



U.S. v. BRAZEEL

2004 | Cited 0 times | D. Maryland | April 14, 2004

MEMORANDUM

On May 20, 2003, the defendant Dale Brazeel pled guilty to one count of wire fraud, in violation of 18 U.S.C. § 1343. The government and the defendant disagree over the calculation of the amount of loss under § 2F 1.1 of the Sentencing Guidelines. The government argues that the offense level should be increased by twelve levels, because the amount of loss is between \$1.5 million and \$2.5 million. U.S.S.G. § 2F1.1(b)(1)(M).¹ The defendant argues that the offense level should be increased by only eleven levels, because the amount of loss is between \$800,000 and \$1.5 million. Id. § 2F1.1(b)(1)(L).

Brazeel was the President of Sabre Product, Inc. ("Sabre"), a company located in San Luis, Arizona that sold fresh produce to supermarkets and other grocery distributors.² In 1997, Sabre entered into a "factoring" agreement with Reservoir Capital Corporation ("RCC"), a lending and accounts receivable factoring company located in Owings Mills, Maryland. RCC agreed to purchase certain creditworthy accounts receivable from Sabre for collection, advancing Sabre approximately 75 percent of the invoiced amounts at the time of purchase. RCC would withhold the remaining 25 percent of the invoiced amounts as its reserve, pending final payment by Sabre's retail customers. The identified account debtors (Sabre's retail customers) then were instructed to make direct payments to RCC. Once RCC collected the full invoiced amounts from the account debtors, RCC would remit part of the 25 percent reserve to Sabre and retain the rest as a fee. The government states that, on average, RCC remitted between 20 to 22 percent of the total invoiced amounts—the majority of the 25 percent reserve which previously had been withheld — to Brazeel. (Gov't's Letter of Feb. 4, 2004, at 2-3.)

Pursuant to the agreement, beginning in July 1997 Brazeel submitted daily schedules of current accounts receivable to RCC, along with invoices and bills of lading to verify the listed transactions. Between October 1999 and December 2000, Brazeel created fictitious bills of lading and invoices and sold these non-existent accounts receivable to RCC for millions of dollars. In order to continue the scheme without detection, Brazeel then forwarded some of the advanced funds that he received from RCC for the fictitious invoices to two of Sabre's customers, S.L. Cooling, LLC and John Livacich Produce. S.L. Cooling and John Livacich Produce in turn used these funds to make payments to RCC for some of the fictitious invoices. The bulk of the payments that RCC made to Brazeel for fictitious invoices thus were recycled to RCC as payments from the two customers for fictitious invoices. RCC discovered the fraud in late 2000 and confronted Brazeel on December 28, 2000.

Over the course of the scheme, Brazeel submitted approximately \$28.522 million in fictitious invoices to RCC, and received advances of approximately \$21.391 million for these invoices. The



U.S. v. BRAZEEL

2004 | Cited 0 times | D. Maryland | April 14, 2004

Presentence Investigation Report relies on this figure as the amount of loss (Presentence Investigation Report at ¶ 42), warranting a sixteen-level increase in the offense level. U.S.S.G. § 2F1.1(b)(1)(Q). However, both the government and the defendant agree that this figure overstates the amount of loss, because Brazeel recycled much of the approximately \$21.391 million that he received back to RCC as payments from Sabre's customers for the fictitious invoices.³ (Gov't's Mem. at 7-8; Def.'s Mem. at 2-3.) At the time that the fraud was discovered on December 28, 2000, RCC had \$2,538,086 in outstanding fictitious invoices from Sabre, and had advanced approximately \$1,903,564.50 to Brazeel for these invoices.⁴

The court agrees with the parties that these figures provide a better starting point for calculating the amount of loss, because the facts of this case are most comparable to a fraudulent loan application case. Brazeel received advances for 75 percent of the face value of the factored invoices accepted by RCC, comparable to multiple loan payments, but these loan payments were based on intentional misrepresentations by Brazeel about the assets that he had pledged as security for the loans, the non-existent accounts receivable themselves. In fraudulent loan application cases, loss is defined in terms of actual loss to the victim:

[I]f a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. U.S.S.G. § 2F1.1, comment. n.8(b). In Brazeel's case, the un-repaid amount of the loan payments at the time of discovery would be the \$1,903,564.50 that had been advanced to Brazeel for the outstanding fictitious invoices.⁵

The remaining issue is whether RCC "has recovered (or can expect to recover) from any assets pledged to secure the loan." *Id.* In their filings with the court and at a motions hearing on January 16, 2004, the government and the defendant disputed whether a sum of \$866,519.90 was available as an asset to offset the advances paid to Brazeel for the outstanding fictitious invoices. Both parties agree that funds in this amount were disbursed to Brazeel in 2001, after the fraud was discovered. The government stated that this figure represented the 25 percent reserve that RCC withheld pending final payment for legitimate invoices that Brazeel submitted to RCC in 2001, after the fraud was discovered. (Gov't's Reply at 2-3.) The defendant, on the other hand, stated that a significant portion of those funds represented the 25 percent reserve withheld for legitimate invoices that Brazeel submitted to RCC in 2000, before the fraud was discovered. (Def.'s Mem. at 3.) In order to clarify the record, the court asked the government and defense counsel to review the relevant records to determine the source of these funds, and both parties now have submitted supplemental letters to the court.

The parties rely on new figures provided by RCC indicating the status of Sabre's account with RCC as of the close of business on December 28, 2000, the date that RCC confronted Brazeel regarding the fraud. These figures show that RCC held \$1,941,261.30 in legitimate invoices submitted by Brazeel as



U.S. v. BRAZEEL

2004 | Cited 0 times | D. Maryland | April 14, 2004

of the close of business on December 28. (Def.'s Letter of Feb. 4, 2004, at Ex. 1.) RCC already would have advanced approximately 75 percent of the face value of these invoices to Brazeel, or \$1,455,945.98. Once these legitimate invoices were paid in full, RCC would have remitted an additional 20 to 22 percent of their face value to Brazeel, after subtracting out RCC's processing and servicing fees and accounting for any invoices that never were paid off in full. (Gov't's Letter of Feb. 4, 2004, at 2-3.) These potential future remittances to Brazeel would have totaled from \$388,252.60 to \$427,077.48, depending on the final amount of fees charged by RCC. (Id at 2.) If these future remittances were considered as pledged assets and were offset against the \$1,903,564.50 in outstanding advances to Brazeel for fraudulent invoices, the result would be an amount of loss between \$1,476,487.10 and \$1,515,311.90, very close to a breaking point in the Sentencing Guidelines.⁶

The defendant seeks to apply these anticipated remittances as offsets against the amount of loss. In its original filings with the court and at the motions hearing on January 16, 2004, the government has argued against this position.⁷ The court agrees with the government that these funds are more properly characterized as a potential source of restitution, rather than as assets pledged to secure the \$1,903,564.50 in previous payments made to Brazeel for the fictitious invoices. The future remittances that Brazeel expected to receive for outstanding legitimate invoices had not been pledged to secure the fictitious invoices. Indeed, the only "assets" formally pledged to secure the fictitious invoices were the anticipated future collections on the accounts themselves, which were worthless. Moreover, the anticipated remittances were not immediately available in December 2000 when the fraud was discovered. The actual cash receipts for the outstanding legitimate invoices were received by RCC over the ensuing months, as the accounts were paid off. This case thus can be distinguished from the cases cited by the defendant, in which the victim had been granted the right to seize specific assets as collateral for loans that had been obtained fraudulently, and the assets were immediately available for forfeiture. See *United States v. Wright*, 60 F.3d 240, 240, 242 (6th Cir. 1995) (bank foreclosed on mortgage and cash funds in other accounts that had served as collateral for loan); *United States v. Lavoie*, 19 F.3d 1102, 1105 (6th Cir. 1994) (bank repossessed automobile that had served as collateral for automobile loan).

At most the anticipated future remittances to Sabre amount to restitution paid to the victim after the fraudulent scheme was discovered, which cannot be applied to reduce the amount of loss under the Sentencing Guidelines. See *United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) ("Whether [the victim] may recover from [the defendant's] other assets is akin to restitution and is not a proper consideration in determining the loss suffered as a result of the fraud."); *United States v. Wilson*, 980 F.2d 259, 261-62 (4th Cir. 1992).⁸

The final amount of loss is \$1,903,564.50, requiring a twelve-level increase to the base offense level under the Sentencing Guidelines. See U.S.S.G. § 2F1.1(b)(1)(M).⁹

A separate order follows. ORDER



U.S. v. BRAZEEL

2004 | Cited 0 times | D. Maryland | April 14, 2004

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that: 1. the amount of loss under § 2F1.1 of the Sentencing Guidelines is calculated as \$1,903,564.50, requiring a twelve-level increase to the base offense level; 2. copies of this Order and the accompanying Memorandum shall be sent to counsel of record.

1. Both parties agree that the Sentencing Guidelines effective November 1, 2000 must be applied to this case because of the ex postfacto doctrine. (Gov't's Mem. at 1 n.l; Def.'s Mem. at 1.1.)
2. The factual background presented here is based on the facts stipulated to in Brazeel's plea agreement.
3. S.L. Cooling paid over \$18 million to RCC for fictitious invoices, and John Livacich Produce paid over \$3 million to RCC for fictitious invoices.
4. This figure is based on a list of admittedly fictitious outstanding invoices, which Brazeel submitted to RCC after he was caught. RCC's auditor identified another \$251,713 in fictitious or questionable outstanding invoices, but the government has agreed not to contest these. (Gov't's Mem. at n.3.)
5. Both the government and the defendant implicitly agree that the amount of loss should be calculated based on the value of the outstanding fictitious invoices submitted by Brazeel, not including outstanding legitimate invoices. Cf *United States v. Wilson*, 980 F.2d 259, 262 (4th Cir. 1992) (limiting amount of loss under § 2F1.1 in fraudulent loan application case to the amount of loss related to the false statement, rather than the total loan amount).
6. The defendant's supplemental letter relies on other calculations performed by an employee of RCC, Vicki Tillman, which the government states (and Ms. Tillman apparently now admits) are erroneous. (Def.'s Letter of Feb. 4, 2004; Gov't's Letter of Feb. 4, 2004, at 2-4.) These calculations are not relevant unless the anticipated reserves on legitimate invoices that had not yet been paid as of December 28, 2000 can be used to offset the amount of loss, an argument that the court rejects. See *infra*.
7. The government's most recent letter filing with the court, dated February 4, 2004, is limited to addressing the court's request for clarification of the factual record, and thus does not reiterate these arguments.
8. For the same reason, the amount of loss will not be reduced by other amounts repaid to RCC by Brazeel after the discovery of the fraud, or by amounts collected on legitimate invoices that were submitted to RCC by Sabre after the discovery of the fraud. (See Def.'s Mem. at 3-5.)
9. The government has argued that the amount of loss should be increased by an additional \$168,774.27 for unpaid processing fees charged by RCC and \$101,563.84 for various fees incurred by RCC for the company's investigation of the fraud scheme. (See Gov't's Mem. at 14-16; Reply at 5n. 1, 6-7.) The government's most recent letter filing with the court also suggests that the total amount of loss could be offset by \$165,303.77, which is listed as the ending balance in Sabre's "reserve account" with RCC as of the close of business on December 28, 2000. (Gov't's Letter of Feb. 4, 2004, at 3.) The court does not need to consider these arguments, because they would not make a difference in the applicable range



U.S. v. BRAZEEL

2004 | Cited 0 times | D. Maryland | April 14, 2004

under the Sentencing Guidelines.

