RECORD NO. 13-4828

In The

United States Court Of Appeals

For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JEFFREY A. MARTINOVICH,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF APPELLATE JURISDICTION 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 2

A. Course of the Proceedings and Disposition in the Court Below 2

B. Statement of the Facts 3

SUMMARY OF ARGUMENT 6

LAW AND ARGUMENT 9

ISSUE I THE EVIDENCE WAS INSUFFICIENT TO CONVICT MARTINOVICH OF CONSPIRACY, WIRE FRAUD AND MAIL FRAUD WHERE THE GOVERNMENT PRESENTED NO EVIDENCE THAT MARTINOVICH KNEW OF OR TRANSMITTED ANY INFORMATION OF A FRAUDULENT NATURE. 9

A. STANDARD OF REVIEW 9

B. ARGUMENT 10

ISSUE II THE DISTRICT COURT DID NOT APPLY THE PROPER LEGAL STANDARD IN SENTENCING WHEN IT TREATED THE ADVISORY SENTENCING GUIDELINES AS MANDATORY. 19

A. STANDARD OF REVIEW 19

B. ARGUMENT 19

ISSUE III THE DISTRICT COURT ERRED AND PREJUDICED THE DEFENDANT BY REPEATEDLY INTERFERING WITH DEFENSE COUNSEL'S PRESENTATION AND BY INDICATING TO THE JURY THAT DEFENSE WITNESSES WERE NOT CREDIBLE 22

A. STANDARD OF REVIEW 22

B. ARGUMENT 22

ISSUE IV THE DISTRICT COURT IMPROPERLY CALCULATED THE LOSS AMOUNT UNDER USSG 2B1.1. 30

A. STANDARD OF REVIEW 30

B. ARGUMENT 30

CONCLUSION 33

STATEMENT REGARDING ORAL ARGUMENT 34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page:

Cases:

Dura Pharmaceuticals v. Broudo,
544 U.S. 336 (2005) 31

Easley v. Cromartie,
532 U.S. 234 (2001) 19, 30

Gall v. United States,
___ U.S. ___, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) 21

Glasser v. United States,
315 U.S. 60 (1942) 10, 11

Kimbrough v. United States,
___ U.S. ___, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007) 21

Neder v. United States,
527 U.S. 1 (1999) 12, 16

Rita v. United States,
515 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) 21

South Atlantic Ltd. Partnership of Tennessee v. Riese,
284 F.3d 518 (4th Cir. 2002) 12

United States v. Alerre,
430 F.3d 681 (4th Cir. 2005) *cert. denied*,
547 U.S. 1113, 126 S. Ct. 1925, 164 L. Ed. 2d 687 (2006) 9

United States v. Allen,
491 F.3d 178 (4th Cir. 2007) 12

United States v. Beidler,
110 F.3d 1064 (4th Cir. 1997) 9

United States v. Booker,
542 U.S. 220 (2005) 20

United States v. Camp,
2014 Lexis 6976 (4th Cir. Jan. 28, 2014, Unpublished) 32

United States v. Carter,
564 F.3d. 325 (4th Cir. 2009) 19, 30

United States v. Evans,
U.S. Lexis 4490, March 11, 2014 (10th Cir. 2014) 21

United States v. Godwin,
272 F.3d 659 (4th Cir. 2001) 12, 23, 27

United States v. Habegger,
370 F.3d 441 (4th Cir. 2004) 9

United States v. Ham,
998 F.2d 1247 (4th Cir. 1993) 12, 16

United States v. Hastings,
134 F.3d 235 (4th Cir. 1998) 22

United States v. Kenrick,
221 F.3d 19 (1st Cir. 2000) 12

United States v. Llamas,
599 F.3d 381 (4th Cir. 2010) 19, 30

United States v. Manigan,
592 F.3d 621 (4th Cir. 2010) 19, 30

United States v. Olis,
429 F.3d 540 (5th Cir. 2005) 31

United States v. Orrico,
599 F.2d 113 (6th Cir. 1979) 9

United States v. Parodi,
703 F.2d 786 (4th Cir. 1983) 23

United States v. Perkins,
470 F.3d 150 (4th Cir. 2006) 10

United States v. Romer,
148 F.3d 359 (4th Cir. 1998), *cert. denied*,
525 U.S. 1141 (1999) 11

United States v. Samad,
754 F.2d 1091 (4th Cir. 1984) 9

United States v. Snelling,
BL 261524 No. 12-4288 (6th Cir. 2014) 32

United States v. Stewart,
256 F.3d 231 (4th Cir.), *cert. denied*, 534 U.S. 1049 (2001) 10

United States v. Williams,
41 F.3d 192 (4th Cir. 1994), *cert. denied*,
514 U.S. 1056 (1995) 9

Statutes:

18 U.S.C. § 1341 11

18 U.S.C. § 1343 11

18 U.S.C. § 1349 11

18 U.S.C. § 1957 18

28 U.S.C. § 1291 1

Sentencing Guidelines:

USSG 2B1.1. . . . . 2, 8, 30, 32

USSG 2B1.1(B)(2)(A) 8

Rules:

Fed. R. App. P. (4)(b) 1

Fed. R. Crim. P. 29 9

Fed. R. Evid. 614B 22

Other:

2 L. Sand, *et al. Modern Federal Jury Instructions – Criminal*
¶ 44.01, Inst. No. 44-3 (2007) 11, 12

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions,*
§ 47.03 (5th ed. 2000) 11, 12

PRELIMINARY STATEMENT

In this opening brief, Appellee will be referred to as the "United States", "the Government", or as "Appellee". Defendant/Appellant, Jeffrey A. Martinovich, will be referred to as "Appellant", "Defendant", or "Martinovich". References to the Joint Appendix will be referred to as (J.A. ___).

STATEMENT OF APPELLATE JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Eastern District of Virginia, Newport News Division, in a criminal case pursuant to the Federal Rules of Appellate Procedure. Fed. R. App. P. (4)(b). Title 28 U.S.C. § 1291 states that the Court of Appeals has jurisdiction from all final decisions of the United States District Courts. Accordingly, this Court properly has jurisdiction over this matter. Defendant timely filed a Notice of Appeal from the trial court's final judgment pursuant to Fed. R. App. P. 4(b).

STATEMENT OF ISSUES

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT MARTINOVICH OF CONSPIRACY, WIRE FRAUD AND MAIL FRAUD WHERE THE GOVERNMENT PRESENTED NO EVIDENCE THAT MARTINOVICH KNEW OF OR TRANSMITTED ANY INFORMATION OF A FRAUDULENT NATURE.

ISSUE II

THE DISTRICT COURT DID NOT APPLY THE PROPER LEGAL STANDARD IN SENTENCING WHEN IT TREATED THE ADVISORY SENTENCING GUIDELINES AS MANDATORY.

ISSUE III

THE DISTRICT COURT ERRED AND PREJUDICED THE DEFENDANT BY REPEATEDLY INTERFERING WITH DEFENSE COUNSEL'S PRESENTATION AND BY INDICATING TO THE JURY THAT DEFENSE WITNESSES WERE NOT CREDIBLE .

ISSUE IV

THE DISTRICT COURT IMPROPERLY CALCULATED THE LOSS AMOUNT UNDER USSG 2B1.1.

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition in the Court Below

The Appellant, Jeffrey A. Martinovich, was indicted on 23 counts related to his operation of a hedge fund. The Defendant pled not guilty to all

counts and a jury heard the case from April 9, 2013 to April 29, 2013. The Defendant made a motion for acquittal of all counts at the conclusion of the United States case-in-chief, the conclusion of all the evidence and after the jury returned its verdict of guilty on certain counts. (J.A. 3493-3498) After the jury verdict and ruling on the motion for acquittal, the District Court entered a judgement of guilty on counts 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 20, 21, 22, and 23. A pre-sentence report was prepared and the Defendant noted numerous objections to the pre-sentence report. (J.A. 3562-3603) (J.A. 3805-3807) The Appellant was sentenced to 140 months and 3 years supervised release and timely noted his appeal. (J.A. 3759-3764)

B. Statement of the Facts

The Appellant Jeffrey A. Martinovich formed a financial services company in approximately 1999 known as Martinovich Investment Consulting Group (MICG). MICG was based in Newport News, Virginia and offered investment advice and services to its clients. (J.A. 3769)

In approximately 2005, Martinovich became the sole owner of MICG. MICG expanded to have multiple offices in Virginia and an office in New York City. MICG also expanded its products to include hedge funds. MICG, under the direction of Martinovich, created three hedge funds which

were Anchor Strategies, LLC, MICG Partners, LP, and MICG Venture Strategies, LLC (Venture Fund). The financial affairs and management of the Venture fund form the basis of the indictment and convictions that are at issue in this appeal. The evidence presented at trial indicated that Martinovich managed and supervised the Venture fund. (J.A. 3770) The fund was designed for high net worth investors. Those investors would sign a private placement memorandum (PPM) which set forth the risks involved in the fund and the duties of Martinovich as the fund manager. The venture fund paid a management fee of 1% and a 20% incentive fee to MICG each year. These fees were set forth and disclosed in the PPM. The 1% fee was based on the overall value of the fund and the 20% incentive was based on increases in the value of the fund, if any. (J.A. 3770)

The venture fund invested in three primary entities, a solar energy company (EPV), an English soccer team, the Derby Rams, and a construction bond for a crane company. (J.A. 3770)

The evidence at trial focused primarily on the management and incentive fees paid to MICG based on the valuation of EPV. EPV was not a publicly traded company and thus in order to determine the share price, an independent valuation had to be obtained. The evidence indicated that any

increase in the valuation of EPV, would result in higher fees being paid to MICG. (J.A. 3771-3773)

In compliance with the need for an independent evaluation of the share value of EPV, Martinovich, through one of his employees, Steve Glasser, engaged Mr. Peter Lynch to perform the valuation. The evidence at trial was that Martinovich did not personally know Mr. Lynch, but relied primarily on Glasser in regard to hiring and interacting with Mr. Lynch. Mr. Lynch had a long history of involvement in the solar energy industry and was called at trial as a witness for the United States. Mr. Lynch performed valuation of the EPV stock in 2007, 2008, and 2009. (J.A. 552-659) At trial, Mr. Lynch, a witness for the United States, testified that he stood by his valuations and that in his view, the value that he assigned to the EPV stock was fair and accurate. In each year MICG took fees from the Venture fund based on the valuations performed by Peter Lynch. The evidence at trial was that Mr. Lynch signed the valuations and confirmed that the value he placed on EPV stock was reasonable. (J.A. 552-659)

The Appellant also testified on his own behalf and stated unequivocally that he relied on the stock valuations provided by Mr. Lynch. The Appellant used those valuations to advise investors regarding the value

of their investments in the Venture fund and also based the fees paid to MICG on the valuations provided by Mr. Lynch. The evidence adduced at trial was that due to the overall conditions in the financial markets and some conditions specific to the solar industry, EPV filed for bankruptcy on February 24, 2010. (J.A. 3779-3781) The Appellant's business and personal financial situation also suffered as a result of market conditions and he was forced to file a personal bankruptcy on February 10, 2011. (J.A. 3784)

SUMMARY OF ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT MARTINOVICH OF CONSPIRACY, WIRE FRAUD AND MAIL FRAUD WHERE THE GOVERNMENT PRESENTED NO EVIDENCE THAT MARTINOVICH KNEW OF OR TRANSMITTED ANY INFORMATION OF A FRAUDULENT NATURE.

The complete lack of evidence of fraudulent intent on the conspiracy, mail fraud and wire fraud charges requires a reversal of the convictions on those charges. The only witness called to testify on the issue of the valuation testified that his valuations were correct. This witness was an expert in the solar industry and was a witness for the United States. The Appellant's reliance on these valuations was reasonable and not based on any fraudulent design or intent.

ISSUE II

THE DISTRICT COURT DID NOT APPLY THE PROPER LEGAL STANDARD IN SENTENCING WHEN IT TREATED THE ADVISORY SENTENCING GUIDELINES AS MANDATORY.

The District Court stated at sentencing that the United States sentencing guidelines (USSG) were mandatory thus indicating that the Court did not apply the proper standard in ruling on the Appellant's request for a variant sentence below the advisory guideline range.

ISSUE III

THE DISTRICT COURT ERRED AND PREJUDICED THE DEFENDANT BY REPEATEDLY INTERFERING WITH DEFENSE COUNSEL'S PRESENTATION AND BY INDICATING TO THE JURY THAT DEFENSE WITNESSES WERE NOT CREDIBLE .

The trial Court's frequent interruptions of Appellant's witnesses and the Court's questioning of the Appellant and his witnesses deprived Appellant of a fair trial. The court's numerous admonishments of defense counsel in front of the jury undermined counsel's ability to effectively present the defense case.

ISSUE IV

THE DISTRICT COURT IMPROPERLY CALCULATED THE LOSS AMOUNT UNDER USSG 2B1.1.

The District Court erred in calculating the loss amount and assessing the Appellant a 16 point enhancement under USSG 2B1.1(B)(2)(A). The proper method of calculating loss in a case involving stock that is not publicly traded and held in a hedge fund with other assets is not to simply assess the entire amount that was invested as a loss. While the standards that the court has applied to this issue have certainly evolved over time, at a minimum, the loss should not include losses to investors that were not a result of any fraudulent activity.

The court's approach in this case was to simply assess the entire amount invested in the Venture fund of which the EPV stock was one of three investments. This broad brush approach does not comport with the applicable law.

LAW AND ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT MARTINOVICH OF CONSPIRACY, WIRE FRAUD AND MAIL FRAUD WHERE THE GOVERNMENT PRESENTED NO EVIDENCE THAT MARTINOVICH KNEW OF OR TRANSMITTED ANY INFORMATION OF A FRAUDULENT NATURE.

A. STANDARD OF REVIEW

This court reviews the denial of a Rule 29 motion de novo. *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005) *cert. denied*, 547 U.S. 1113, 126 S. Ct. 1925, 164 L. Ed. 2d 687 (2006). When a defendant challenges the sufficiency of a jury's guilty verdict on appeal, he "bears a heavy burden." *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). However, this is not an insurmountable burden. *United States v. Habegger*, 370 F.3d 441, 444-445 (4th Cir. 2004). This Court views the evidence in a light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. *United States v. Williams*, 41 F.3d 192, 199 (4th Cir. 1994), *cert. denied*, 514 U.S. 1056 (1995). However, a jury is entitled to make only reasonable inferences from the evidence. *United States v. Samad*, 754 F.2d 1091, 1097 (4th Cir. 1984), *quoting United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). When

evaluating the sufficiently of a jury verdict on appeal, this court has held that "the jury verdict must be upheld if there exists substantial evidence, including circumstantial and direct evidence, to support the verdict, viewing the evidence in a light most favorable to the government." *United States v. Stewart*, 256 F.3d 231, 429 (4th Cir.), *cert. denied*, 534 U.S. 1049 (2001). This Court must sustain the appellant's conviction if it determines that the evidence was sufficient for a rational trier of fact to find the essential elements of the crime. *United States v. Perkins*, 470 F.3d 150, 160-61 (4th Cir. 2006).

B. ARGUMENT

At trial, the government presented insufficient evidence to show that Martinovich engaged in false and fraudulent conduct regarding the valuation of EPV for purposes of generating a performance fee for MICG. The government failed to show false and fraudulent conduct when its sole witness regarding EPV valuation, Peter Lynch, confirmed repeatedly the validity of the per share estimates upon which MICG performance fees were generated.

This Court reviews claims of evidentiary sufficiency under the familiar standard of *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Specifically, "the jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it." *Id*. *See also*, *United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). Martinovich moved for a judgment of acquittal at the conclusion of the government's case (J.A. 2338-2369), and again at the conclusion of all evidence. (J.A. 3402-3448)

Before the district court, the government charged Martinovich with conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349, as well as both mail and wire fraud under 18 U.S.C. §§ 1341 and 1343 respectively. The foundation charges of mail and wire fraud makes illegal "any scheme or artifice to defraud" or any scheme "for the purpose of obtaining money or property by false or fraudulent pretenses, representations, or promises" and using mail (or use of wire, radio or other electronic communications in the case of wire fraud) in realizing the scheme. *Id*.

Mail and wire fraud both require proof that a defendant knowingly devised or participated in any scheme alleged by the government in its indictment. O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions,* § 47.03 (5th ed. 2000); 2 L. Sand, *et al*. *Modern Federal Jury Instructions – Criminal* ¶ 44.01, Inst. No. 44-3 (2007). If the government

alleges a scheme or artifice to defraud, the accused must also know of its fraudulent nature. *Id.* Moreover, if the scheme or artifice was to obtain money by false representations, the accused must also know that the representations were both material and false. *Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993).

The government must also prove that the accused held a specific intent to defraud. *Id.*; *see South Atlantic Ltd. Partnership of Tennessee v. Riese*, 284 F.3d 518, 531 (4th Cir. 2002). The existence of an accused's specific intent to defraud may "be inferred from the totality of the circumstances and need not be proven by direct evidence." *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (internal quotations omitted). Crucial to the examination of this issue in the case at bar is the requirement that intent to defraud does not require an intent to cause permanent economic harm to others, but rather constitutes simply the intent to acquire target property by means of deceptive, fraudulent conduct. *United States v. Allen*, 491 F.3d 178, 186 (4th Cir. 2007), citing *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000).

At trial, the government called Peter Lynch to testify regarding his interactions with EPV. During the summer of 2007, Steven Gifis, the chairman of EPV, contacted Lynch to perform a valuation of the company. (J.A. 556-560) From this contact with Gifis to the time of his testimony, Lynch did not know Martinovich nor was he aware of MICG. (J.A. 560-566). When Gifis contacted Lynch, Lynch indicated that he could not perform a professional evaluation of EPV due to the complexity of such a task. (J.A. 557-558). Gifis indicated to Lynch that a summary valuation would be acceptable, and that the request was a personal one so that he could help some shareholders with regard to private financing that they were pursuing. (J.A. 558-563).

Agreeing to perform a valuation of EPV, Lynch conducted an enterprise valuation of the company.[1] Lynch defined an enterprise valuation as, "if you had a company and I wanted to buy it I would buy it for my estimate of your enterprise value." (J.A. 629-633). Further, Lynch affirmed that a 'per share value' of the company was a division of the number of

[1] Lynch possessed experience in analyzing various solar companies and in performing work as an equity analyst on public solar companies and assisting them in raising financing. (J.A. 618). In fact, Lynch had acted as a consultant to small emerging companies focusing, in part, on renewable energy for the past 20 years and prior to that had been a Wall Street equity analyst. (J.A. 552).

shares and what the enterprise value would constitute. *Id.* Relying on information provided by Gifis, Lynch evaluated the price to earning ratios and price to revenue ratios of ten solar power companies that were publicly traded and then compared those numbers to that of EPV to determine the approximate enterprise value of EPV. (J.A. 567-568). Again, during the course of his valuation of EPV, Lynch had no contact with anyone at MICG and had no indication that the valuation would be used by MICG. (J.A. 581-582)

In January of 2009, Lynch endorsed a revised valuation of EPV. (J.A. 609-611). That assessment contained a valuation of EPV of being worth $500 million which translated to a per share value of $2.88. (J.A. 608) Lynch testified that he was comfortable with that valuation, "because the key valuation, which is 500 million, hasn't really changed significantly from earlier valuations. That's the key element." (J.A. 615). Moreover, Lynch opined that the per share values he had assigned to EPV were conservative and that any minor increases in the per share price would have fallen within an acceptable range of values for EPV. (J.A. 615-616). In fact, Lynch testified specifically that even though valuation suggestions were made by Gifis of EPV, "I had the opportunity to look at the valuation to determine if

it was within the parameters of what I thought was appropriate," and that if he not felt that the valuation was within the parameters of what he felt appropriate, he would not have signed off on the valuation. (J.A. 616).

Consequently, the four increasing per share values set by Lynch during the course of his valuation of EPV were, in his opinion, reasonable figures. Specifically, Lynch testified that the four per share figures – $2.13, $2.16, $2.42 and finally $2.88 – were all reasonable per share values "based on that it was derived from the key element, which was the overall value of the company." (J.A. 617) As a result, Lynch's final evaluation, issued on his letterhead and under his signature, stated "Consequently, it is my conclusion that the share value of $2.88 and the overall company valuation of approximately 500 million arrived at earlier in this memo is conservative." (J.A. 651) Moreover, Lynch affirmed that when meeting with federal law enforcement agents regarding his valuation of EPV, he advised several times that he had always felt that the value he had assigned to EPV was very conservative. As a result, any minor increase in the per share price would have been within his acceptable range of values for the company, and that he considered the difference between all the valuations to be insignificant. (J.A. 659).

The sum and substance of Lynch's testimony can be reduced to a simple point: Regardless of the purpose of his valuation of EPV, he repeatedly maintained the accuracy of the per price share that he had articulated. This testimony – even taken in the light most favorable to the government – renders the allegation of fraud by Martinovich insufficient as a matter of law because there simply existed no matrix by which the government could have shown Martinovich made any false representations as to the value of EPV. When the government alleges a scheme or artifice to defraud, the accused must also know of its fraudulent nature. Given that Lynch repeatedly testified that the per share price of EPV – subsequently published by Martinovich – was valid, no false representations could have been made by Martinovich given that the valuation was neither false nor fraudulent. *See*, *Neder v. United States*, *supra* 527 U.S. at 25; *United States v. Ham, supra*, 998 F.2d at 1254 (if the scheme or artifice was to obtain money by false representations, the accused must also know that the representations were both material and false).

At trial, the government argued that Martinovich committed fraud when he caused a private equity valuation of EPV to be inflated, and then misrepresented to investors and others so that MICG could claim year end

performance fees. In support, the government relied upon the testimony of Gifis, Bruce Glasser (a cooperating witness testifying under a grant of immunity) and others who alleged that Martinovich directed the four per share increases in the value of EPV. Repeatedly dismissing Lynch's valuation as a "rubber stamp," the government contended at trial that it was Martinovich who picked the per share value of EPV in order to maximize MICG's performance fee for that particular venture fund.

However, given that Lynch was the only witness who actually performed the per share valuation of EPV, his uncontroverted affirmations at trial as to the accuracy and validity of the $2.88 per share price wholly negates any allegation that Martinovich's reliance and publication of that value to investors (and use of it for the calculation of year end performance fees) were representations both material and false. During the course of their case in chief, the government elicited uncontroverted testimony that Lynch was in fact the sole individual who conducted any valuation of EPV. For example, Mike Feldman, the chief financial officer of MICG testified that Lynch was the individual who created the valuation for EPV. (J.A. 452, 488-491)

In sum, given that Lynch repeatedly testified that the per share price of EPV was valid, as a matter of law no false representations could have been made by Martinovich in his subsequent publication of and reliance upon that figure given that the valuation was neither false nor fraudulent.

The Appellant's convictions for Money Laundering under 18 U.S.C. § 1957 are not legally valid once the conviction on the fraud and conspiracy counts are reversed. In order to sustain a conviction under 18 U.S.C. § 1957, the government must prove that the funds were obtained from a specified illegal activity. In this case, the only illegal activity alleged was fraud. If the funds that were used in the various transactions that form the basis of convictions under 18 U.S.C. § 1957 were not obtained through fraud then those counts must, as a matter of law, be dismissed.

The Appellant requests that the convictions on Counts 1, 6, 7, 8, 9,10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, and 23 be reversed for the reasons set forth above.

ISSUE II

THE DISTRICT COURT DID NOT APPLY THE PROPER LEGAL STANDARD IN SENTENCING WHEN IT TREATED THE ADVISORY SENTENCING GUIDELINES AS MANDATORY.

A. STANDARD OF REVIEW

When addressing a claim that the District Court did not properly apply the sentencing guidelines, this court reviews the District Court's sentencing under "a deferential abuse-of-discretion standard." *United States v. Carter,* 564 F.3d. 325 (4th Cir. 2009). In assessing whether a sentencing court has properly applied the guidelines, [this Court] review[s] factual findings for clear error and legal conclusions de novo." *United States v. Llamas*, 599 F.3d 381, 387 (4th Cir. 2010) Clear error exists "only if 'on the entire evidence' [we are] 'left with the definite and firm conviction that a mistake has been committed" *United States v. Manigan*, 592 F.3d 621, 631 (4th Cir. 2010) (*Quoting Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

B. ARGUMENT

The District Court stated during sentencing that the sentencing guidelines were mandatory. Specifically the Court said "It appears to me that the guidelines have now become more than guides. You know, the Supreme Court indicates that they are advisory; however, I find that they're more than

advisory. They're reversible error if you don't follow them or give a good reason why you're not following them, so they're no longer advisory". I will follow the guidelines only because I have to. I find that they're not discretionary, they're mandatory, although people think they're discretionary and although the courts have said they're only advisory". (J.A. 3645-3646)

It is obvious from these comments that the District Court misunderstood the advisory nature of the guidelines and did not consider the defense's request for a sentence below the guidelines because the Court felt it was legally not able to do so.

The authority and case law that indicates that the guidelines are merely advisory is without dispute. The guidelines are only one of numerous factors that the Court should consider in arriving at a proper sentence in a case. The fact that the Court said it would follow the guidelines but "only because I have to." (J.A. 3646) is a clear indication that the Court would have imposed a non-guideline sentence had there been an understanding by the Court of the role of the guidelines in sentencing.

The United States Supreme Court in *United States v. Booker*, 542 U.S. 220 (2005) altered both the substance and process of federal sentencing.

The United States Supreme Court in *Rita v. United States*, 515 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007), *Gall v. United States*, ___ U.S. ___, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), and *Kimbrough v. United States*, ___ U.S. ___, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007), has consistently stated that a properly calculated guideline range is only one factor that a court should consider in arriving at a sentence. As this court stated in *United States v. Evans*, U.S. Lexis 4490, March 11, 2014 (10th Cir. 2014) when addressing the role of the guidelines in sentencing. "*Gall* and its companion case, *Kimbrough v. United States*, (cites omitted) supply the precedent governing Evans' challenges to his sentence. These cases unequivocally establish that . ... the advisory sentencing guidelines, although important, simply do not have the pre-eminent and dominant role that Evans claims for them ... "

When analyzed against this clear precedent, the District Court's application of a standard that treated the guidelines as mandatory and the stated refusal to consider a sentence that was not a guideline sentence is error and the appropriate remedy is to remand the case for the Appellant to receive a sentencing hearing where the court uses the guidelines as a factor but does not treat them as "mandatory".

The defense made a timely and compelling request for a sentence below the advisory guidelines. (J.A. 3588-3601) the Court refused to consider it and imposed a guideline sentence. The Court went to great lengths to point out many factors about the Appellant's background and the facts of the case that justify a below guideline sentence. The application of a legal standard that treated the guidelines as mandatory was error and the Appellant requests that the sentence be vacated and the case be remanded to the District Court for re-sentencing.

ISSUE III

THE DISTRICT COURT ERRED AND PREJUDICED THE DEFENDANT BY REPEATEDLY INTERFERING WITH DEFENSE COUNSEL'S PRESENTATION AND BY INDICATING TO THE JURY THAT DEFENSE WITNESSES WERE NOT CREDIBLE .

A. STANDARD OF REVIEW

The comments and conduct of the trial court were not objected to by defense counsel. Thus the court reviews it for plain error to determine if it impinged on defendant's substantial rights and affected the outcome of the proceeding. *United States v. Hastings*, 134 F.3d 235 (4th Cir. 1998).

B. ARGUMENT

The Appellant concedes that a trial judge may question witnesses (Federal Rule of Evidence 614B). A judge when questioning witnesses must

always "remember that he occupies a position of preeminence and social persuasiveness in the eyes of the jury, and because of this, he should take particular care that his participation during trial – whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct – never reaches the point at which it appears clear to the jury that the court believes the accused is guilty" *United States v. Parodi*, 703 F.2d 786 (4th Cir. 1983). The ultimate inquiry is "whether the trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial." *United States v. Godwin*, 272 F.3d 659 (4th Cir. 2001).

Applying this standard and reviewing the entire transcript for those instances where the trial judge either interrupted or cut-off Appellant's counsel without objection, questioned or cross examined Appellants witnesses, stated or accused Appellant's witnesses of testifying falsely, and the conduct of the court during Appellant's testimony, it is clear that the District Judge's conduct deprived the Appellant of a fair trial.

It is not feasible to cite and catalog every instance of the court interrupting defense counsel, but any fair minded reading of the record clearly shows that the court was intent on not allowing the defense to try its case.

Counsel has read and reviewed the entire transcript of trial and there are literally hundreds of occasions when the trial court interrupts defense counsel, admonishes defense counsel and questions the witness during counsel's direct or cross-examination. There are numerous occasions in the presence of the jury when the court chastises defense counsel for presenting information that the court deems to not be necessary. The United States Attorney, whose job it is to prosecute the defendant, did not object to defense counsel's questioning on any of these occasions. The court interrupts counsel or questions the defendant on 168 occasions during his testimony.

The defense cites as an illustrative example the testimony of Michael Umscheid, but urges the court to review the entire transcript to show the manner in which the court interjected itself into the defense presentation:

Direct Testimony of Mr. Michael Umscheid (J.A. 2622-2740)

Mr. Umschied was an auditor called as a defense witness. All of the cited examples are instances in which there was no objection from the United States Attorney:

J.A. 2627-2630 On four occasions the court admonishes defense counsel to deal with a specific hedge fund;

J.A. 2631-2632	The court admonishes defense counsel to stop three times and tells him, in front of jury, he is not dealing with a proper issue;
J.A. 2635-2636	Court interrupts defense counsel and questions witness. Admonished defense counsel to stop;
J.A. 2638-2640	Court interrupts defense counsel and questions witness and defense counsel. Admonished defense counsel to stop;
J.A. 2641-2642	Court interrupts defense counsel and questions witness;
J.A. 2643	Court interrupts and questions defense counsel;
J.A. 2645-2646	Court questions witness;
J.A. 2646-2647	Court questions witness;
J.A. 2648-2649	Court questions witness;
J.A. 2651-2653	Court questions witness;
J.A. 2654-2655	Court questions witness;
J.A. 2657	Court questions witness;
J.A. 2660	Court questions witness;
J.A. 2661	Court questions witness;
J.A. 2665-2666	Court questions witness;
J.A. 2668	Court questions witness;
J.A. 2669-2670	Court questions witness;

J.A. 2671-2678	Court questions witness for seven pages of transcripts;
J.A. 2681-2683	Court questions witness;
J.A. 2684-2687	Court questions witness;
J.A. 2691	Court questions witness;
J.A. 2693	Court questions witness;
J.A. 2696	Court questions witness;
J.A. 2699-2702	Court questions witness;
J.A. 2702-2703	Court questions witness;
J.A. 2703-2704	Court, outside the presence of jury, warns the witness to testify factually and tells the witness the court's view of certain evidence.

The Untied States Attorney became so concerned about the Court's treatment of this witness that he expressed his concern about the court's questioning of Mr. Umscheid. (J.A. 2705)

The court continues its involvement in and interference with the defense presentation:

J.A. 2712	The court: "objection; asked and answered. Lets move along Mr. Broccoletti";
J.A. 2714	Court questions witness;
J.A. 2720-2722	Court admonishes defense counsel and questions witness;

J.A. 2726-2727	Court questions witness;
J.A. 2728	Court admonishes defense counsel;
J.A. 2731-2733	Court admonishes defense counsel in front of jury and questions his reasons for presenting certain evidence;
J.A. 2737	Court questions witness.

The court's involvement in the defense's presentation of Mr. Umscheid's testimony is demonstrative of how the court involved itself in all of the defense witnesses, and defense cross examinations.

The near constant interruption of defense counsel and admonitions that defense counsel was wasting time or was not focusing on proper issues completely undermines the integrity of the process. The trial court went so far as to on one occasion to accuse defense counsel of taking a discovery deposition during cross-examination of a key government witness. He then chastised defense counsel in front of the jury for not doing discovery before trial (J.A. 1946-47). Again this was done sua sponte by the court and not in response to an objection by counsel for the United States.

Finally, the court's questioning of and interference with the Appellant's testimony is beyond the standard set by *Godwin*. There is often no more crucial or compelling portion of a criminal trial than when the

defendant testifies in his own behalf. The credibility of the defendant is paramount and a jury's verdict often hinges on how the defendant's credibility and testimony is viewed. This is particularly true where the real issue in the case is intent as it was in this case. The stock valuations, fees paid, content of the PPM, and other financial figures in the case were not really at issue. What was at issue was whether the Appellant had knowingly and intentionally provided or obtained false information for his own gain. In this scenario, any suggestion by the trial court that the Appellant is not being straightforward and honest in his testimony has a devastating negative affect on the jury's impression of the Appellant. The defendant began his testimony at page 2944 of the joint appendix by being asked about his background and experience as had every witness for the United States. This is a key and critical point for the jury to assess the defendant and understand his background, his business and his experience. The court almost immediately and without objection from the United States, began to interrupt and admonish defense counsel as follows:

J.A. 2946 — The court "that's getting a little - - lets move on to the issues in the case"

J.A. 2952-54 — The court admonishes defense counsel on 3 occasions to get to an issue in the case.

This was while the defendant was attempting to explain the formation and expansion of his business in his own words, an issue the United States had called numerous witness to discuss. The court continues throughout the defendant's testimony to make lengthy interruptions to question him and admonish defense counsel. (J.A. 2944-3401)

The Appellant contends that the combination of the Court's comments toward defense counsel and the treatment and questioning of the defense witnesses including the Appellant, denied him due process and a fair trial. The Appellant request that the convictions be reversed and the case remanded for a new trial.

The Defense contends that the court's role in this matter actually affected the outcome. This case was one in which the actual conduct was not really in dispute, i.e. the various stock valuations, the fees paid to MICG, the Appellant's income based on those fees were not issues that the parties disputed. The only real issue was the Appellant's intent and purpose in relying on the valuations of Mr. Lynch. It thus becomes all the more important that the court not convey to the jury any sense of the court's opinion about the credibility of the defense witness and validity of the Appellant's belief and intention when taking the actions he did. The almost

constant questioning of defense witnesses, interruptions of the defense presentation, and admonishments to defense counsel could only convey to the jury that the court had disdain for and disbelief of the defense case.

ISSUE IV

THE DISTRICT COURT IMPROPERLY CALCULATED THE LOSS AMOUNT UNDER USSG 2B1.1.

A. STANDARD OF REVIEW

When addressing a claim that the District Court did not properly apply the sentencing guidelines, this court reviews the District Court's sentencing under "a deferential abuse-of-discretion standard." *United States v. Carter*, 564 F.3d. 325 (4th Cir. 2009). In assessing whether a sentencing court has properly applied the guidelines, [this Court] review[s] factual findings for clear error and legal conclusions de novo." *United States v. Llamas*, 599 F.3d 381, 387 (4th Cir. 2010) Clear error exists "only if 'on the entire evidence' [we are] 'left with the definite and firm conviction that a mistake has been committed" *United States v. Manigan*, 592 F.3d 621, 631 (4th Cir. 2010) (*Quoting Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

B. ARGUMENT

The District Court erred in refusing to consider market forces and other non-fraud factors in calculating the loss amount for the advisory

sentencing guidelines. The record of this case is replete with references to the economic circumstances and market downturn that occurred during the 2008-2009 time frame. Practically every witness who was involved in the financial management or investment field testified to the devastating effects of the economy on investments and money markets. The defense raised this issue at sentencing but the court refused to apply any analysis or to recognize that any of the losses were due to the market force that were separate and apart from any actions or decisions of the Appellant.

There is a large body of legal precedent that sets forth the requirement for a court to determine loss based only on fraudulent conduct and not hold a defendant accountable for losses that are based on market factors. The United States Supreme Court in *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005), made it clear that the court must consider market factors in determining a loss amount. Although *Dura*, *Supra* was a civil case, the concept that determining loss is subject to a market analysis has been applied by courts in a criminal context. *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). The logic of this approach is irrefutable, i.e. that someone should be punished only for the harm caused by their conduct not for events

and conditions which they did not cause or participate in and over which they had no control.

The court also failed to take into account the value of the other assets and potential future redemptions when calculating the loss amount pursuant to 2B1.1. The evidence in the case was clear that there was real value to the other assets in the Venture fund after EPV filed for bankruptcy. The courts have recognized that a proper loss calculation in a case such as the present one requires an analysis of and credit to the defendant for the amounts returned to or recovered by the victims and the fair market value of remaining assets and collateral. *United States v. Camp*, 2014 Lexis 6976 (4th Cir. Jan. 28, 2014, Unpublished) and *United States v. Snelling*, BL 261524 No. 12-4288 (6th Cir. 2014).

It is clear from the evidence in this case that investors in the Venture Fund and MICG profited by several million dollars during the time frame of the alleged fraud and at the time of sentencing the Venture Fund still held assets that were worth several million dollars, mainly the investment in the Derby Rams.

The District Court clearly erred in the approach that the loss amount was the same as the gross amount invested. The Appellant contends that the

actual loss is zero or nearly zero. This court's role is not to do the mathematical analysis of the loss amount, that calculation is for the District Court when applying a proper legal and factual standard. The Appellant requests that his court set aside the sentence and remand the case with an order to properly calculate the loss amount by applying the principles set forth above.

CONCLUSION

Appellant contends that the issues presented above are meritorious and, therefore, respectfully requests the Court to overturn his conviction and/or sentence and remand to the district court for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Jeffrey A. Martinovich, by counsel, asserts that the arguments contained in this Brief are complete and meritorious. The Appellant requests oral argument in order to address any issues raised by the United States and to answer any questions the court may have.

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Dated: November 21, 2014

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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