UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	15 Cr. 450 (VSB)
- v. -	:	
MARCELLO TREBITSCH,	:	
Defendant.	:	

GOVERNMENT'S SENTENCING SUBMISSION

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum in connection with the sentencing of defendant Marcello Trebitsch, which is scheduled for December 16, 2015, at 2:30 p.m. For the reasons that follow, the Government submits that a sentence within the advisory Guidelines range of 51 to 63 months' imprisonment is appropriate in this case.

For approximately seven years, Marcello Trebitsch engaged in a scheme to defraud four separate investors who lost a total of nearly $6 million. During the life of the scheme, Trebitsch's means and methods of defrauding his investors evolved, but the pattern remained the same: Trebitsch promised outsized returns, failed to adhere to his purported investment strategies, stole or lost his investors' money, lied to his investors about their returns, ultimately admitted to his lies, begged forgiveness, and promised to pay back the investors in full, which, in each case, never occurred. Trebitsch's criminal conduct was calculated, sustained, and brazen, and the goals of sentencing — in particular, to reflect the seriousness of the offense, promote respect for the law, and adequately deter Trebitsch and others from committing similar conduct — warrant a term of imprisonment within the Guidelines range.

STATEMENT OF FACTS

On July 13, 2015, Trebitsch entered a plea of guilty to Count One of the Information, charging him with securities fraud arising out of a scheme to defraud investors of money provided to him to invest. (PSR ¶ 4). The charged conduct stemmed from Trebitsch's seven-year Ponzi scheme operated through his investment company, Allese Capital LLC ("Allese"), which resulted in four separate victims losing a total of nearly $6 million.

I. The Offense Conduct

A. Victim-1 and Victim-2

In 2007, Trebitsch received an initial investment from a charitable foundation run by the family of a member of Trebitsch's religious community ("Victim-1").[1] Trebitsch promised Victim-1 that Trebitsch would create and perfect shell companies that he would sell to private companies looking to engage in reverse mergers. (PSR ¶ 9(ii)). Trebitsch did in fact create some shell companies with funds supplied by Victim-1, but he never sold any of them or made any money off them, notwithstanding representations to the contrary to Victim-1. Instead, and unbeknownst to Victim-1, he later used these shell companies to conceal the proceeds of the scheme. Victim-1 and his family ultimately invested at least $700,000 with Trebitsch's company, none of which Trebitsch returned. When Victim-1 finally confronted Trebitsch in or about 2012, Trebitsch apologized to Victim-1 and explained that he used Victim-1's money in ways other than what he had represented he would do. Trebitsch acknowledged to Victim-1 that Trebitsch had lost all of the money. In light of their shared religious beliefs, Victim-1 agreed to attempt to resolve the matter with Trebitsch directly rather than by reporting the matter to law enforcement. Trebitsch, however, did not return any of Victim-1's investment.

Beginning in or about 2008, Trebitsch met another individual from Trebitsch's community ("Victim-2") who was interested in day trading and needed someone who could execute trades quickly and efficiently. Trebitsch held himself out to Victim-2 as a successful day trader, and offered to act as Victim-2's broker under an arrangement pursuant to which Trebitsch

[1] Relying on the PSR, Trebitsch's submission refers to "Victim-1" as a real estate developer in Maryland who initially invested with Trebitsch in 2009. However, neither Trebitsch nor the PSR accounts for two investors whom Trebitsch previously victimized and lost approximately $1 million between them. (Information 15 Cr. 450 (VSB) ¶ 1). Accordingly, this memorandum renumbers the victims consistent with the order in which they were victimized by Trebitsch; thus, the victim numbering differs from the PSR and Trebitsch's submission.

promised to execute trades throughout the business day based on Victim-2's instructions. (PSR ¶ 9(ii)). After an initial simulation demonstrated that Victim-2 was a successful trader, Trebitsch told Victim-2 that he would also duplicate Victim-2's trades with trades in his own account, and therefore would not charge Victim-2 any commission. Believing that Trebitsch was "honest and religious," Victim-2 initially invested approximately $100,000 with Trebitsch, and eventually invested approximately $800,000 in additional funds. Each day, Victim-2 would communicate trading instructions Trebitsch, who told Victim-2 that he was executing the trades as instructed. Trebitsch sent Victim-2 daily emails about the purported earnings from the trades, which were consistent with Victim-2's tally. In fact, these emails were fabricated, as Trebitsch did not execute the trades as directed by Victim-2. In or about January 2010, after earning what he believed to be millions of dollars in trading gains, Victim-2 asked Trebitsch to send approximately $3 million to Victim-2's bank account. Trebitsch, who at various times between 2008 and 2010 used some investment money from other victims to return approximately half of Victim-2's initial investment, did not provide the funds to Victim-2 as requested. Ultimately, with no other option, Trebitsch admitted to Victim-2 that he had not traded Victim-2's money as directed, but rather had lost all but approximately $55,000 of the funds belonging to Victim-2. After revealing the truth to Victim-2, Trebitsch returned approximately $75,000 in January 2010, which bank records show to have come from money that Victim-3 had invested in late 2009, as discussed below. Victim-2 attempted to resolve the matter in rabbinical court, which resulted in a settlement whereby Trebitsch signed two promissory notes to repay Victim-2. Trebitsch, however, has not abided by the settlement agreement nor returned any money to Victim-2 since January 2010. Moreover, Victim-2 paid significant income taxes based on phony Schedule K-1's provided by Trebitsch, which cost considerable additional time and expense to rectify with

the IRS.

B. Victim-3 and Victim-4

In or about 2009, Trebitsch met a real estate developer ("Victim-3") through an attorney who represented both Victim-3 and Victim-1 in transactional matters. Victim-3 was looking for someone to invest some of his money in the stock market, and Victim-3 met with Victim-1 to discuss Victim-1's investment with Trebitsch. Victim-1, not yet realizing that he was a victim of fraud, recommended Trebitsch to Victim-3. Victim-3 also met with Trebitsch, who made a number of false representations to Victim-3, including: (1) that he would invest in large cap stocks and the investment would earn annual returns in the range of 14 to 16 percent with minimal risk of loss, (PSR ¶¶ 9(ii), 16(i)); (2) that Trebitsch cleared his trades through a major Wall Street bank that had also invested $50 million with Trebitsch, (PSR ¶ 9(iii)); and (3) that Trebitsch's wife was a Certified Public Account who co-owned, managed and kept the books for the business, (PSR ¶ 9(iv)).[2] Trebitsch also told Victim-3 that Victim-3 could redeem his investment at any time, provided that he gave Trebitsch notice of the redemption request at least one quarterly period in advance. (PSR ¶ 16(iii)).

In or about October 2009, Victim-3 made an initial investment of $300,000 with Trebitsch. (PSR ¶ 17). After Victim-3 made this investment, Trebitsch began to provide account statements that professed to show excellent returns (the "Allese Account Statements"). In fact, the Allese Account Statements were all fabricated, as were the yearly Schedule K-1's provided to Victim-3 based upon which Victim-3 paid income taxes on the investment in Allese. Based on the positive returns set forth in the phony account statements, from in or about 2010 up through in or about 2013, Victim-3 invested another approximately $6.2 million in Allese, for

[2] Trebitsch has not filed taxes for Allese from 2009 to the present, nor have Trebitsch and his wife (a CPA) filed personal income taxes since 2011. (PSR ¶ 101).

which Victim-3 continued to receive phony account statements showing excellent returns. (PSR ¶ 18). During the same period of time, Victim-3 received approximately $2.3 million in redemptions from Trebitsch, some of which came from money invested by Victim-4. (*Id.*). Victim-3 never received any his purported return on his investment and ultimately lost $4,223,704 of his investment capital. (*Id.*).

Through Victim-3, Trebitsch met a licensed CPA and a partner in an accounting firm located Maryland who had been Victim-3's personal and business accountant for more than twenty years ("Victim-4"). (PSR ¶ 19). Beginning in or about 2010, Victim-4 became aware that Victim-3 had invested with Trebitsch, and in or about April 2013, Victim-4 began receiving duplicate copies of Victim-3's account statements from Allese in his role as Victim-3's accountant. (PSR ¶¶ 21-23). Aware of the consistent (and falsely) stated positive returns on Victim-3's investments with Trebitsch, in or about January 2014, Victim-4 decided to invest with Trebitsch himself, ultimately investing $700,000 in Allese on behalf of himself, his business and his family between January and April 2014. (PSR ¶¶ 24, 26). On or about May 19, 2014, Trebitsch forwarded Victim-4 a document purporting to show Allese's performance in 2013 and early 2014 (the "Performance Report"). (PSR ¶ 27). According to the Performance Report, Allese generated an annual return of 16.2 percent for 2013 and an average monthly return of 1.23 percent for 2014. (*Id.*). Victim-4 never received any disbursements or redemptions from his investments with Trebitsch. (PSR ¶ 28).

C. The Scheme Unravels

In June 2014, Victim-3 requested a redemption of $1.4 million. (PSR ¶ 30). At that time, the account statements for Victim-3's investments indicated that Victim-3's balance with Allese was more than $7 million. (*Id.*). After failing to return any of the money that Victim-3

repeatedly requested, Trebitsch arranged for a meeting with Victim-3 and Victim-4 on or about July 21, 2014. (PSR ¶ 33). At the meeting, Trebitsch admitted that he did not have any of the money Victim-3 and Victim-4 had invested (or supposedly earned), that the account statements and Schedule K-1's provided to Victim-3 and Victim-4 were false, and that he kept approximately $400,000 for himself.[3] (PSR ¶¶ 34, 35). Trebitsch also agreed to assist in any efforts undertaken by Victim-3 or Victim-4 to investigate the fraud and confirm that Trebitsch indeed had no money left. (PSR ¶ 36).

In August 2014, Victim-3 retained a forensic accountant ("the Accountant") to investigate the fraud committed by Trebitsch. (PSR ¶ 37). In the fall of 2014, the Accountant met with Trebitsch approximately seven or eight times, and Trebitsch provided certain records to the Accountant, including, but not limited to, an excel spreadsheet that Trebitsch stated was the template that he used to generate certain of the false Allese Account Statements (the "Allese Excel Spreadsheet"). (PSR ¶ 39). After reviewing the Allese Excel Spreadsheet, the Accountant determined that the formula used to compute the month-end returns on Victim-3's investment was designed to compute fictitious values based upon a certain percentage increase (or, in theory, decrease) selected by the person using the formula, not to reflect the actual increase or decrease in any real investments. (PSR ¶ 40). The Accountant also determined that there were no real returns on Victim-3's investments, because the funds paid to Trebitsch by Victim-3 were never invested by Allese in large-cap stocks. (PSR ¶ 41). The computer-generated Allese Account Statements, and the corresponding K-1s provided to Victim-3, both of which reflected consistent gains for Victim-3's investments, were fraudulent and did not accurately reflect a true accounting

[3] According to Paul Shechtman, Trebitsch's then-attorney who was at the meeting, Trebitsch told Victim-3 and Victim-4 that he had kept $500,000 for himself. (*See* Def. Mem., Ex. 1 ¶ 6 (Shechtman Affidavit)).

of Victim-3's investments with Allese. (PSR ¶ 42).

While Trebitsch provided certain documents to the Accountant in connection with the Accountant's review, Trebitsch was not fully cooperative. Trebitsch did not, for example, provide full access to all documents requested by the Accountant. Nor did Trebitsch fully acknowledge that he never intended to invest Victim-3's money as promised, or that he had previously defrauded Victim-1 and Victim-2 of approximately $1 million. Trebitsch, who had opened numerous bank accounts in his name and in the name of shell companies that he originally created as part of the scheme with Victim-1, also did not provide all of his bank account information to the Accountant.

The Government's investigation of Trebitsch's conduct confirmed what the Accountant had learned during his review; that is, that Trebitsch did not invest the Victim-3 and Victim-4's money in large-cap stocks through Allese as he had promised. (PSR ¶ 46). In fact, Trebitsch used only a portion of the funds to engage in trading, and that trading — which was largely conducted through Trebitsch's personal brokerage accounts, not Allese brokerage accounts — resulted in net losses. (PSR ¶ 46). Rather, between in or about 2010 and at least in or about 2014, Trebitsch transferred or caused to be transferred, at a minimum, millions of dollars money to personal bank accounts or brokerage accounts held by Trebitsch or Trebitsch's wife for their benefit or the benefit of others. (PSR ¶ 47). Trebitsch layered these funds through several different accounts, both business and personal. For example, on or about March 3, 2010, an Allese Account at JPMorgan Chase Bank ending in 8765, which is controlled by Trebitsch and Trebitsch's wife (the "8765 Account"), received a wire transfer in the amount of $500,000 from Victim-1. (PSR ¶ 48(i)). Prior to the wire transfer from Victim-3, the 8765 Account had a balance of approximately $19. On or about March 9, 2010, Trebitsch wrote a check in the

amount of $425,000 from the 8765 Account to a company called Israeli Car Rental,[4] which was a shell company Trebitsch had created with money from Victim-1 (the "ICR Check"). (PSR ¶ 48(ii)). On or about the same date, the ICR Check was deposited into an account at JPMorgan Chase Bank ending in 2633 and held in the name "Israeli Car Rental Co" (the "2633 Account"). (PSR ¶ 48(iii)). The sole signatory on the 2633 Account is Trebitsch's wife. (*Id.*). Within two weeks of the ICR Check being deposited into the 2633 Account, Trebitsch's wife caused approximately $422,000 to be transferred to other accounts that she or Trebitsch controlled, to be used for the benefit of Trebitsch, Trebitsch's wife, or others. (PSR ¶ 48 (iv)).

Moreover, a review of the bank records demonstrates that, with respect to funds invested in Allese by Victim-4, Trebitsch never invested any of Victim-4's money at all. Rather, Trebitsch used Victim-4's money to pay distributions to Victim-3, in Ponzi-scheme fashion, just as he had used a portion of Victim-3's money to pay money owed to Victim-2 in January 2010. (PSR ¶ 49).

DISCUSSION

Applying the factors set forth in Title 18, United States Code, Section 3553(a), a sentence within the applicable Guidelines range of 51 to 63 months' imprisonment would be "sufficient, but not greater than necessary" to serve the goals of sentencing. Trebitsch attempts to portray himself as a poor investor who made a simple mistake by failing to alert his investors to his investment losses. In fact, Trebitsch repeatedly victimized unsuspecting investors — including two from the community that he professes to assist so much — by making grandiose promises of success and false representations as to the type and results of his investments. Yet rather than simply admitting that he lost the victims' money — a possibility contemplated by any investor

[4] Israeli Car Rental was a shell company that Trebitsch created with Victim-1's investment that Trebitsch did not sell but kept for his own use.

— Trebitsch fabricated documents and accounts statements to represent that he was successfully investing his victims' money, which prompted the victims to invest even more with him. He further perpetuated the Ponzi scheme by using new money from victims to repay other victims. Finally, when Trebitsch had no choice but to reveal his fraudulent actions to his victims, he followed a consistent pattern of begging for forgiveness and promising to repay the money, which he never did. His conduct was not an isolated event; rather, he perpetrated this scheme on four individuals over the period of seven years, repeatedly accepting more and more money from his victims, hundreds of thousands of dollars of which he used for himself. The "nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), and the need for both specific and general deterrence, 18 U.S.C. § 3553(a)(2), thus weigh heavily in favor of a substantial term of imprisonment.

I. The Applicable Guidelines Range

In a plea agreement dated July 9, 2015, the parties stipulated to a Guidelines range of 51 to 63 months' imprisonment, calculated as follows: a base offense level of 7, pursuant to U.S.S.G. § 2B1.1(a)(1); an 18-level upward adjustment as a result of the loss amount of $5,905,949,[5] pursuant to U.S.S.G. § 2B1.1(b)(1)(J); and an additional two-level upward adjustment for sophisticated means, pursuant to U.S.S.G. § 2B1.1(b)(10), owing to the extensive web of bank and brokerage accounts Trebitsch used to perpetrate and conceal his fraud. With a three-level downward adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, the total offense level is 24. The parties agreed that the defendant is in Criminal History

[5] Pursuant to Application Note 3(E)(i) of Section 2B1.1, money returns to a victim of the offense before the offense was detected is credited against the loss amount. Accordingly, even though Trebitsch solicited and received more than $8 million of investment capital from his four victims, that number is reduced by the amount he returned to his victims prior to the victims discovering the offense.

Category I. The PSR also concludes that the applicable Guidelines range is 51 to 63 months' imprisonment. (PSR ¶ 103).

II. The Governing Legal Framework

The advisory Sentencing Guidelines promote the "basic aim" of Congress in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *United States* v. *Booker*, 543 U.S. 220, 252 (2005). Thus, the Guidelines are more than "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *United States* v. *Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The applicable Sentencing Guidelines range "will be a benchmark or a point of reference or departure" when considering a particular sentence to impose. *United States* v. *Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005). In furtherance of that goal, a sentencing court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims." *Booker*, 543 U.S. at 259-60 (citations omitted). The relevance of the Guidelines throughout the sentencing process stems in part from the fact that, while the Guidelines are advisory, "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives," *Rita* v. *United States*, 551 U.S. 338, 348 (2007), and the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall* v. *United States*, 552 U.S. 38, 46 (2007); *see also Rita*, 551 U.S. at 349.

Along with the Guidelines, the other factors set forth in Section 3553(a) must be considered. Section 3553(a) directs the Court to impose a sentence "sufficient, but not greater

than necessary" to comply with the purposes set forth in paragraph two. That sub-paragraph sets forth the purposes as:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .

Section 3553(a) further directs the Court – in determining the particular sentence to impose – to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the statutory purposes noted above; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a).

The Second Circuit has instructed that district courts should engage in a three-step sentencing procedure. *See Crosby*, 397 F.3d at 103. First, the Court must determine the applicable Sentencing Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the Court must consider whether a departure from that Guidelines range is appropriate. *Id*. Third, the Court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose, whether it

be a Guidelines or non-Guidelines sentence. *Id.* at 113. In so doing, it is entirely proper for a judge to take into consideration his or her "own sense of what is a fair and just sentence under all the circumstances." *United States* v. *Jones*, 460 F.3d 191, 195 (2d Cir. 2006).

III. A Guidelines Sentence Is Warranted

A. The Nature and Seriousness of the Offense

Trebitsch's conduct throughout the course of the charged scheme was pervasive, premeditated, sophisticated, and reprehensible. By holding himself out as an experienced investment advisor who managed $50 million from a Wall Street bank, Trebitsch convinced multiple victims to entrust millions of dollars to him. Over and over, Trebitsch made promises that he knew he could not keep. He told Victim-1 he would use the money to perfect shell companies and coordinate reverse mergers, but he instead used the money for other purposes and did not return the investment capital. He promised Victim-2 he would follow Victim-2's instructions, yet he not only acted in opposition to Victim-2's instructions but he provided phony email records of his trading (and corresponding K-1's) to goad Victim-2 into believing he was true to his word, thereby inducing Victim-2 to invest more money. He promised Victim-3 returns of 14 to 16 percent and then fabricated phony account statements and K-1's to fool Victim-3 into believing that Trebitsch had delivered on his promises, which not only caused Victim-3 to invest millions more but also induced Victim-3's accountant, Victim-4, to invest $700,000, all of which he lost. In order to execute his scheme, and conceal it from detection, Trebitsch created numerous bank accounts through which he wired these funds, ultimately keeping a significant amount of the money for himself. In order to prolong the scheme, he used some of the investment money to repay other victims. Worse yet, Trebitsch took advantage of his good reputation amongst the members of his religious community to lure investors, and to assure

his victims that they would eventually be repaid once he had confessed that he had "lost" their money.

Moreover, while the seriousness of Trebitsch's offense is significant, the repetitive and pervasive nature of the offense spanning seven years is particularly striking. Far from admitting his mistakes and making attempts to rectify a bad situation, Trebitsch continued to deceive his victims about their investments in numerous ways, lulling them into investing more and more money. Trebitsch's methods evolved over time, but the pattern remained the same — Trebitsch never invested the victims' money as he had promised, and instead used a portion of the funds for his own personal expenses. When Trebitsch had no choice but to admit his fraud to Victim-2, he had an opportunity to do the right thing after Victim-2 afforded him a second chance by choosing rabbinical court over law enforcement. Instead of coming clean, learning his lesson, and making amends, Trebitsch escalated his fraudulent behavior, soliciting millions of dollars more from two additional victims, and lulling them into investing more and more money through sophisticated means such as bogus account statements reflecting outsized returns. Victim-1 then provided Trebitsch with a second opportunity to correct his fraudulent ways, but Trebitsch's tearful apology and promise to repay the money did not cause him to stop defrauding Victim-3 or, later, Victim-4. The brazen nature of Trebitsch's scheme increased over time, notwithstanding the fact that he had already received a second chance from Victim-2 and a third chance from Victim-1.

The defendant's sentencing submission focuses in part on Trebitsch's connection to his father-in-law, Sheldon Silver, and implies that Victim-3 (referred to in the defendant's submission as "Victim-1") invested with Trebitsch because Victim-3 was hoping to benefit from that connection to Silver. (Def. Mem. at 1-2, 4-5). This argument is unavailing for at least three

reasons. First, Trebitsch's fraudulent scheme did not begin with Victim-3, a fact that Trebitsch's submission ignores. Indeed, it was the false representations made to Victim-1 by Trebitsch about the success of Victim-1's investment that led Victim-1 to recommend Trebitsch as an investment advisor to Victim-3. Victim-3 conducted extensive due diligence prior to investing with Trebitsch, including by meeting with Victim-1, Trebitsch, and Trebitsch's wife (whom Trebitsch relied upon to assure Victim-3 of the legitimacy of Allese). Only after conducting this due diligence did Victim-3 invest the initial $300,000 with Trebitsch in October 2009.[6]

Second, even if Victim-3 did have ulterior motives for investing with Trebitsch — which, as discussed above, the evidence does not support — Victim-3 surely did not intend to become a victim of a fraudulent scheme that resulted in losses of more than $4 million. The defendant's argument simply amounts to an effort to "blame the victim," yet the motives of a victim are, of course, irrelevant to Trebitsch's fraudulent conduct, which resulted in Trebitsch losing or stealing millions of dollars from Victim-3. Moreover, Trebitsch's companion argument of his own "extraordinary acceptance of responsibility" cannot be squared with his efforts to cast responsibility for his criminal conduct on a victim of that crime. *See United States* v. *Friedman*, No. 02-CR-0048A, 2006 WL 2459462, at *2 (W.D.N.Y. Aug. 23, 2006) (noting that a defendant who "continues to blame the victim for his actions . . . still does not recognize the wrongfulness of his conduct").

Third, after investing the initial $300,000, Trebitsch immediately began to send Victim-3 sham account statements reflecting outsized returns. Understandably believing that Trebitsch

[6] Notably, right from the start of Victim-3's investment in Allese, Trebitsch knew he was defrauding Victim-3, as he used some of Victim-3's initial investment to repay Victim-2 three months after receiving the money. Indeed, contrary to Trebitsch's argument here, this demonstrates that he *never* intended to invest Victim-3's money in the manner he represented to Victim-3.

was investing his money successfully based on those blatant and intentional misrepresentations, Victim-3 proceeded to invest more and more money with Trebitsch. In turn, Trebitsch continued to send false account statements and Schedule K-1's reflecting excellent returns, and Victim-3 continued to invest money with Trebitsch and pay taxes he did not owe. In fact, Trebitsch's bogus account statements were so impressive that they lulled Victim-3's accountant, Victim-4, to invest $700,000 with Trebitsch. Trebitsch did not reject that additional money from Victim-4, nor did he invest it. In fact, Trebitsch immediately used Victim-4's investments to satisfy some of Victim-3's redemption requests. In sum, Victim-3 invested $6.5 million with Trebitsch, $6.2 million *after* Trebitsch began sending Victim-3 phony documents reflecting positive returns. Regardless of Victim-3's initial motives to invest with Trebitsch — which, in any event, are wholly irrelevant — they cannot explain the vast majority of Victim-3's investment with Trebitsch, which followed Victim-3's receipt of fabricated account statements showing stellar returns.

B. The History and Characteristics of the Defendant

Much of the defendant's sentencing submission addresses the numerous letters submitted to the Court from family, friends and members of Trebitsch's community addressing his good deeds and service to his family and the community. (Def. Mem. at 9-26). Many of these letters also address the "sincere remorse and regret" that Trebitsch apparently feels for his conduct. *Id.* at 9). The Government has no reason to doubt the veracity of any of these letters. And if the conduct here consisted of an isolated incident where the defendant's good deeds might outweigh a single bad decision, perhaps the message of these letters would be persuasive. But that is not what happened here. Marcello Trebitsch engaged in a fraudulent scheme for seven years. He solicited money from four different victims based on promises he knew were false. He

demonstrated characteristics of a calculating, scheming, sophisticated criminal, who used false documents and numerous bank accounts to perpetuate a long-running scheme for his own personal gain.

Moreover, this is not the first time Trebitsch has expressed "sincere remorse and regret" for his criminal actions, nor is it the second — in fact, it is the third time he has done so. Worse yet, Trebitsch took advantage of the trust from the same community that he purportedly serves so well. Indeed, two victims were members of Trebitsch's community who lost approximately $1 million based on Trebitsch's lies and deceit. In both of these cases, Trebitsch took advantage of his victims' religious devotion. In the case of Victim-2, who invested with Trebitsch in part because he appeared to be "honest and religious," Trebitsch escaped more severe punishment because Victim-2 attempted to resolve this matter through rabbinical court after Trebitsch apologized profusely, expressed extreme regret, and promised to return the money. Yet Victim-2 never received any of the money he invested in the years that followed, during which time Trebitsch ramped up his fraudulent activity with Victim-3 and Victim-4.

In the case of Victim-1, after Trebitsch (again) tearfully apologized and expressed regret for losing all of Victim-1's investment, Victim-1 agreed to resolve the matter with Trebitsch out of court, but also never received any money from his investment. Victim-2 already provided Trebitsch with a second chance, and Victim-1 provided him with a third. Yet when given the opportunity to do the right thing, Trebitsch instead carried on with his fraudulent scheme. He stole hundreds of thousands of dollars from his victims for his own personal use, some of which he used to promote his standing in his own community through charitable giving and other means. The Government therefore respectfully submits that the Court should not credit the "profound remorse" that Trebitsch now purports to feel, (*see* Def. Mem., Ex. 2 (Trebitsch Letter

dated Nov. 26, 2015)), as this is not the first (or second) time he has allegedly expressed similar sentiments when he has no choice but to admit to his criminal conduct.

For similar reasons, Trebitsch's claim of "extraordinary acceptance of responsibility" should also be discounted. (Def. Mem. at 6-7). In June 2014, when Victim-3 requested a significant redemption of $1.4 million, Trebitsch was out of options. He had already used nearly all of Victim-4's investment to repay Victim-3 earlier that year, and he had no additional victims' money to use to perpetuate his Ponzi scheme. Trebitsch had no choice but to fall on his sword and beg forgiveness, as he had seemingly done so effectively in the past. Similar to his efforts to tearfully apologize to Victim-1 and Victim-2, Trebitsch attempted to do the same thing with Victim-3 and Victim-4. He met with them, admitted his conduct, apologized profusely, and promised to do what he could to repay the money. As outlined above, Trebitsch provided some — but not full — cooperation to the Accountant, hired by Victim-3 to examine what transpired during the nearly five years that Victim-3 had been defrauded by Trebitsch. To be sure, while Trebitsch fully warrants credit for acceptance of responsibility in this case — has always acknowledged his guilt and pled guilty to an Information without the benefit of reviewing discovery[7] — his acceptance of responsibility has not been "extraordinary," particularly considering his efforts to blame the victim, as discussed above.[8]

Finally, Trebitsch also argues that his family will suffer the most from a significant period of incarceration and therefore the Court should demonstrate leniency at sentencing. (Def. Mem. at 34). That a defendant's family often suffers more than the defendant himself from a

[7] Trebitsch was in possession of the Accountant's report, which outlines the fraudulent scheme in great detail.

[8] Although Trebitsch's discussion of his communications with Victim-3 and Victim-3's representatives about repayment of the lost investment are wholly irrelevant to Trebitsch's sentencing, it is worth noting that the Government's investigation did not commence based on any information provided by any of the victims or their representatives.

period of incarceration is unfortunately true for any defendant with a family. And it is no doubt difficult and sad for the family of a defendant such as Trebitsch, who, according to the letters, is relied upon a great deal by his family and the community. But during the seven years that he perpetrated a fraud — and that was his only "job" during that time frame (PSR ¶ 95) — Trebitsch should have considered the collateral consequences of his criminal activity and the effect it would have on his family. Luckily for him, however, the numerous letters make clear that he has a supportive family and community who no doubt can (and will) assist his family while he is incarcerated.

C. The Need to Afford Both General and Specific Deterrence

Under Section 3553(a), the need for a sentence to "afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(B), must also be considered. This factor also strongly counsels in favor of a substantial sentence.

The legislative history of 18 U.S.C. § 3553 demonstrates that "Congress viewed deterrence as 'particularly important in the area of white collar crime.'" *United States* v. *Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (citing S. Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259); *see also United States* v. *Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006) (deterrence of white-collar crime is "of central concern to Congress"). As the *Martin* Court noted: "Congress was especially concerned that prior to the Sentencing Guidelines, '[m]ajor white collar criminals often [were] sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.'" *Martin*, 455 F.3d at 1240 (citation omitted).

Indeed, general deterrence is seen as an important sentencing factor in fraud and white-collar cases because it is effective. *See Martin*, 455 F.3d at 1240 ("Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence.") (internal quotation marks and citation omitted). Unlike defendants in a gun or drug case, who often act without reflection, there is reason to believe that individuals who engage in financial fraud can be deterred by a substantial threat of penalties. As with the case of Trebitsch, those who engage in financial frauds — particularly long-running schemes with multiple victims — choose to engage in such white-collar crime because they believe that the potential for significant financial benefits outweighs the risk that they will be punished. General deterrence is achieved by sending a message that such outrageous acts of fraud will result in real penalties. This Court's sentence should send the important message that those who commit calculated, sophisticated fraud schemes will go to prison if caught. Moreover, the deliberate nature of fraud often renders it more difficult to uncover because individuals engaged in fraud often take affirmative steps to conceal their conduct. Accordingly, additional sanctions are necessary to counterbalance the lower risk of apprehension.

Deterrence also works. As at least one recent study has found: "Our findings provide credible evidence that a one-month increase in expected punishment lowers the probability of committing a crime. This corroborates the theory of general deterrence." *See* Francesco Drago, Roberto Galbiati & Pietro Vertova, "The Deterrent Effects of Prison: Evidence from a Natural Experiment," Vol. 117, No. 2 J. POL. ECON. 257, 278 (Univ. of Chicago) (2009). Any defense argument that deterrence does not require lengthier terms of incarceration for more culpable conduct conflicts with Congress's directive to the Sentencing Commission to consider, among

other things, the deterrent effects of the "length of a term of probation, imprisonment, or supervised release." 28 U.S.C. § 994(c). Further, such a defense argument would counsel in favor of similarly short sentences in all fraud cases, regardless of the size and scope of the fraud, which would directly frustrate proportionality, an important goal of sentencing. *See Booker*, 543 U.S. at 264.

Here, the Government respectfully submits that a substantial sentence is necessary to serve general deterrence. Unfortunately, there are many individuals who hold themselves out as trusted financial professionals in this and other jurisdictions who are similarly situated to Trebitsch. Those individuals exploit the personal relationships of friends, family, and community members for their own personal gain. Imposing a substantial sentence in this case will serve to deter others from engaging in similar fraudulent schemes and send an appropriate message that this type of fraud will not be countenanced. Accordingly, pursuant to 18 U.S.C. § 3553(a)(2)(B), the need for general deterrence militates in favor of a substantial term of imprisonment for Trebitsch's conduct.

Contrary to Trebitsch's arguments, his criminal conduct was not the byproduct of some momentary lapse in judgment. On the contrary, Trebitsch engaged in fraud for *years* and his fraud involved a long series of lies and deceptive conduct that perpetuated and preserved the fraudulent scheme. Trebitsch also went to great lengths to conceal his fraud, using numerous bank accounts in his name, his wife's name, and in the name of shell companies he created to layer wire transfers to conceal his crime. For these reasons, Trebitsch's arguments to minimize his conduct as a momentary lapse of judgment "understate the gravity of the underlying offenses by compressing the defendant's entire record of misconduct as if it were a single, isolated episode of crime, a one-time or sometime thing that occurred over a lifetime of otherwise

immaculate behavior. There is a fallacy in this argument. It distorts the record. . . ." *United States* v. *Regensberg*, 635 F. Supp. 2d 306, 309 (S.D.N.Y. 2009). Such arguments are wholly inapposite given the true extent and duration of Trebitsch's fraud.

Moreover, because this is not an isolated incident but rather a calculated scheme that involved four victims over seven years, specific deterrence is warranted to ensure that Trebitsch does not commit crimes in the future. On two occasions in the past, a victim of his scheme has confronted Trebitsch, which prompted Trebitsch to tearfully apologize for his criminal conduct and promise to repay the money. In those two situations, the victims agreed to resolve the matter outside of the civil or criminal process. As a result, Trebitsch's only punishment was a toothless agreement to repay the money, which Trebitsch did not begin to satisfy in either case. Contrary to his attempts to portray himself as a sad case who simply got in too deep, those ineffective resolutions were plainly insufficient to deter him from continuing his criminal scheme, as he proceeded to defraud Victim-3 and Victim-4 in an even more aggressive and brazen manner. Marcello Trebitsch did not learn his lesson from his early mistakes or from the kindness of his victims. A substantial sentence is therefore warranted to insure that Trebitsch does not do this again.

CONCLUSION

For the foregoing reasons, the Government respectfully submits that a sentence within the advisory Guidelines range of 51 to 63 months' imprisonment is appropriate in this case.

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Respectfully submitted,

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