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## INTEREST OF *AMICI CURIAE* AND INTRODUCTION

The National Association of Criminal Defense Lawyers (“NACDL”) is the nation’s preeminent professional bar association of criminal defense attorneys. Founded in 1958, the Association has 12,000-plus direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling more than 40,000 attorneys, who are private lawyers, public defenders, and military defense counsel. They and the NACDL seek to ensure justice for all criminal defendants.

The New York State Association of Criminal Defense Lawyers, (“NYSACDL”), formed in 1986, is a statewide organization of more than 850 attorneys. The NYSACDL is responsive to the needs of private practitioners as well as public defenders, and is dedicated to assuring equal protection of individual rights and liberties for all. The NYSACDL is one of the NACDL’s largest affiliates.

The New York Council of Defense Lawyers (“NYCDL”) is a not-for-profit professional association of approximately 240 lawyers, many of whom are former prosecutors, whose principal area of practice is criminal defense in federal and state courts in New York. NYCDL’s mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice. As amicus, NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant white collar criminal cases in federal and state courts. NYCDL’s amicus briefs have been cited by the Court or concurring justices in cases such as Rita v. United States, 551 U.S. 338, 373 (2007) (Scalia, J., concurring in the judgment), and United States v. Booker, 543 U.S. 220, 266 (2005).

This case raises questions of great interest to the *amici* organizations regarding the loss analysis to be applied under the United States Sentencing Guidelines (“Guidelines”) in cases involving fraud.<sup>1</sup> In its response to the sentencing submission of defendant Ivy Woolf Turk, the government acknowledges a line of Second Circuit cases holding that defendants are responsible only for those losses that result from their particular offense conduct, rather than for losses that are caused by outside forces. See, e.g., United States v. Ebberts, 458 F.3d 110, 128 (2d Cir. 2006) (“Losses from causes other than the fraud must be excluded from the loss calculation.”); United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007) (remanding because the district court failed to consider how factors other than defendant’s fraud contributed to the decline of the company’s stock price). However, the government then argues that this fundamental principle is limited to the narrow context of securities fraud matters. Gov’t Sentencing Memorandum at 5-6. In other words, the government contends that while defendants charged with securities fraud should receive the benefit of proximate cause principles adopted by the United States Sentencing Commission (“Sentencing Commission”) and articulated by various courts of appeals (including the Second Circuit), defendants in all other types of fraud cases are not entitled to such a loss analysis, and should instead be sentenced based on even those losses that their conduct did not proximately cause.

The government’s position is not only unsupported, but also would create significant injustice. It can hardly be disputed that the Guidelines were intended to establish a principled system in which sentencing decisions would be premised upon a defendant’s culpability, and in cases involving fraud, culpability is gauged primarily by the loss table set forth in Guidelines

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<sup>1</sup> This *amici curiae* brief is limited solely to legal issues regarding loss causation under the Guidelines. The *amici* organizations take no position as to the factual and other legal disputes at issue between the parties.

Section 2B1.1(b). However, subject to certain exceptions that are not relevant here, the method of applying the loss table does not turn on the type of fraud a defendant has committed. To the contrary, the Guidelines, case law and principles of fundamental fairness each require that defendants who are to be sentenced pursuant to Section 2B1.1(b) be held accountable only for those losses that bear a sufficient causal link to their offense, and the government's efforts to limit proximate cause analysis to securities fraud cases cannot be squared with the weight of this authority.

Further, the limitation of principles of proximate causation to only securities fraud cases would also cause what other courts have recognized as the “utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic.” United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006); United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (“While I acknowledge that the Guidelines ‘reflect Congress’ judgment as to the appropriate national policy for such crimes,’ this does not mean that the Sentencing Guidelines for white-collar crimes should be a black stain on common sense.”) (internal citation omitted). As explained in more detail below, calculating actual loss using a methodology that identifies the losses that the defendant’s fraud actually caused is not only consistent with well-established precedent, but also represents an approach to sentencing that is “cabined by common sense” and will result in sentences that are just and reasonable under the circumstances presented. Adelson, 441 F. Supp. 2d at 512.

In addressing the issues raised by the government’s sentencing submission, this memorandum of law is divided into three main parts. First, the memorandum discusses the body of well-settled law in which the Second Circuit has held that defendants are to be sentenced based only upon those losses that their conduct proximately caused. Second, the memorandum

addresses the government's attempt to limit this loss causation analysis to the narrow area of securities fraud matters, and demonstrates the unpersuasive nature of the government's efforts. Third and last, the memorandum discusses the manner in which the government's position, if adopted, would undermine the purposes of the Guidelines, and would result in the types of exceedingly lengthy and egregiously harsh sentences that are a "black stain on common sense." Parris, 573 F. Supp. 2d at 754.

**I. THE GUIDELINES AND SECOND CIRCUIT PRECEDENT APPLYING PROXIMATE CAUSE PRINCIPLES**

Section 2B1.1(b) of the Guidelines provides for an enhancement of a fraud defendant's offense level based upon, among other factors, the amount of losses involved. The amount of loss attributed to the defendant significantly impacts a defendant's Guidelines calculation—while a loss of more than \$5,000 will lead to a 2 level enhancement, a loss of more than \$1 million will cause a 16 level enhancement, and a loss of more than \$20 million will cause a 22 level enhancement. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1) (2008). In the commentary to Section 2B1.1, the Sentencing Commission explained that, for purposes of this loss table, losses should be calculated based upon either the actual loss or intended loss from the offense, whichever is greater. (The government concedes that "intended loss" is "irrelevant" in this case. Gov't Sentencing Memorandum at 14.) Actual loss is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense." U.S. Sentencing Guidelines Manual § 2B1.1 cmt. n.3(A)(i). The wording of Application Note 3(A)(ii) suggests that "actual loss" under Section 2B1.1 has three components: pecuniary harm to the victim(s), that such harm was "reasonably foreseeable," and that the pecuniary harm must have resulted from the offense.

In what is now a firmly settled body of case law, the Second Circuit set forth the appropriate means by which sentencing courts applying Section 2B1.1 are to reach reasonable

estimates of both intended and actual losses resulting from an offense. The calculation of actual loss requires a purely objective assessment of the cause of the losses. In cases in which actual loss is used as the measurement of losses for purposes of Section 2B1.1(b), the case law has followed the text of the Guidelines' Application Notes in holding that "[t]he loss must be the result of the fraud," and "[l]osses from causes other than the fraud must be excluded from the loss calculation." Ebbers, 458 F.3d at 128 (citation omitted). This means that losses caused by a defendant's criminal conduct must be untangled from losses caused by outside events such as market forces, and the losses caused by such outside forces must not be included in the Guidelines calculation. Rutkoske, 506 F.3d at 179; see also United States v. Zolp, 479 F.3d 715, 719 (9th Cir. 2007) ("[T]he court must disentangle the underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation of that value due to unrelated causes."). In other words, where the revelation of a fraud coincides with or is followed by a decline in the market value of an asset, thereby resulting in a loss to investors, actual loss is to include only that the portion of the decline in value that is directly attributable to the fraud. See Ebbers, 458 F.3d at 128 (citing United States v. Olis, 429 F.3d 540 (5th Cir. 2005)).

The Second Circuit's decision in United States v. Ebbers provides a clear demonstration of these fundamental principles. Ebbers, the former CEO of WorldCom, Inc., was convicted of a massive fraud that artificially inflated the company's stock price. For purposes of Ebbers's Guidelines loss calculation, the court took a narrow view of the loss attributable to Ebbers's fraud, explaining that actual loss consisted only of the losses "suffered by those investors who bought or held WorldCom stock during the fraud period either in express reliance on the accuracy of the [company's] financial statements or in reliance on what Basic, Inc. v. Levinson described as the 'integrity' of the existing market place." Ebbers, 458 F.3d at 126-27. The

Second Circuit further held that losses attributable to other causes, such as outside market pressures on the price of WorldCom stock, could not be included in the amount of actual loss used to enhance Ebbers's sentence. Id. at 128. Given the dramatic scale of the fraud in the Ebbers case, the exclusion of losses caused by outside forces had no practical effect, because even a correct actual loss calculation resulted in a loss figure that exceeded the top of the Guidelines. Nonetheless, the court clearly cautioned that sentencing courts must untangle the numerous factors that could contribute to victim losses, and thereby ensure that defendants are sentenced only on the basis of losses their specific criminal conduct actually caused. Id. ("Many factors causing a decline in a company's performance may become publicly known around the time of the fraud and be one cause in the difference in price between X-day and Y-day. . . . Losses from causes other than the fraud must be excluded from the loss calculation.").

The Second Circuit's subsequent decision in United States v. Rutkoske further underscores this point. Rutkoske had been the owner of a brokerage firm that encouraged its customers to invest in a company known as NetBet, the stock of which Rutkoske's firm not only owned but also manipulated. When NetBet's stock price collapsed, the brokerage firm's customers lost over \$12 million. To calculate actual losses for sentencing purposes, the district court used the difference between the stock price at the time the conspiracy began and on the last date for which the parties had price information for the stock from market makers, which was after the conspiracy ended. On appeal, the Second Circuit found this to be reversible error, because the district court's actual loss calculation had "implicitly attributed the total amount of the decline in the value of NetBet shares to Rutkoske's offense conduct" without considering or accounting for the impact of non-fraud causes for the decline. Rutkoske, 506 F.3d at 178.

