

1 KEKER & VAN NEST, LLP  
ELLIOT R. PETERS - #158708  
2 ERIC H. MacMICHAEL - #231697  
710 Sansome Street  
3 San Francisco, CA 94111-1704  
Telephone: (415) 391-5400  
4 Facsimile: (415) 397-7188

5 Attorneys for Defendant  
WILLIAM J. DEL BIAGGIO  
6  
7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 UNITED STATES OF AMERICA,  
13 Plaintiff,  
14 v.  
15 WILLIAM J. DEL BIAGGIO,  
16 Defendant.

Case No. CR 08-0874 CRB

**MEMORANDUM REGARDING PROPER  
APPLICATION OF UNITED STATES  
SENTENCING GUIDELINES**

Date: March 31, 2009  
Time: 2:15 p.m.  
Dept: 8, 19<sup>th</sup> Floor  
Judge: Hon. Charles R. Breyer

Date Comp. Filed: N/A

Trial Date: None set.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND .....	1
III. LEGAL ANALYSIS.....	3
A. Federal Sentencing After <u>United States v. Booker</u> .....	3
B. Advisory Guidelines Calculation.....	5
C. “Loss” Enhancement Under U.S.S.G. § 2B1.1 .....	5
D. Mr. Del Biaggio’s Investment Management Activities Are Not “Relevant Conduct” Within the Meaning of § 1B1.3 and Cannot Be Included in the Loss Amount.....	7
1. The uncharged conduct cannot be considered part of the “same course of conduct” or a “common plan or scheme” .....	7
2. There is insufficient evidence to conclude that the uncharged conduct could give rise to criminal liability .....	11
E. Calculating the Loss Amount for Purposes of Sentencing Is a Separate and Distinct Inquiry from Calculating Loss for Purposes of Restitution.....	13
IV. CONCLUSION.....	14

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Federal Cases**

Gall v. United States  
128 S. Ct. 586 (2007).....4, 5

Kimbrough v. United States  
128 S. Ct. 558 (2007).....4

United States v. Berger  
473 F.3d 1080 (9th Cir. 2007) .....6

United States v. Booker  
543 U.S. 220 (2005).....3, 4, 5

United States v. Crandall  
525 F.3d 907 (9th Cir. 2008) .....6, 13

United States v. Dickler  
64 F.3d 818 (3d Cir. 1995) .....11

United States v. Dove  
247 F.3d 152 (4th Cir. 2001) .....11

United States v. Dove  
585 F. Supp. 2d 865 (W.D. Va. 2008) .....13

United States v. Frith  
461 F.3d 914 (7th Cir. 2006) .....13, 14

United States v. Haddock  
12 F.3d 950 (10th Cir. 1993) .....6

United States v. Hahn  
960 F.2d 903 (9th Cir. 1992) .....3, 8, 11

United States v. Jain  
93 F.3d 436 (8th Cir. 1996) .....11

United States v. LaBarbara  
129 F.3d 81 (2d Cir. 1997) .....9, 10

United States v. Maxwell  
34 F.3d 1006 (11th Cir. 1994) .....9

United States v. Mise  
No. 00-3079, 2000 U.S. App. LEXIS 29896 (6th Cir. Nov. 21, 2000).....8

United States v. Moreland  
509 F.3d 1201 (9th Cir. 2007) .....7

United States v. Mullins  
971 F.2d 1138 (4th Cir. 1992) .....10

United States v. Palomba  
31 F.3d 1456 (9th Cir. 1994) .....11

United States v. Parrott  
992 F.2d 914 (9th Cir. 1993) .....14

**TABLE OF AUTHORITIES**  
(cont'd)

		<u>Page(s)</u>
1		
2		
3	<u>United States v. Peterson</u> 101 F.3d 375 (5th Cir. 1996) .....	12
4	<u>United States v. Pinnick</u> 47 F.3d 434 (D.C. Cir. 1995) .....	9
5	<u>United States v. Randle</u> 324 F.3d 550 (7th Cir. 2003) .....	14
6	<u>United States v. Schaefer</u> 291 F.3d 932 (7th Cir. 2002) .....	11, 12
7	<u>United States v. Sepulveda</u> 115 F.3d 882 (11th Cir. 1997) .....	12
8	<u>United States v. Shafer</u> 199 F.3d 826 (6th Cir. 1999) .....	11
9	<u>United States v. Soderling</u> 970 F.2d 529 (9th Cir. 1991) .....	14
10	<u>United States v. Solis</u> 299 F.3d 420 (5th Cir. 2002) .....	11
11	<u>United States v. Stoddard</u> 150 F.3d 1140 (9th Cir. 1998) .....	6, 8
12	<u>United States v. Woods</u> 554 F.3d 611 (6th Cir. 2009) .....	13
13	<u>United States v. Wright</u> 60 F.3d 240 (6th Cir. 1995) .....	6
14		
15	<b>Federal Statutes</b>	
16	18 U.S.C. § 1348 .....	1, 7
17	18 U.S.C. § 3553(a) .....	1, 3, 4
18		
19	<b>Constitutional Provisions</b>	
20	Sixth Amendment .....	3, 5
21		
22		
23		
24		
25		
26		
27		
28		

**I. INTRODUCTION**

The defendant William Del Biaggio respectfully submits this Memorandum in response to the Court’s Order dated February 9, 2009, that the parties set forth their positions on the proper application of the United States Sentencing Guidelines to this case.

Mr. Del Biaggio stands before the Court after pleading guilty to a single count of securities fraud in violation of 18 U.S.C. § 1348. We recognize the seriousness of this offense and appreciate fully the Court’s views expressed during the change of plea hearing on February 4, 2009. In particular, the Court was clear during the hearing that the notion of relevant conduct “matters” and must be addressed to frame the pertinent issues for sentencing. Therefore, this brief will focus on the issue of whether there is any “relevant conduct” under U.S.S.G. § 1B1.3 that should impact the Court’s Guidelines calculation.<sup>1</sup>

As explained further below, we respectfully submit that there is no uncharged criminal activity which is part of the “same course of conduct or common scheme or plan” as the offense of conviction. Therefore, the Court should not look to uncharged conduct for purposes of calculating the Guidelines range, but should adopt the Guidelines calculation recommended by the Government and agreed to by the parties.

**II. FACTUAL BACKGROUND**

At a basic level, the Plea Agreement reached in this matter separates and treats differently two distinct courses of conduct. Mr. Del Biaggio pleaded guilty to a one-count Information charging him with securities fraud in violation of 18 U.S.C. § 1348. (Plea Agreement ¶ 1) As recounted in the Information and in the subsequent Plea Agreement, Mr. Del Biaggio admitted to using altered brokerage statements in order to obtain extensions of credit which allowed him to purchase an interest in a National Hockey League team. (Plea Agreement ¶ 2) This offense conduct occurred between August of 2007 and April of 2008. Id. As explained below, the

<sup>1</sup> The positions set forth in this brief are not intended to waive arguments Mr. Del Biaggio will be making separately to the Court, that under the terms of 18 U.S.C. § 3553(a) Mr. Del Biaggio should receive a low-end or below-Guidelines sentence. This brief does not make a recommendation as to the appropriate sentence, but rather, is intended only to discuss Guidelines issues if the Guidelines are applied to this case, pursuant to this Court’s Order.

1 agreed-upon estimation of “actual loss” to the lenders in connection with these loans is \$19.25  
2 million. (Plea Agreement ¶ 9)

3 Separately, in connection with bankruptcy and civil litigation which has been filed  
4 against Mr. Del Biaggio, allegations have been made relating to various investment vehicles  
5 managed by him. After filing for bankruptcy in June of 2008, Mr. Del Biaggio was sued by  
6 persons who had invested in promissory notes and membership interests issued by three  
7 investment entities he controlled, alleging that he mismanaged and/or commingled the assets of  
8 those entities. Specifically, Mr. Del Biaggio has been sued by investors of Sand Hill Capital  
9 Partners III (“Sand Hill III”), based on the allegation that Mr. Del Biaggio commingled and  
10 misused the funds that he received from investors in exchange for promissory notes. (Plea  
11 Agreement ¶ 3(a)) Additionally, Mr. Del Biaggio has been sued by investors in BDB  
12 Management, LLC (“BDB I”) and BDB Management III, LLC (“BDB III”), based on the  
13 allegation that he improperly margined stock purchased with investment funds. (Plea Agreement  
14 ¶ 3(b) – (c))

15 The operations of Sand Hill III, BDB I, and BDB III were investigated by the  
16 Government in the months leading up to the plea negotiations. In connection with that  
17 investigation, Mr. Del Biaggio produced every document in his possession surrounding the  
18 financial affairs of these entities, and answered honestly every question regarding his conduct.  
19 At the end, Mr. Del Biaggio was neither charged with nor convicted of any crimes involving this  
20 separate conduct. Instead, Mr. Del Biaggio agreed that these investors would be part of his Plea  
21 Agreement for purposes of “calculating and ordering restitution” only, since it has been his  
22 objective from the outset of this process that all of his substantial assets be distributed to  
23 creditors equitably via the bankruptcy process. (Plea Agreement ¶¶ 3, 10)

24 However, to describe the investors of these unrelated entities as “victims” of the criminal  
25 case would not be correct. To consider their losses as “relevant conduct” for calculating Mr. Del  
26 Biaggio’s sentence in this criminal case would also be incorrect. The Plea Agreement separates  
27 this conduct from the offense conduct precisely because this uncharged conduct lacks any  
28 similarity, regularity, or temporal proximity to the offense to which Mr. Del Biaggio pled guilty,



1 Kimbrough v. United States, 128 S. Ct. 558, 569-70 (2007). With this decision, the Court freed  
2 sentencing courts from the rigid, mechanistic framework that existed under the Sentencing  
3 Guidelines, replacing it with a system that provides judges the discretion to consider any relevant  
4 characteristic of an offense or of the particular defendant, with the goal of imposing a sentence  
5 “sufficient, but not greater than necessary” to accomplish the goals of sentencing. Id. at 570  
6 (quoting 18 U.S.C. § 3553(a)). Booker thus returns sentencing courts to the “federal judicial  
7 tradition for the sentencing judge to consider every convicted person as an individual and every  
8 case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the  
9 crime and the punishment to ensue.” Gall v. United States, 128 S. Ct. 586, 598 (2007) (quoting  
10 Koon v. United States, 518 U.S. 81, 113 (1996)).

11 The Supreme Court’s recent post-Booker decisions have clarified the procedure a district  
12 court should follow in sentencing. The court “should begin all sentencing proceedings by  
13 correctly calculating the applicable Guidelines range.” Id. at 596. “The Guidelines are not the  
14 only consideration, however.” Id. Indeed, the sentencing court “may not presume that the  
15 Guidelines range is reasonable.” Id. at 596-97. Instead, the Court’s mandate, after considering  
16 all of the sentencing factors enumerated under § 3553(a), is to impose a sentence “sufficient, but  
17 not greater than necessary” to serve the goals of sentencing. Kimbrough, 128 S. Ct. at 570. That  
18 sentence may be either inside or outside the Guidelines range. Gall, 128 S. Ct. at 597;  
19 Kimbrough, 128 S. Ct. at 570. It will be reviewed only for abuse of discretion. Gall, 128 S. Ct.  
20 at 597.

21 The Court then must consider any and all information relating to the background,  
22 character and conduct of the defendant, in order to “make an individualized assessment based on  
23 the facts presented.” Id. Although the Court must consider the extent to which its sentence  
24 varies from the advisory Guidelines, and must explain its justification for the degree of any  
25 variance, the Court need not cite “extraordinary” circumstances to justify a non-Guidelines  
26 sentence, id. at 595, nor must its justification be proportional to the extent of the variance. Id. at  
27 595-96. Either requirement would “come too close to creating an impermissible presumption of  
28  
be valuable in mitigating the losses to all creditors. (Plea Agreement ¶ 17)

1 unreasonableness for sentences outside the Guidelines range,” *id.* at 595, thereby restoring the  
 2 mandatory nature of the Guidelines that made them unconstitutional under the Sixth  
 3 Amendment. *Id.* at 595-96; *Booker*, 543 U.S. at 233-35.

4 **B. Advisory Guidelines Calculation**

5 Mr. Del Biaggio’s Plea Agreement calculates the advisory sentencing range as follows:

6 Base offense level (§ 2B1.1(a)(1))	7
7 Loss exceeding \$7,000,000 (§ 2B1.1(b)(1)(K))	+20
8 Number of Victims (§ 2B1.1(b)(2)(A))	+2
9 Gross Receipts from a Financial Institution (§ 2B1.1(b)(14)(A))	+2
10 Acceptance of Responsibility (§ 3E1.1)	-3
11 <b>Offense Level: 28</b>	Criminal History I, Advisory Guidelines Range: <b>78 – 97 months</b>

13 **C. “Loss” Enhancement Under U.S.S.G. § 2B1.1**

14 In calculating loss pursuant to U.S.S.G. § 2B1.1(b), the general rule is that the sentencing  
 15 court should apply the greater of the actual or intended loss. U.S.S.G. § 2B1.1 cmt. n.3(A). The  
 16 parties are in agreement that “actual loss” is the appropriate measure for calculating the loss  
 17 enhancement in this case, because although Mr. Del Biaggio misrepresented his financial  
 18 holdings in order to obtain several loans, he neither intended to nor did expose his lenders and  
 19 guarantors to the risk of losing the total amount of the loan proceeds. Rather, he repaid portions  
 20 of several of the loans, reducing the outstanding balance of the loans to approximately \$48.5  
 21 million. (Plea Agreement ¶ 2; Exhibit A) In addition, he used a majority of the loan proceeds to  
 22 purchase a substantial interest in the Nashville Predators professional hockey team, an interest  
 23 that has been made available to all creditors and has been valued by the U.S. Bankruptcy Trustee  
 24 at approximately \$29.25 million.

25 In calculating the loss amount, therefore, Mr. Del Biaggio and the Government are in  
 26 agreement that Mr. Del Biaggio should be sentenced based on the estimated actual loss to his  
 27 lenders and guarantors, and that a reasonable estimate of that loss is \$19.25 million. (Plea  
 28 Agreement ¶ 9) The parties reached this figure by applying the fair market value of the interest

1 in the team to the outstanding balances of the loans. See § 2B1.1 cmt. 3(C) (providing that a  
2 court “need only make a reasonable estimate of the loss” based on available information and a  
3 number of factors “as appropriate and practicable under the circumstances”). This approach is  
4 intended to reflect a reasonable approximation of the amount of money the lenders will actually  
5 lose as a result of Mr. Del Biaggio’s misrepresentations. See United States v. Haddock, 12 F.3d  
6 950, 961 (10th Cir. 1993) (“[O]nly net loss is considered; anything received from the defendant  
7 in return reduces the actual loss.”); United States v. Wright, 60 F.3d 240, 242 (6th Cir. 1995)  
8 (noting that “[l]oss’ should not include amounts that a bank can and does easily recover by  
9 foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual  
10 debtor and other similar legal remedies”); cf. United States v. Berger, 473 F.3d 1080, 1104-08  
11 (9th Cir. 2007) (holding that in determining actual loss for restitution purposes, in case involving  
12 falsified loan documents, district court properly calculated loss based on loan advancements  
13 received due to fraudulent application and then discounted that figure by the percentage the  
14 banks recovered when they foreclosed on the defendant’s company’s assets).

15 Furthermore, while any good-faith approach agreed to by the parties at this stage can be  
16 criticized for lack of precision, it is important to remember that “[t]he Guidelines do not present  
17 a single universal method for loss calculation under § 2B1.1 – nor could they, given the fact-  
18 intensive and individualized nature of the inquiry.” United States v. Crandall, 525 F.3d 907, 912  
19 (9th Cir. 2008) (quoting United States v. Zolp, 479 F.3d 715, 718 (9th Cir. 2007)). For that  
20 reason, “§ 2B1.1 is not to be applied mechanically in valuing loss” and sentencing courts are  
21 instructed to “take a realistic, economic approach to determine what losses the defendant truly  
22 caused or intended to cause, rather than the use of some approach which does not reflect the  
23 monetary loss.” United States v. Stoddard, 150 F.3d 1140, 1145-46 (9th Cir. 1998) (quoting  
24 United States v. Allison, 86 F.3d 940, 943 (9th Cir. 1996)). Consequently, the parties submit  
25 that \$19.25 million represents the most accurate real-world estimate of the monetary loss caused  
26 by Mr. Del Biaggio’s criminal conduct.

27  
28

1 **D. Mr. Del Biaggio’s Investment Management Activities Are Not “Relevant Conduct”**  
2 **Within the Meaning of § 1B1.3 and Cannot Be Included in the Loss Amount**

3 At the February 4, 2009 hearing, the Court indicated that it was considering whether to  
4 sentence Mr. Del Biaggio not merely for the offense to which he pled guilty, but also on the basis  
5 of separate conduct which is included in the Plea Agreement solely “for the purposes of  
6 calculation and ordering restitution.” (Plea Agreement ¶ 3) Under clearly established law,  
7 however, Mr. Del Biaggio’s separate dealings in connection with unrelated investment vehicles  
8 may not be treated as “relevant conduct” within the meaning of § 1B1.3 unless two conditions  
9 are established by a preponderance of the evidence:<sup>3</sup> (1) the investment management activities  
10 must have been part of the “same course of conduct” or “common plan or scheme” as the  
11 offense, and (2) they must have amounted to criminal conduct. We respectfully submit that  
12 neither finding is warranted in this case.

13 **1. The uncharged conduct cannot be considered part of the “same course of**  
14 **conduct” or a “common plan or scheme”**

15 Mr. Del Biaggio’s mismanagement of the three investment entities does not qualify as  
16 “relevant conduct” within the meaning of § 1B1.3. Pursuant to § 1B1.3(a)(2),<sup>4</sup> conduct other  
17 than the offense of conviction may be relevant conduct for purposes of calculating the total  
18 amount of loss where the acts and omissions “were part of the same course of conduct or  
19 common scheme or plan as the offense of conviction.”

20 To constitute a “common scheme or plan,” offenses must be “substantially connected to  
21 each other by at least one common factor, such as common victims, common accomplices,  
22 common purpose, or similar modus operandi.” See § 1B1.3 cmt. n.9(A). Where two or more

23 <sup>3</sup> A district court generally uses a preponderance-of-the-evidence standard of proof when finding  
24 facts at sentencing. United States v. Moreland, 509 F.3d 1201, 1220 (9th Cir. 2007) (citing  
25 United States v. Kilby, 443 F.3d 1135, 1140 (9th Cir. 2006)). However, when a sentencing  
26 factor has an “extremely disproportionate effect” on the sentence relative to the offense of  
27 conviction, a district court must find the facts by a clear and convincing standard of proof. Id.  
(citing United States v. Dare, 425 F.3d 634, 642 (9th Cir. 2005)). While we would argue that the  
determination of the loss enhancement in this case easily satisfies the disproportionate effect test  
given the impact this enhancement will have on the overall sentence, the Court need not resolve  
this issue as we submit that the evidence fails to satisfy the preponderance standard.

28 <sup>4</sup> § 1B1.3(a)(2) applies to violations that are subject to grouping under § 3D1.2(d), which  
includes violations of 18 U.S.C. § 1348. See § 2B1.1.

1 offenses “do not qualify as part of a common scheme or plan,” they “may nonetheless qualify as  
2 part of the same course of conduct if they are sufficiently connected or related to each other as to  
3 warrant the conclusion that they are part of a single episode, spree, or ongoing series of  
4 offenses.” See § 1B1.3 cmt. n.9(B). Factors to be considered include “the degree of similarity of  
5 the offenses, the regularity (repetitions) of the offenses, and the time interval between the  
6 offenses.” Id.; see United States v. Hahn, 960 F.2d 903, 909-10 (9th Cir. 1992) (describing the  
7 inquiry as a “factually-oriented test” and holding that “the essential components of the section  
8 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity”). Where one of the key  
9 components is weak or missing, a stronger showing of at least one of the other components is  
10 necessary to support a finding of relevant conduct. See § 1B1.3 cmt. n.9(B).

11 In order to conclude that there are “substantial connections” between the alleged relevant  
12 conduct and the offense of conviction in this case would require a significant stretching of the  
13 facts. With regard to the offense of conviction, Mr. Del Biaggio has admitted that during the  
14 eight-month interval between August 2007 and April 2008, he misrepresented his financial  
15 wherewithal in order to obtain loans from a number of persons and entities for the goal of  
16 purchasing an interest in a professional hockey team. In short, he procured the loans by giving  
17 the appearance that he had more personal assets than he actually owned.

18 By contrast, the conduct that Mr. Del Biaggio admitted for purposes of restitution only  
19 involves wholly different parties, property, methods of obtaining money, and time frames. As  
20 for parties, there is no indication that anyone aided Mr. Del Biaggio in carrying out the  
21 investment management activities, and not one of the persons or entities named in Exhibit A of  
22 the Plea Agreement (listing the lenders and guarantees) is also named in Exhibits B, C, or D  
23 (listing the private investors). See United States v. Mise, No. 00-3079, 2000 U.S. App. LEXIS  
24 29896, at \*13-14 (6th Cir. Nov. 21, 2000) (unpublished) (rejecting a finding of relevant conduct  
25 where there were “no common victims, accomplices, purposes or methods”).<sup>5</sup> The property

26  
27 <sup>5</sup> In Mise the court refused to treat as relevant conduct an offense that “involved withdrawing  
28 money from the victim’s checking account via forged checks and unauthorized ATM  
transactions” with an underlying offense that “involved issuing checks for which sufficient funds  
were not available.” Mise, 2000 U.S. App. LEXIS 29896, at \*13-14.

1 involved, and the methods of obtaining that property, are also of a fundamentally different  
2 nature; the offense of conviction concerns outstanding balances on loans and guarantees obtained  
3 through the use of falsified account statements, whereas the investment management activities  
4 concern separate funds that were raised and held under management in private entities. Cf.  
5 United States v. Maxwell, 34 F.3d 1006, 1011 (11th Cir. 1994) (holding that in the absence of  
6 “distinctive similarities,” a cocaine distribution scheme could not be treated as relevant conduct  
7 to a conviction of conspiring to distribute dilaudid “simply because they both involve drug  
8 distribution”). Finally, though the August 2007 – April 2008 time frame for the offense of  
9 conviction overlaps in part with the operation of Sand Hill III and BDB III, over two years had  
10 elapsed since BDB I’s operations ceased in January 2005.

11 The most one could argue in favor of a finding of relevant conduct is that both the  
12 investment fund activity and the offense of conviction involve “fraud” for the goal of personal  
13 enrichment. However, even if such a finding could be established from the evidence, and we  
14 submit that it cannot, the law is clear that the commonality of “fraud to obtain money is not  
15 enough” to prove the “same course of conduct.” See United States v. Pinnick, 47 F.3d 434, 439  
16 (D.C. Cir. 1995); see also id. at 438-39 (finding that the district court committed clear error in  
17 treating “credit card fraud,” in which the defendant used an alias to apply for a credit card  
18 account, as relevant conduct to the offense of conviction, in which the defendant cashed five  
19 counterfeit checks).

20 In United States v. LaBarbara, 129 F.3d 81, 82-83 (2d Cir. 1997), for example, the  
21 defendant was the principal officer of a labor union who was convicted of conspiracy to steal  
22 union welfare benefits, theft from an employee benefit plan, embezzlement of union property,  
23 and mail fraud. The court considered whether the defendant’s 1989 conviction for accepting  
24 bribes from an employer could be treated as part of a “common scheme or plan” or the “same  
25 course of conduct” as the offense of conviction. There were, undoubtedly, a number of  
26 similarities: “LaBarbara’s greed is certainly common to both sets of crimes; each involved  
27 LaBarbara’s willingness to abuse his positions of trust for profit; and there is a temporal overlap.  
28 Moreover, there is also some overlap of victims in that Local 66’s members may have suffered

1 some diminution in wages and benefits as a result of the payments to LaBarbara that were the  
2 subject of the 1989 conviction as well as harm from the loss to the Funds in the instant case.” Id.  
3 at 87.

4 Despite these similarities, however, the LaBarbara court ultimately concluded that there  
5 was no “common scheme or plan” because “the differences between the two sets of crimes easily  
6 outweigh the similarities.” Id.<sup>6</sup> Central to this holding was the court’s conclusion that “[t]he fact  
7 that LaBarbara was personally enriched by the two sets of crimes is not by itself enough to  
8 establish a common scheme or plan.” Id.

9 Finally, extending the concept of relevant conduct to cover Mr. Del Biaggio’s investment  
10 management activities would not only upset the balance struck in the Plea Agreement, but would  
11 also conflict with the purpose behind § 1B1.3. “The goal of the provision . . . is for the sentence  
12 to reflect accurately the seriousness of the crime charged, but not to impose a penalty for the  
13 charged crime based on unrelated criminal activity.” United States v. Mullins, 971 F.2d 1138,  
14 1145 (4th Cir. 1992) (emphasis added, citations omitted).<sup>7</sup> Thus, it is not sufficient that other  
15 crimes are “of the same kind” as the charged offense if they are not part of the same course of  
16 conduct or plan. Id. In this case, to describe the operations of Sand Hill III, BDB I, or BDB III  
17 as part of the same course or plan as Mr. Del Biaggio’s offense conduct “is to describe his  
18 conduct at such a level of generality as to eviscerate the evaluation of whether uncharged  
19 criminal activity is part of the ‘same course of conduct or common scheme or plan’ as the  
20 offense of conviction. With a brushstroke that broad, almost any uncharged criminal activity can  
21 be painted as similar in at least one respect to the charged criminal conduct.” Id.

22 In sum, Mr. Del Biaggio’s separate conduct of mismanaging and commingling money  
23

24 <sup>6</sup> The court rejected the contention that a prior conviction for bribery was part of the “same  
25 course of conduct,” explaining that although “the offenses bear some very general resemblance  
26 to each other, we agree that there is no substantial similarity”: “embezzling from the union is  
27 dissimilar from accepting gratuities from employers in exchange for favorable terms.”  
28 LaBarbara, 129 F.3d at 87.

<sup>7</sup> The court in Mullins concluded that the uncharged fraud and the offense of conviction were too  
dissimilar in light of the differences in “the kind of property to be obtained and the method of  
doing so, the type of victim to be defrauded, the general modus operandi of the criminal activity,  
and the actual conduct engaged in by the defendant.” Mullins, 971 F.2d at 1145.

1 raised for investment funds is too far attenuated from the offense to which he pled guilty –  
 2 improperly obtaining loans through the use of falsified documents – that it cannot be considered  
 3 relevant conduct. At worst, both share the common thread of conduct for personal enrichment,  
 4 but that is simply not enough to establish a “common plan or scheme” or the “same course of  
 5 conduct” within the meaning of § 1B1.3.

6 **2. There is insufficient evidence to conclude that the uncharged conduct could**  
 7 **give rise to criminal liability.**

8 Courts that have considered the issue have uniformly held that relevant conduct under  
 9 U.S.S.G. § 1B1.3 is limited to criminal conduct only – not conduct that was simply unlawful or  
 10 could subject the defendant to civil liability.<sup>8</sup> Though the Ninth Circuit has not squarely  
 11 addressed the issue, there is no reason to think they would depart from this unbroken chain of  
 12 authority. See United States v. Palomba, 31 F.3d 1456, 1464 (9th Cir. 1994) (“Relevant conduct  
 13 is defined with reference to the degree of similarity, regularity, and temporal proximity linking  
 14 the charges of conviction with other criminal conduct by the defendant.” (emphasis added));  
 15 United States v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992) (explaining that “[t]here must be  
 16 ‘sufficient similarity and temporal proximity to reasonably suggest that repeated instances of  
 17 criminal behavior constitute a pattern of criminal conduct’” (emphasis added, quotation marks  
 18 omitted)).

19 In this case, while we are aware that at least one unhappy investor has written to the  
 20 Court urging that Mr. Del Biaggio be charged criminally for his investment management

21 <sup>8</sup> See United States v. Schaefer, 291 F.3d 932, 941 (7th Cir. 2002) (“The language of § 1B1.3  
 22 clearly limits relevant conduct, for the purposes of Chapters Two and Three sentencing  
 23 determinations, to criminal conduct.”); United States v. Solis, 299 F.3d 420, 461-62 (5th Cir.  
 24 2002) (stating that relevant conduct “must be criminal” (quotation mark omitted)); United States  
 25 v. Dove, 247 F.3d 152, 155 (4th Cir. 2001) (rejecting government’s argument that “‘non-benign’  
 26 conduct may properly be considered as relevant conduct,” because “relevant conduct under the  
 27 Guidelines must be criminal conduct”); United States v. Shafer, 199 F.3d 826, 831 (6th Cir.  
 28 1999) (holding that “a district court may not include conduct in its sentencing calculation  
 pursuant to § 1B1.3(a)(2) unless the conduct at issue amounts to an offense for which a criminal  
 defendant could potentially be incarcerated”); United States v. Jain, 93 F.3d 436, 443 (8th Cir.  
 1996) (“Relevant conduct for sentencing purposes must be criminal conduct.”); United States v.  
Dickler, 64 F.3d 818, 830-31 (3d Cir. 1995) (holding that relevant conduct within the meaning of  
 § 1B1.3 must be criminal conduct and vacating and remanding case with instructions to require  
 the government to identify “the statute or statutes it relies upon and to identify the record  
 evidence that satisfies each element of the offense proscribed”).

1 activities, the simple fact is that he has not been so charged. Furthermore, the facts in the Plea  
2 Agreement – which are the only facts before the Court – do not present a sufficient factual basis  
3 for the Court to conclude that Mr. Del Biaggio’s investment management activities were in fact  
4 criminal conduct. Therefore, it would be improper to use these losses as a basis for enhancing  
5 his sentence.<sup>9</sup>

6 Additionally, even if it could be established that some aspect of Mr. Del Biaggio’s  
7 conduct in connection with these entities was criminal in nature, there is no non-speculative way  
8 of apportioning the amount of loss caused by such conduct. With respect to Sand Hill III, for  
9 example, the Plea Agreement states that of the money Mr. Del Biaggio raised from investors, he  
10 only “used some of the funds” for unrelated personal and business expenses. Plea Agreement  
11 ¶ 3a (emphasis added). With respect to BDB I and BDB III, the agreement states that Mr. Del  
12 Biaggio’s primary transgression was over-margining the securities being held for investors. But  
13 the agreement does not identify what amount of investors’ losses, if any, were caused by such  
14 misconduct. (Plea Agreement ¶ 3(b) – (c)) Consequently, there is no way the Court could  
15 accurately isolate the loss amount caused by any criminal malfeasance on the one hand, as  
16 opposed to poor investment decisions or overall market conditions on the other. While the  
17 Guidelines do not require laser precision in determining the amount of loss, they do require that  
18 courts be able to make a reasonable estimate before increasing the punishment of a defendant on  
19 that basis. See United States v. Sepulveda, 115 F.3d 882, 890-91, 891 n.29 (11th Cir. 1997)  
20 (noting that “[w]hile estimates are permissible, courts ‘must not speculate concerning the  
21 existence of a fact which would permit a more severe sentence under the guidelines,’” and

22  
23 <sup>9</sup> In United States v. Peterson, 101 F.3d 375 (5th Cir. 1996), for example, the Fifth Circuit  
24 vacated the district court’s calculation of the loss amount in a securities fraud case because the  
25 court had failed to determine “whether the defendant’s conduct with regard to the \$1.3 million  
26 loss to the ABFL was actually criminal conduct rather than a violation of the fiduciary agreement  
27 making the defendant civilly liable.” Id. at 385 (emphasis added). In so holding, the Fifth  
28 Circuit reasoned that “[t]o hold otherwise would allow individuals to be punished by having their  
guideline range increased for activity which is not prohibited by law but merely morally  
distasteful or viewed as simply wrong by the sentencing court.” Id.; see also United States v.  
Schaefer, 291 F.3d 932, 938 (7th Cir. 2002) (noting that although the government asserted that  
the defendant’s “entire artwork business ‘was permeated with fraud,’ that characterization may  
have both civil and criminal aspects,” and “only the latter category implicates § 1B1.3 of the  
Guidelines”).

1 holding that because the government failed to “offer reliable, specific evidence estimating the  
2 volume of unauthorized calls appellants generated and the dollar amount reasonably attributed  
3 thereto,” the government failed to establish the amount of loss by a preponderance of the  
4 evidence (citation omitted)).

5 Thus, because there is insufficient evidence for the Court to determine that Mr. Del  
6 Biaggio engaged in criminal conduct with respect to his investment management activities, or to  
7 reasonably estimate the amount of funds that were criminally misused or mismanaged, such  
8 conduct cannot be included in the loss amount for purposes of sentencing Mr. Del Biaggio for  
9 Count 1.

10 **E. Calculating the Loss Amount for Purposes of Sentencing Is a Separate and Distinct  
11 Inquiry from Calculating Loss for Purposes of Restitution**

12 In calculating the amount of loss for the count to which Mr. Del Biaggio has pleaded  
13 guilty, the Court should not be misled by the amount of loss which he has agreed to solely for the  
14 purpose of calculating and ordering restitution. As is well recognized, “[l]oss for purposes of  
15 evaluating the seriousness of a fraud under the Sentencing Guidelines and loss for purposes of  
16 restitution are . . . potentially quite different.” United States v. Crandall, 525 F.3d 907, 916 (9th  
17 Cir. 2008); see also United States v. Woods, 554 F.3d 611, 614 (6th Cir. 2009) (“Restitution and  
18 amount of loss for the purposes of U.S.S.G. § 2B1.1 are not the same.”)<sup>10</sup>

19 The difference lies in the fact that restitution can generally include: “(1) losses caused by  
20 the specific conduct that is the basis of the offense of conviction; (2) losses caused by conduct  
21 committed during ‘an offense that involves as an element a scheme, conspiracy, or pattern’; and  
22 (3) restitution agreed to in a plea agreement.” United States v. Frith, 461 F.3d 914, 919 (7th Cir.  
23 2006). Depending on the circumstances of a case, therefore, the calculation of loss for purposes  
24 of restitution may be either narrower or broader than the loss contemplated by the Guidelines for  
25 purposes of sentencing. In the absence of a plea agreement, the scope of restitution may be  
26 narrower in the sense that a court may not order restitution for losses that are not directly caused

27 <sup>10</sup> See also United States v. Dove, 585 F. Supp. 2d 865, 869 (W.D. Va. 2008) (“The amount of  
28 loss for determining the proper sentencing guideline range is distinct from the amount of loss for  
restitution purposes.”)

1 by the offense of conviction.

2 Where the defendant has executed a plea agreement, however, restitution may encompass  
3 amounts “as bargained for” in the agreement, including loss for unrelated conduct and persons  
4 who are not victims of the offense of conviction. See id.; United States v. Randle, 324 F.3d 550,  
5 556 (7th Cir. 2003) (“[C]ourts are authorized to order restitution to persons other than a ‘victim’  
6 only ‘if agreed to by the parties in a plea agreement.’”). Furthermore, it is not uncommon in the  
7 plea agreement context for the amount of restitution to exceed the amount of “loss” for purposes  
8 of the Guidelines. See United States v. Soderling, 970 F.2d 529, 532 (9th Cir. 1991) (noting that,  
9 as part of plea bargain, defendants agreed to pay an amount of restitution that was “greater than  
10 the loss caused by the offenses to which [they] pleaded guilty”); see also United States v. Parrott,  
11 992 F.2d 914, 917 (9th Cir. 1993) (noting that a sentencing court may “award any amount of  
12 restitution, even an amount greater than the amount of losses alleged in the indictment, pursuant  
13 to a fully negotiated plea agreement”).

14 The facts of this case fall squarely under this category. The Government made the  
15 decision, in the exercise of prosecutorial discretion, to charge Mr. Del Biaggio with securities  
16 fraud in connection with the loans he improperly obtained. However, because the funds obtained  
17 from the offense of conviction had subsequently become commingled with funds misused or  
18 mismanaged in Mr. Del Biaggio’s capacity as an investment fund manager, and because Mr. Del  
19 Biaggio wanted all creditors to stand on the same footing when it came to the distribution of his  
20 assets, he agreed to pay restitution to persons affected by his investment management activities  
21 as well. The fact that the loss from Mr. Del Biaggio’s investment management activities was  
22 included for restitution purposes does not, and should not, affect the Court’s determination of the  
23 criminal conduct for which Mr. Del Biaggio may be sentenced.

#### 24 IV. CONCLUSION

25 The Plea Agreement in this case is the product of careful and specific negotiations by the  
26 Government and Mr. Del Biaggio over the course of several months. It is a tenet of our justice  
27 system that the adversarial process produces a fair and just result. That maxim applies here.  
28 Highly skilled, aggressive, and ethical federal prosecutors conducted an investigation into all of

1 the dealings referenced in the Plea Agreement, participated in numerous and detailed briefings  
2 with Mr. Del Biaggio during which Mr. Del Biaggio took full responsibility for his actions, and  
3 then worked out a Plea Agreement which embodies a fair outcome under difficult circumstances.  
4 After careful review of the Plea Agreement, we respectfully urge the Court to accept the agreed-  
5 upon Guidelines calculation, and then address the appropriate sentence for Mr. Del Biaggio  
6 within the contours of that agreement.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: March 20, 2009

KEKER & VAN NEST, LLP

By: /s/ Elliot R. Peters  
ELLIOT R. PETERS  
Attorneys for Defendant  
WILLIAM J. DEL BIAGGIO