (28%) gain (loss) 19 Distributions
9c Unrecaptured sec 1250 gain 20 Other information
10 Net section 1231 gain (loss) B 3,168.
11 Other income (loss)
12 Section 179 deduction
13 Other deductions K* STMT
14 Self-employment earnings (loss) A 0.

*See attached statement for additional information.
For IRS Use Only

Schedule K-1 (Form 1065)

2012

Final K-1 Amended K-1 OMB No. 1545-0099

Department of the Treasury Internal Revenue Service

For calendar year 2012, or tax year beginning ending

Partner's Share of Income, Deductions, Credits, etc. See separate instructions.

Part I Information About the Partnership
Part II Information About the Partner
A Partnership's employer identification number
B Partnership's name, address, city, state, and ZIP code
C IRS Center where partnership filed return
D Check if this is a publicly traded partnership (PTP)
E Partner's identifying number
F Partner's name, address, city, state, and ZIP code
G General partner or LLC member-manager Limited partner or other LLC member
H Domestic partner Foreign partner
I1 What type of entity is this partner?
I2 If this partner is a retirement plan (IRA/SEP/Keogh/etc.), check here
J Partner's share of profit, loss, and capital:
K Partner's share of liabilities at year end:
L Partner's capital account analysis:
M Did the partner contribute property with a built-in gain or loss?

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items
1 Ordinary business income (loss)
2 Net rental real estate income (loss)
3 Other net rental income (loss)
4 Guaranteed payments
5 Interest income
6a Ordinary dividends
6b Qualified dividends
7 Royalties
8 Net short-term capital gain (loss)
9a Net long-term capital gain (loss)
9b Collectibles (28%) gain (loss)
9c Unrecaptured sec 1250 gain
10 Net section 1231 gain (loss)
11 Other income (loss)
12 Section 179 deduction
13 Other deductions
14 Self-employment earnings (loss)
15 Credits
16 Foreign transactions
17 Alternative min tax (AMT) items
18 Tax-exempt income and nondeductible expenses
19 Distributions
20 Other information

For IRS Use Only

EXHIBIT

2

SIGNAL LAKE SIDE FUND, L.P.

Page 2 of 5
 Statement Period
 08/01/07 through 08/31/07
 E00 P PC 0C 48
 Enclosures 6
 Account Number [REDACTED]

Deposit Accounts

Full Analysis Business Checking - Small Business

SIGNAL LAKE SIDE FUND, L.P.

Your Account at a Glance

Account Number	[REDACTED]	Statement Beginning Balance	\$4,247.41
Statement Period	08/01/07 through 08/31/07	Amount of Deposits/Credits	\$5,573,541.00
Number of Deposits/Credits	8	Amount of Withdrawals/Debits	\$5,384,654.42
Number of Withdrawals/Debits	19	Statement Ending Balance	\$193,133.99
Number of Days in Cycle	31	Average Ledger Balance	\$314,675.02
		Service Charge	\$0.00

Deposits and Credits

Date Posted	Customer Reference	Amount (\$)	Description	Bank Reference
08/09		100,000.00	Wire Type:Wire IN Date: 070809 Time:1420 Et [REDACTED]	[REDACTED]
08/13		400,000.00	Wire Type:Wire IN Date: 070813 Time:1652 Et [REDACTED]	[REDACTED]
08/24		3,000,000.00	Orig:First Trust Corporation Snd Bk:Bank Of New Yo Rk (Utica) ID:0001 Pmt Det:1004522 Barton W Stuck Wire Type:Wire IN Date: 070824 Time:0709 Et [REDACTED]	[REDACTED]
08/28		1,876,341.00	Deposit	[REDACTED]
08/28		3,125.00	Deposit	[REDACTED]
08/31		98,683.00	Deposit	[REDACTED]
08/31		94,392.00	Deposit	[REDACTED]
08/31		1,000.00	Online Banking transfer from [REDACTED] [REDACTED]	[REDACTED]

Withdrawals and Debits
Checks

Check Number	Amount (\$)	Date Posted	Bank Reference	Check Number	Amount (\$)	Date Posted	Bank Reference
288	238.50	08/03	[REDACTED]	291	1,510.50	08/30	[REDACTED]
289	6,050.00	08/14	[REDACTED]	292	1,266,810.00	08/29	[REDACTED]
290	1,876,341.00	08/27	[REDACTED]	293	738,660.00	08/29	[REDACTED]