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The Honorable Raymond J. Dearie
Senior United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

U.S.A. v. Maksim Zaslavskiy, 17 CR 647 (s-1)(RJD)

Your Honor:

Mr. Zaslavskiy pled guilty to count two of the above-captioned indictment, conspiracy to commit securities fraud, a violation of 18 U.S.C. §371. Mr. Zaslavskiy is scheduled to be sentenced on May 20, 2019, at 11:00 a.m.

As detailed in our response to the Presentence report, we calculate Mr. Zaslavskiy's total offense level to be 9, his criminal history category to be I, and his recommended guideline range of imprisonment to be 4 to 10 months. This recommendation falls within Zone B of the sentencing table, and permits the Court to impose a sentence of probation, with a period of home confinement equal to the recommended range of imprisonment. *See* U.S.S.G. §§5B1.1(a)(2) and 5C1.1(c)(3). In Ms. Zaslavskiy's case, this would be a sentence of probation with at least 4 months of home confinement.

As will be detailed below, however, this is a sentence greater than necessary to achieve the goals of sentencing. We respectfully request that the Court, after considering all of the 18 U.S.C. §3553(a) factors, impose a sentence of probation without home confinement.

I. The factors to consider in determining sentence.

Pursuant to the holding of United States v. Booker, 543 U.S. 220 (2005), the Court is now required to consider all of the sentencing factors enumerated in 18 U.S.C. §3553(a). 18 U.S.C. §3553(a) requires the Court to impose a sentence sufficient, but not greater than necessary, to comply with the sentencing purposes set forth in §3553(a)(2).

1. 18 U.S.C. §3553(a)(1).

Pursuant to this factor, the Court is required to consider the nature and circumstances of the offense and the history and characteristics of Mr. Zaslavskiy

A. The nature and circumstances of the offense.

Mr. Zaslavskiy became interested in the emerging field of crypto currency, but believed that crypto currency needed to be hedged by real world assets to encourage investors to invest in and use the currency. Mr. Zaslavskiy's desire for, and his belief in, the importance of a hedge on crypto currency was founded in the fact that at one time, gold bullion was used as a hedge to secure almost all of the world's currencies. Mr. Zaslavskiy hoped that his crypto currency, and its block chain technology, could be used to create self-executing smart contracts, especially in the field of real estate, to reduce costs and encourage projects. Mr. Zaslavskiy eventually realized that real estate was too volatile in value to serve as a true hedge for his crypto currency. He decided to switch his hedge to diamonds, which he believed would be more stable in value and thus a true hedge for his crypto currency.

Mr. Zaslavskiy exaggerated and made false statements about the state of his project in his efforts to get investors, but his aim was simply that, to get investors and investment, not to steal from or cheat those investors. Mr. Zaslavskiy needed investment to finalize the block chain technology and various soft ware and hard ware platforms that would support the crypto currency. Without a large investor/investment base, Mr. Zaslavskiy could not achieve these goals. To get that investment, however, Mr. Zaslavskiy made false statements about having already purchased real estate and diamonds as a hedge for the currency, and false statements about the number of investors and the amount of investment to date.

At no time, however, did Mr. Zaslavskiy seek to enrich himself by taking investors' money. This is demonstrated by the fact that he was able to refund almost all of the money invested in the project, once he was contacted by the SEC, and they raised their concern that this was a security, not a currency investment. The fact that Mr. Zaslavskiy delayed using investors' money is indicative of the fact that he had no intent to steal investors' money for himself.

B. The history and characteristics of Mr. Zaslavskiy.

Mr. Zaslavskiy's personal history is accurately reported in the Presentence report (PSR) at ¶¶55-102, with the exception of the corrections that we brought to the attention of the Probation Department in our response to the PSR dated May 3, 2019.

What was not detailed in the PSR, and what is detailed in the letters from friends and family enclosed in exhibit A, is what a good, caring, generous friend Mr. Zaslavskiy is and has been. From the time he was a child, Mr. Zaslavskiy has been helping his family and his friends. From cooking the family meals to provide respite to his mother, who was working and studying to be a nurse; to providing aid and companionship to the elderly; to supporting his friends emotionally and financially through their times of trouble; to working to support his synagogues, Mr. Zaslavskiy has endeavored to be a good and caring member of society.

Mr. Zaslavskiy emigrated with his family to the United States to get away from the anti-Semitism they faced in Ukraine. Mr. Zaslavskiy attended high school in Queens and worked while he was in high school to help support his family. Mr. Zaslavskiy had an aptitude for computers, and after leaving high school went to work for various firms as a computer consultant. These firms included UBS, Merrill Lynch, and Sikorsky. Mr. Zaslavskiy then started his own computer consulting firm, "King of Beasts," and worked world-wide as a computer consultant. Mr. Zaslavskiy earned an executive Masters Degree in Finance and an LLM along the way.

Mr. Zaslavskiy describes this as a time when he was working almost constantly, and had no time for a personal life or time to consider life in a broader sense. By 2009 he was burnt out, his company had failed, and he began working sporadically simply as a way to keep body and soul together. When crypto currencies and block chain technology emerged, Mr. Zaslavskiy found an idea that interested him, and ignited his desire to participate in this fast growing field. He believed that he could create a crypto currency that would have real benefit in the world of real estate, and he began to try to implement his ideas in the form of ReCoin and Diamond.

2. 18 U.S.C. §3553(a)(2).

The Court is next required to consider the following four factors in determining the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational, or vocational training, medical care, or other correctional treatment in the most effective manner.

A. A sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

While Mr. Zaslavskiy made false statements to encourage investment in ReCoin and Diamond, he did not make those statements with the hope of getting money from investors to personally enrich himself. He tried to get investors and investment to bring his project to fruition. While making false statements to investors is never acceptable, this is a very different case from the ones the Court usually sees where a defendant is making false statements to steal investor money to buy houses, boats, cars, or fund a lavish life style for himself.

A felony conviction and sentence of probation reflects the seriousness of the offense and will punish Mr. Zaslavskiy. In addition to the common civil disabilities that result from a felony conviction, Mr. Zaslavskiy will be permanently barred from the securities field and, upon information and belief, will be permanently barred from serving as a corporate officer or director.

The collateral consequences of the conviction and the period of probation will promote respect for the law, demonstrating that false statements to investors are not acceptable, even when they are made without the intent to steal or cheat investors. The sentence will also provide just punishment for the offense, demonstrating that despite the fact that false statements to investors are illegal, the Court recognizes the difference between false statements made to fund an economic project, versus false statements made to steal money and personally enrich the maker of the false statements.

B. A sentence to adequately deter criminal conduct.

This is Mr. Zaslavskiy's first offense. He is 39 years old and there is no reason to believe he will ever engage in criminal activity in the future. If Mr. Zaslavskiy violated the terms of his probation, the sentence he faces for such a violation is any sentence originally available under the statute or recommended by the sentencing guidelines for the instant offense.

Mr. Zaslavskiy's lack of a criminal history until this offense, and the penalties he faces for any violation of probation, will make a probationary sentence sufficient to deter criminal conduct in his case.

C. A sentence to protect the public from any future crimes on the part of Mr. Zaslavskiy.

The penalties Mr. Zaslavskiy faces for any violation of probation will serve to protect the public as well.

D. A sentence to provide needed educational, vocational, or medical treatment.

Mr. Zaslavskiy is educated and has been employed for many years, so there is no need to impose an incarceratory sentence to achieve these goals. Once the case is resolved and the SEC has removed the financial prohibitions against Mr. Zaslavskiy, which currently prevent him from having any bank or credit accounts, he will be able to work on the books again. As the Court is aware from his travel to Puerto Rico, Mr. Zaslavskiy is interested in working in the real estate market there to help promote the island's recovery after Hurricane Maria.

There is no need to impose an incarceratory sentence to achieve medical treatment.

3. 18 U.S.C. §3553(a)(3).

The Court must next consider the kinds of sentences available. Mr. Zaslavskiy is not subject to any mandatory sentence, so all sentencing options are available to the Court.

4. 18 U.S.C. §3553(a)(4).

As detailed in our response to the PSR, we disagree with the Probation Department's guideline calculation.

First, as detailed in our response, we disagree with the loss amount in ¶36. Mr. Zaslavskiy and his civil attorneys provided the SEC with documents detailing that almost all of the money invested in ReCoin and Diamond was refunded to investors. The only loss in this case is approximately \$13,000 that was invested via Amazon, credited to the Amazon account, but used by Amazon, via an automatic deduction system, to pay for advertising for ReCoin and Diamond. This money was thus not available to be refunded to investors. Mr. Zaslavskiy is committed to repaying this money, and again, had no intention of a loss to the investor, but the loss is the result of Amazon's automatic deductions from the account for advertising costs, and the SEC freezing Mr. Zaslavskiy's financial account so that he could not access information to refund the money.

Guideline §2B1.1, application note 3.E.(i), states that loss amount shall be reduced by money returned. As a result of the money being returned to the investors, the only "loss," if counted as such, is \$13,000. This results in a specific offense increase of 2 points.

Second, we disagree that Mr. Zaslavskiy should receive a guideline enhancement in ¶38 for holding himself out as an investment advisor. While Mr. Zaslavskiy promoted investment in ReCoin and Diamond, he did not hold himself out to be an investment advisor as defined under securities law and the sentencing guidelines. The sentencing guidelines, in §2B1.1, application note 16(a), states the term 'investment advisor' has the meaning assigned to it in 15 U.S.C. §80b-2(a)(11). According to that provision of the statute,

“Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities;

At no time during this offense did Mr. Zaslavskiy engage in the business of advising others about securities, nor was he compensated for investment advice. As a result, this enhancement should not apply.

Our guideline offense computation is as follow:

¶35:	Base offense level:	6
¶36	Loss	2
¶37:	Mass marketing:	2
¶40:	Organizer	<u>2</u>
¶42:	Adjusted offense level	12
¶44	Acceptance	-2
¶45	Timely acceptance	<u>-1</u>
¶46	Total offense level	9

In criminal history category I, this offense level carries a guideline recommendation of 4 to 10 months in custody. This offense level is in Zone B, so home confinement can be substituted for the custodial portion of the sentence. *See* U.S.S.G. §§5B1.1(a)(2) and 5C1.1(c)(3). In Mr. Zaslavskiy’s case, this would be a sentence of probation with at least 4 months of home confinement.

As detailed above, however, the deductions by Amazon for advertising costs, and the freezing of Mr. Zaslavskiy’s accounts by the SEC, do not reflect an intent on Mr. Zaslavskiy’s part to subject investors to a loss. If the 2 point enhancement for loss were removed, the total offense level would be 7, which, in criminal history category I, recommends a sentence of 0 to 6 months in custody. This is a sentence within Zone A of the sentencing table, and permits a sentence of probation with no home confinement requirement.

5. 18 U.S.C. §3553(a)(5).

The Court must next consider whether there are any pertinent policy statements issued by the sentencing commission that would affect Mr. Zaslavskiy’s sentence. While not a policy statement, there is a statutory mandate in 28 U.S.C. §994(j) that states:

“The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first

offender who has not been convicted of a crime of violence or an otherwise serious offense. . . “

This mandate would encourage the Court to impose a sentence of probation in Mr. Zaslavskiy’s case.

6. 18 U.S.C. §3553(a)(6).

The Court must next consider the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. Given the nature of the offense and the fact that it was not a scheme to steal money from the investors, given Mr. Zaslavskiy’s restitution to almost all of the investors, and given his compliance with pretrial supervision, a sentence of probation without home confinement would not create unwarranted sentencing disparity.

7. 18 U.S.C. §3553(a)(7).

The Court next needs to determine if there are any victims in the case requiring restitution. As detailed above, there remains approximately \$13,000 of restitution to investors in ReCoin and Diamond. Mr. Zaslavskiy cannot begin to make this restitution, however, until the SEC unfreezes the financial accounts associated with investment in ReCoin and Diamond, which will permit Mr. Zaslavskiy to get access to the electronic wallets where investor information is stored. Mr. Zaslavskiy is committed to repaying these investors as soon as he is able.

II. Conclusion.

For the reasons set forth above, we respectfully request that the Court impose a sentence of probation and restitution. This is a sentence sufficient, but not greater than necessary, to achieve the goals of sentencing.

Respectfully submitted,

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enc.

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