IN THE UNITED STATES DISTRICT Court
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. **ANTHONY JAMES DEMARCO, III,** **Defendant.**	**CRIMINAL ACTION** **NO. 10-790-1**

Baylson, J. **November 7, 2012**

MEMORANDUM RE: AMOUNT OF LOSS FOR DEFENDANT DEMARCO

Defendant entered a plea of guilty to all counts of the indictment, charging a massive mortgage fraud scheme, in which defendant was the undisputed leader and the most culpable. From the nature of the crime as well as the presentence report, it was obvious to defendant, and all others involved in this case, that the amount of loss would be a major factor in the calculation of the guideline offense level. Prior to the sentencing hearing, the government had supplied defense counsel with several drafts of the chart presented at the sentencing hearing, showing the government's calculations of the amount of loss. See government memorandum filed October 15, 2012 (ECF # 149).

Defendant's attorney, a very experienced trial lawyer in criminal cases, did not file any objections to the presentence report, and specifically stated at the outset of the sentencing hearing that he thought that the calculation of the amount of loss in the presentence report was correct. Mr. DeMarco then expressed some dissatisfaction with counsel's preparation for the sentencing hearing, and indicated that he objected to the calculation of the amount of loss and wanted a delay for his extensive review of various documents, including all of the HUD-1's, and time to review them with other records to challenge the amount of loss.

This memorandum is being filed to expand on the Court's decision at the time of

sentencing as to why the Court refused to delay the sentencing hearing.

The presentence report, which Mr. DeMarco received on July 16, 2012, was very detailed in its description of DeMarco's offense and relates the major events which the Probation Office garnered from the facts of record and the various victim statements. Concerning the loss amount, paragraph 85 of the presentence report summarizes the calculation as showing a loss greater than $7 million but not in excess of $20 million, specifically $17,846,457. 78, resulting in an addition of 20 levels to the base offense level of seven. *See* U.S.S.G. § 2B1.1(b)(1)(K).

At the hearing, the government presented a 27 page chart showing the "Fraud Loss Amounts". The key columns are columns are F and J entitled: "Loss to Seller (proceeds not received) and "net (loss)/gain to bank", respectively. These columns show totals in excess of $11 million and $6 million, respectively. As noted above, drafts of this chart had been provided to defense counsel well in advance the sentencing hearing. At the sentencing hearing the Government called as witnesses two agents who had prepared the charts and testified in detailed as to the charts. Both agents had worked extensively on this case. Both agents testified there is no possibility that the amount of total loss could have been less than $7 million, given the nature of the fraud, the number of victims, and the underlying value of the properties.

As long as the loss was at least $7 million, there would not be any change in the guideline calculation. Thus, there was a "$10 million leeway" for possible errors in the preparation of the chart.

Mr. DeMarco's claim at his sentencing hearing that his review of the underlying documents would result in a lower loss calculation is factually impossible and frivolous. There were a total of 135 properties, all of which had very substantial mortgage loans outstanding, and the chart reflects those amounts, themselves in excess of $30 million, and collateral valued at

over $24 million.

It should be noted that Mr. DeMarco also disputed one other factor in the presentence report, another finding reflected in paragraph 85. Mr. DeMarco disputed the addition of two levels for an asserted violation of a prior specific judicial or administrative order pursuant to U.S.S.G. § 2B1.1(b)(9)(C). After discussion on this point, the Court agreed with Mr. DeMarco that the government could not establish by a preponderance that this increase was proper and therefore reduced the calculated offense level by two levels.

The Court finds as a fact that the loss calculation was substantially accurate. The case law does not require anything more than a fair "estimation"of the loss. *See* the recent nonprecedential opinion of the Third Circuit in *United States v. O'Malley*, 2012 WL 39884457 (September 12, 2012) in which the Court summarized well settled Circuit law as follows:

> The government must prove loss by a preponderance of the evidence, after which the burden shifts to the defendant. The District Judge, who "is in a unique position to ... estimate the loss," "need only make a reasonable estimate of the loss ... based on available information." U.S.S.G. § 2B1.1 CMT. n. 3(C); This determination is reviewed for clear error, and may be reversed only if it is "completely devoid of a credible evidentiary basis," and the Court is "left with a definite and firm conviction that a mistake has been committed," 185, 199. It is the responsibility of an appellate Court to accept the factual determination of the fact-finder unless that determination either (1) is completely devoid of evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. U.S.S.G. § 2B1.1 CMT. N. 3 (C). We cannot say this finding was "completely devoid of a credible evidentiary basis."

The Court denied Mr. DeMarco's request for a delay in the sentencing for several reasons:

1. His attorney, with good grounds, had not objected to the calculations.

2. Although Mr. DeMarco should have been visited by his attorney before the sentencing hearing to review all of the government's calculations, Mr. DeMarco did not support his request for a continuance by showing he made any communication to his attorney. Mr.

DeMarco had received the presentence report on July 16, 2012. There is no evidence of record that he expressed any desire to object to the loss calculation or that he had any objections.[1]

3. Mr. DeMarco's last minute attempt to delay the sentencing proceeding was strategic in nature. The testimony of the victim witnesses who appeared in Court, was highly incriminating of defendant. Mr. DeMarco obviously wanted to have some time delay between the Court's hearing, those witnesses, and imposition of the sentence. The Court acted in its discretion in refusing to postpone the sentence. The Court concludes that Mr. DeMarco did not suffer any prejudice from the Court proceeding with the sentencing, despite the lack of substantial preparation to review the presentence report before the hearing with his attorney. However, the Court did require a four-hour delay for defendant and his counsel to meet and discuss the report.

Thus, all in all, Mr. DeMarco had a fair sentencing hearing. The Court believes that it acted wisely and properly within its discretion in refusing the request for a continuance and that a delay for Mr. DeMarco to review documents to try to challenge the calculated loss level, would not have resulted in any change in the offense level.

Since Mr. DeMarco received a sentence that was within the guideline range as calculated, the sentence imposed was fair and the proceedings leading up to it were also fair.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

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[1]The Court, of course, does not have any knowledge of privileged communications between Mr. DeMarco and his counsel, if any. Generally, post-conviction proceedings are the appropriate forum for consideration of disputes between defendant and his counsel, that may be relevant on an allegation of lack of adequate legal representation under 6th Amendment standards.