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UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 UNITED STATES OF AMERICA, )  
15 Plaintiff, )  
16 v. )  
17 WILLIAM J. "BOOTS" DEL BIAGGIO, III, )  
18 Defendant. )

Case No. CR 08-0874 CRB  
THE UNITED STATES' PRELIMINARY  
SENTENCING MEMORANDUM  
Hearing Date: March 31, 2009  
Time: 2:15 p.m.  
Courtroom 8  
Sentencing Date: June 10, 2009  
Hon. Charles R. Breyer

19  
20 **I. INTRODUCTION**

21 On December 4, 2008, the United States charged William Del Biaggio, III, with one  
22 count of securities fraud in connection with a scheme to defraud a variety of lenders. The  
23 defendant pleaded guilty pursuant to a Plea Agreement on February 4, 2009. As part of the Plea  
24 Agreement, the parties agreed to a Sentencing Guidelines calculation of 28, which, assuming a  
25 Criminal History Category I, results in a recommended term of imprisonment of 78-97 months.  
26 Plea Agreement, ¶ 8.

27 The Court has requested that the parties provide briefing as to the appropriate Sentencing  
28 Guideline range. See February 9, 2009 Scheduling Order. The United States respectfully

1 submits that the Sentencing Guidelines calculation specified in the Plea Agreement sets out the  
 2 appropriate range.

3 **II. ANALYSIS**

4 **A. The Charged Conduct and the Plea Agreement**

5 The Information charges Mr. Del Biaggio with one count of securities fraud in connection  
 6 with a scheme to defraud lenders. Between August 2007 and April 2008, Mr. Del Biaggio  
 7 applied for or renewed approximately \$49 million in loans, primarily for the purpose of financing  
 8 his purchase of an interest in the Nashville Predators, a National Hockey League franchise.  
 9 During this same time, he agreed to guarantee approximately \$55 million in additional  
 10 obligations. *See* Plea Agreement, ¶ 2a, Exh. A. In connection with these loans and guarantees,  
 11 Mr. Del Biaggio provided the lenders with falsified securities brokerage statements. More  
 12 specifically, he obtained through David Scott Cacchione, an accomplice employed at a San  
 13 Francisco investment brokerage firm, the account statements of third parties, doctored those  
 14 statements to make it appear as if they reflected his own assets, and forwarded those statements  
 15 to the lenders to bolster the appearance of his financial condition. Mr. Cacchione also prepared  
 16 false account control agreements (which were provided to the lenders) as part of the scheme. *See*  
 17 *id.*<sup>1</sup>

18 The Plea Agreement sets out the Sentencing Guidelines calculation for this count at  
 19 paragraph 8:

- |    |   |     |
|----|---|-----|
| A. | Base Offense Level, U.S.S.G. § 2B1.1:         | +7  |
| B. | Specific offense characteristics              |     |
| 1. | Loss Amount, U.S.S.G. § 2B1.1(b)(1):          | +20 |
| 2. | Number of Victims, U.S.S.G. § 2B1.1(b)(2)(A): | +2  |

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27 <sup>1</sup> The facts and allegations proffered herein that are not included in the Plea Agreement  
 28 are based upon the government’s investigation, including communications with the trustee(s) in  
 the Bankruptcy Proceedings.

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2	3. Gross Receipts from a Financial Institution, U.S.S.G. § 2B1.1(b)(14)(A): <sup>2</sup>	+2
3	iii. Acceptance of Responsibility:	<u>-3</u>
4	Adjusted Offense Level:	28

5 **B. The Sentencing Guidelines Calculation**

6 **1. Base Offense Level**

7 Under U.S.S.G. § 2B1.1(a)(1), the base offense level is 7 if the defendant was convicted  
 8 of an offense referenced to that guideline and if the offense of conviction has a statutory  
 9 maximum term of imprisonment of 20 years or more. Both elements are satisfied here. Section  
 10 1348 of Title 18 of the United States Code, to which the defendant pleaded guilty, is referenced  
 11 to the applicable guideline. *See* U.S.S.G. §§ 1B1.2(a), 2B1.1 cmt. 2(A), Appendix A. In  
 12 addition, the offense of conviction has a statutory maximum term of imprisonment of 20 years or  
 13 more. *See* 18 U.S.C. § 1348 (25 year maximum).

14 **2. The Loss Amount**

15 The Plea Agreement provides for a loss amount of \$19.25 million, which results in an  
 16 increase of 20 levels. Plea Agreement, ¶ 9; U.S.S.G. § 2B1.1(b)(1)(K).

17 **a. The Facts**

18 **I. The Defendant’s Conduct**

19 **A. The Loans**

20 Between approximately August 2007 and April 2008, the defendant used the falsified  
 21 account statements to obtain or renew \$48.85 million in direct loans. Plea Agreement, ¶ 2a, Exh.  
 22 A. The proceeds of those loans primarily were used to purchase a controlling interest in  
 23 Forecheck Investments, LLC (“Forecheck”), which acquired an interest in the Nashville  
 24 Predators franchise of the National Hockey League. While a number of the loans were  
 25 unsecured, some purported to be secured by the securities accounts that Mr. Del Biaggio falsely  
 26 claimed to own. Some of the loans also were secured in part by securities that appear to have  
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28 <sup>2</sup> The Plea Agreement incorrectly cited U.S.S.C. § 2B1.1(b)(13)(A).

1 been legitimately held by Mr. Del Biaggio. None of the loans was secured by Mr. Del Biaggio's  
2 interest in Forecheck. The principal amount currently outstanding on these loans, all of which  
3 are in default and in arrears, is \$48,513,070. Plea Agreement, Exh. A.

#### 4 **B. The Guarantees**

5 Using these same falsified account statements, the defendant provided \$54.975 million in  
6 guarantees for loan commitments to two third parties. Plea Agreement, ¶ 2a, Exh. A.

7 In or about April 2006, Zions First National Bank ("Zions") extended an approximately  
8 \$15 million credit facility to Deer Point, LLC, which was developing a real estate venture in  
9 Utah. At that time the credit facility was guaranteed by Mr. Del Biaggio, Namwest, and two  
10 other individuals. The defendant submitted the falsified account statements to the lender when  
11 he updated his financial information in approximately August 2007. That credit facility, which  
12 was unrelated either to the Nashville Predators or to the defendant's interest in Forecheck, is  
13 currently in default and is approximately \$5.3 million in arrears. One of the other individual  
14 guarantors was released in 2008, and Namwest filed for bankruptcy in October 2008. The credit  
15 facility is secured by the real property underlying the Deer Point development, which property  
16 was valued within the last several months at between \$6 million and \$9 million.

17 In approximately December 2007, the defendant guaranteed \$40 million of a larger credit  
18 facility provided by CIT Group to Predators Holding, LLC. Predators Holding, LLC is current  
19 on its loan payments, and CIT Group has agreed to substitute additional guarantors in place of  
20 Mr. Del Biaggio, who was one of several guarantors to that facility.

#### 21 **ii. The Bankruptcy Proceedings**

22 In June 2008, the defendant, both personally and on behalf of a number of entities under  
23 his control, filed for bankruptcy under Chapters 7 and 11 of the Bankruptcy Code. *See In Re*  
24 *Sand Hill Capital Partners III*, Case No. 08-30989 (N.D. Cal.); *In Re William James Del Biaggio*  
25 *III*, Case No. 08-30991 (N.D. Cal.); *In Re BDB Management, LLC*, Case No. 08-31001 (N.D.  
26 Cal.); *In Re BDB Management III, LLC*, Case No. 08-31002 (N.D. Cal.) (collectively, the  
27 "Bankruptcy Proceedings"). Approximately 250 claims have been filed or scheduled in the  
28 Bankruptcy Proceedings as secured or unsecured claims. Some of those claims are duplicative,

1 some are unliquidated and/or contingent, and some ultimately may be disputed. All of the  
2 lender-victims of the charged conduct have filed claims in the Bankruptcy Proceedings for at  
3 least the outstanding amounts of their loans. As for the guarantee-victims, CIT Group's claim is  
4 unliquidated and contingent and may be disputed, and Zions has not filed a claim. These victims  
5 together comprise, by amount of claim, the largest creditors in the Bankruptcy Proceedings.

6 The most valuable single asset in the bankruptcy estates is Mr. Del Biaggio's interest in  
7 Forecheck. The bankruptcy trustee is currently in negotiations to sell that interest. At the time  
8 the parties executed the Plea Agreement, the bankruptcy trustee estimated that Forecheck would  
9 be sold for between \$25 million and \$33.5 million.<sup>3</sup> The value of Forecheck and whether and to  
10 what extent any of the claimants in the Bankruptcy Proceedings can claim any preference to that  
11 asset are disputed issues that are unknown or unlikely to be resolved until well after the June 10,  
12 2009 sentencing date.

13 **b. The Law**

14 "Loss is the greater of actual or intended loss." U.S.S.G. § 2B1.1, cmt. n. 3(A); *see*  
15 *generally United States v. Zolp*, 479 F.3d 715, 718 (9<sup>th</sup> Cir. 2007).

16 "Intended loss" in the case of a fraudulent loan "focus[es] on the intended financial  
17 harm." *United States v. McCormac*, 309 F.3d 623, 629 (9<sup>th</sup> Cir. 2002). "[E]ven though in many  
18 instances this will simply be an inquiry into whether a defendant intended to repay, when  
19 collateral is involved courts must also consider whether a defendant planned to return the  
20 collateral or anticipated that such collateral would be repossessed or foreclosed on by the lending  
21 institution." *Id.* (citation omitted) (2001 Sentencing Guidelines); *see also, e.g., United States v.*  
22 *Shaw*, 3 F.3d 311, 314 (9<sup>th</sup> Cir. 1993) (intended loss is "the extent to which, if at all, [the  
23 defendant] subjectively intended to repay what he had borrowed") (unsecured loan) (1989  
24 Sentencing Guidelines).

25 Ordinarily, in calculating actual loss defendants receive no credit for amounts refunded to  
26 their victims after the discovery of the offense. *See, e.g., United States v. Bright*, 353 F.3d 1114,

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27  
28 <sup>3</sup> The trustee recently informed the government that his current estimate is in the lower  
level of this range.

1 1118 (9<sup>th</sup> Cir. 2004). However, in fraudulent loan cases defendants can receive credit for  
2 amounts subsequently recovered by the victims. *See, e.g., McCormac*, 309 F.3d at 628 (pledged  
3 collateral); U.S.S.G. § 2B1.1, cmt. n. 3(E)(ii) (“Loss shall be reduced by . . . [i]n a case involving  
4 collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at  
5 the time of sentencing from disposition of the collateral, or if the collateral has not been disposed  
6 of by that time, the fair market value of the collateral at the time of sentencing.”).

7 “The guidelines do not present a single universal method for loss calculation under §  
8 2B1.1 – nor could they, given the fact-intensive and individualized nature of the inquiry.” *Zolp*,  
9 479 F.3d at 718; *see also United States v. Stoddard*, 150 F.3d 1140, 1145-46 (9<sup>th</sup> Cir. 1998) (“§  
10 2B1.1 is not to be applied mechanically in valuing loss”) (citation omitted). “The Court need not  
11 make its loss calculation with absolute precision; rather it need only make a reasonable estimate  
12 of the loss based on available information.” *Zolp*, 479 F.3d at 719 (citing U.S.S.G. § 2B1.1, cmt.  
13 n. 3(C)); *United States v. West Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 991 (9<sup>th</sup> Cir.  
14 2001) (court is not required to search for the perfect theoretical or statistical fit). “[T]he  
15 sentencing court should take a realistic, economic approach to determine what losses the  
16 defendant truly caused or intended to cause, rather than the use of some approach which does not  
17 reflect the monetary loss.” *United States v. Allison*, 86 F.3d 940, 943 (9<sup>th</sup> Cir. 1996) (citation  
18 omitted). The government bears the burden of proving loss by a preponderance of the evidence.  
19 *United States v. Santos*, 527 F.3d 1003, 1006-07 (9<sup>th</sup> Cir. 2008).

20  
21 **c. \$19.25 Million Is a Reasonable Estimate of the Loss Based  
upon the Information Available in This Case**

22 As noted above, in the case of fraudulent loans the Court is to look to the intended  
23 financial harm, which analysis frequently inquires into (although is not limited to) “whether the  
24 defendant intended to pay.” *McCormac*, 309 F.3d at 629; *see also Shaw*, 3 F.3d at 312-13 (“the  
25 fact that a loan is unsecured does not, by itself, require that ‘intended loss’ equate with the total  
26 at risk”). Based upon the facts and circumstances of this case and given the government’s burden  
27 at sentencing, the United States believes that actual loss is the proper measure of loss here.

28 ///

1 The victims' actual loss will not be known with certainty until the Bankruptcy  
2 Proceedings are completed, which may take several years. However, the Court may consider the  
3 information available at present and reasonably estimate the loss now. *See, e.g., Zolp*, 479 F.3d  
4 at 719; U.S.S.G. § 2B1.1, cmt. n. 3(E)(ii) (where collateral has not been disposed of by time of  
5 sentencing, loss may be reduced by collateral's fair market value). Based on the facts known to  
6 the government at the time the Plea Agreement was executed, the government calculated that a  
7 reasonable estimate of the actual loss to the victims of the charged conduct is \$19.25 million.  
8 Plea Agreement, ¶ 9. This figure credits the defendant the average then-expected sales price of  
9 his interest in Forecheck (\$29.25 million) against the outstanding principal amount owed to the  
10 non-guarantee victims (approximately \$48.5 million).<sup>4</sup> *See, e.g., United States v. Watson*, 118  
11 F.3d 1315, 1319 (9<sup>th</sup> Cir. 1997) (using average loss to extrapolate total actual loss figure).

12 The two guarantee-victims, Zions and CIT Group, are calculated to have no actual loss  
13 under U.S.S.G. § 2B1.1. The property securing the Zions credit facility was most recently  
14 appraised at approximately 180% of the value of the outstanding balance, one solvent guarantor  
15 remains liable to Zions for the entire balance, and Zions has not filed a claim in the Bankruptcy  
16 Proceedings. In addition, Predators Holdings is current on its credit facility to CIT Group, which  
17 also has obtained additional guarantors since the defendant filed for bankruptcy.

18 This methodology provides a reasonable estimate of the actual loss. Given the  
19 uncertainties and expected duration of the Bankruptcy Proceedings, the government's burdens at  
20 sentencing, the further expenditures in time and resources that would be required to determine  
21 the actual loss with more precision, and the complexities inherent in calculating the actual loss  
22 under these circumstances, this formula provides a reasonable estimate while at the same time  
23 promoting the interests of finality and prompt resolution of the criminal case.

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27 <sup>4</sup> While the terms of the loans require the defendant to pay interest, "[i]nterest of any  
28 kind" and "amounts based on an agreed-upon return or rate of return" are excluded from the loss  
calculation. U.S.S.G. § 2B1.1 cmt. 3(D)(I)

1                   **3. The Number of Victims**

2                   The plea agreement provides for a two-level increase because there were 10 or more  
3 victims. U.S.S.G. § 2B1.1(b)(2)(A). As set forth in the Plea Agreement, there were 12 victims.  
4 *See* Plea Agreement, Exh. A.

5                   **4. Gross Receipts from a Financial Institution**

6                   Section 2B1.1(b)(14)(A) of the Sentencing Guidelines requires a two-level increase if the  
7 defendant derived more than \$1 million in gross receipts from one or more financial institutions  
8 as a result of the offense. “Gross receipts” is defined to include “all property, real or personal,  
9 tangible or intangible, which is obtained directly or indirectly as a result of such offense.”  
10 U.S.S.G. § 2B1.1 cmt. 11(B). “Financial institution” is defined to include, among other things,  
11 any state bank, investment company, or trust company. *Id.* cmt. 1. Most of the loan proceeds  
12 obtained by the defendant, certainly well in excess of \$1 million, were obtained from financial  
13 institutions. *See* Plea Agreement, Exh. A.<sup>5</sup>

14                   **5. Acceptance of Responsibility**

15                   The Sentencing Guidelines provide for a three-level decrease if the defendant clearly  
16 demonstrates acceptance of responsibility for his offense and assists the government by timely  
17 notifying it of his intention to enter a guilty plea. U.S.S.G. § 3E1.1. This reduction is designed  
18 to avert the costs to the government and the Court of preparing for trial. *Id.* To date, the  
19 defendant has satisfied these criteria. *See also* U.S.S.G. § 3E1.1 cmt. 1 (listing appropriate  
20 considerations).

21                   Whether the defendant may obtain a further departure pursuant to 18 U.S.C. § 3553 by  
22 providing additional cooperation to the government, the bankruptcy trustees, the victims, or  
23 others is not addressed at this time.

24                   **C. The Uncharged Conduct and the Plea Agreement**

25                   At the defendant’s February 4, 2009 change of plea hearing, the Court inquired whether  
26 the conduct set forth at paragraph 3 of the Plea Agreement – conduct for which the defendant

27 \_\_\_\_\_  
28                   <sup>5</sup> Section 2B1.1(14) further provides that the minimum resulting offense level is 24.  
U.S.S.G. § 2B1.1(14)(D).

1 was not charged but for which he has agreed to pay restitution – should be considered relevant  
2 conduct for sentencing purposes. For the reasons set forth below, under the particular facts and  
3 circumstances of this case the uncharged conduct is not “relevant conduct” for purposes of the  
4 Sentencing Guidelines.

5 **1. The Defendant’s Conduct and the Plea Agreement**

6 The uncharged conduct concerns Mr. Del Biaggio’s misuse of funds as a principal in  
7 three investment entities, Sand Hill Capital Partners III (“Sand Hill III”), BDB Management,  
8 LLC (“BDB I”), and BDB Management III, LLC (“BDB III”). *See* Plea Agreement, ¶ 3.

9 The defendant was not criminally charged in connection with Sand Hill III, BDB I, or  
10 BDB III. However, the Plea Agreement requires him to pay restitution to the investors in those  
11 funds. Plea Agreement, ¶ 10; *see* 18 U.S.C. § 3663(a)(1)(A) (court may order restitution to  
12 persons other than victims of charged offense where the parties so agree in a plea agreement).  
13 Under the Plea Agreement, restitution is calculated as the investor’s outstanding principal  
14 investment account balance less the amount recovered in the Bankruptcy Proceedings. Plea  
15 Agreement, ¶ 10. The Plea Agreement does not limit restitution to losses caused by Mr. Del  
16 Biaggio as opposed to other (*e.g.*, market) forces. The victims are to be returned the entire  
17 outstanding balance of their investments. *Cf. United States v. Hicks*, 217 F.3d 1038, 1048-1049  
18 (9<sup>th</sup> Cir. 2000) (affirming conviction for false statements to a bank but remanding for re-  
19 sentencing where district court made no findings about whether the bank’s losses were inflated  
20 by independent and unforeseeable events).

21 **2. Given the Facts of This Case, the Uncharged Conduct Is Not**  
22 **“Relevant Conduct”**

23 The Sentencing Guidelines direct that specific offense characteristics, such as loss, shall  
24 be determined on the basis of all “relevant conduct,” which includes “all acts and omissions”  
25 committed or caused by the defendant “that occurred during the commission of the offense of  
26 conviction, in preparation for that offense, or in the course of attempting to avoid detection or  
27 responsibility for that offense.” U.S.S.G. § 1B1.2 (a)(1). For offenses such as fraud that would  
28 require grouping of multiple counts under U.S.S.G. § 3D1.2(d), those “acts and omissions” must

1 be “part of the same course of conduct or common scheme or plan as the offense of conviction.”  
2 U.S.S.G. § 1B1.2(a)(2); *see also United States v. Armstead*, 552 F.3d 769, 779 (9<sup>th</sup> Cir. 2008).  
3 The “essential components” of a relevant conduct inquiry are “similarity, regularity, and temporal  
4 proximity.” *United States v. Hahn*, 960 F.2d 903, 910 (9<sup>th</sup> Cir. 1992) (footnote omitted).

5 Although both emanate from the defendant’s greed, the charged and uncharged conduct  
6 do not share the factor necessary for a common scheme or plan. *See* U.S.S.G. § 1B1.3 cmt. 9(A)  
7 (to constitute a common scheme or plan, the offenses “must be substantially connected to each  
8 other by a least one common factor, such as common victims, common accomplices, common  
9 purpose, or similar *modus operandi*”). Nor are they “sufficiently connected or related to each  
10 other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series  
11 of offenses.” U.S.S.G. § 1B1.3 cmt. 9(B) (factors to consider include “the degree of similarity of  
12 the offenses, the regularity (repetitions) of the offenses, and the time interval between the  
13 offenses”). Among other things, the uncharged conduct did not involve the falsified account  
14 statements or control agreements, the time periods and victims are not the same, and the *modus*  
15 *operandi* are different. Under the particular facts of this case, the uncharged conduct is not  
16 relevant conduct for purposes of the Sentencing Guidelines.

17 The fact that the uncharged conduct is not considered “relevant conduct” under the  
18 Sentencing Guidelines does not diminish its seriousness or harm, nor does it in any way excuse  
19 that conduct. Nevertheless, because the uncharged conduct is not “relevant conduct” it is not  
20 included in the calculation of the offense level.

### 21 III. CONCLUSION

22 For all of the foregoing reasons, the United States respectfully submits that the  
23 defendant’s Sentencing Guidelines is properly calculated at 28.

24 DATED: March 20, 2009

Respectfully submitted,

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26 /S/

27  
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