

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16949

In the Matter of

Sandip Shah,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM

Pursuant to this Court's July 20 Order the Division files the following Reply Memorandum.

- A. The Agreed Upon Resolution Between the Division and Mr. Shah Provides a Basis for the Court Imposing a Penny Stock Bar

As indicated in its June 21, 2016, Status Report, Counsel for the Division and Respondent, Sandip Shah, engaged in discussions and exchanged proposals that led to the Division and Mr. Shah agreeing on an approach for resolving this matter. The parties agreed that the primary issue in the case is that of sanctions and, therefore, agreed that they would enter into a stipulation regarding liability. In that stipulation, Mr. Shah would stipulate on the record that he is liable for the violations alleged in the Order Instituting Proceedings in this matter (OIP).

Throughout the case, Mr. Shah has proceeded *pro se*. In addition, he has been and remains incarcerated in a federal correctional facility. As a result, the logistics of communicating with Mr. Shah have been difficult. Nonetheless, an agreement was reached and the Division believes it still offers a path to resolution of this matter. The Division set out the nature of the stipulation agreed to between it and Mr. Shah in both its

Status Report and Memorandum regarding sanctions. Mr. Shah's submission regarding sanctions clearly creates confusion as to whether he, in fact, has agreed to stipulate as described above. The Division submits that, based on its discussions and other communications with Mr. Shah, he both understands and agrees to the stipulation outlined by the Division and would acknowledge such in a conference with the Court. Getting Mr. Shah to enter into a formal written stipulation is problematic, however, because of his insistence on correcting any item in the OIP with which he disagrees. Obviously the fact that Mr. Shah is proceeding *pro se* complicates this process.

The Division also submits for the Court's consideration the Sentencing Memorandum submitted on behalf of Mr. Shah in the criminal case related to this administrative proceeding, *United States of America v. Sandip Shah, Case No. 1:14-cr-10135 NMG. See Exhibit 1*. The Sentencing Memorandum addresses the same tension that Mr. Shah discusses in his submission regarding sanctions in this proceeding. In it, Mr. Shah states that he traveled to Boston and agreed to meetings with an individual who turned out to be an undercover FBI agent ("UA") for entirely appropriate (and legal) reasons. *Sentencing Memorandum, pp. 5, 7 and 12*. Mr. Shah states that he was "initially not even offered a kickback, spent his own money for travel and his time to come to Boston to try and get money for these companies to help them and to help promote his business." *Id., p. 12*. In other words, Mr. Shah argues that he did not start down the path that led to his criminal convictions, and to the charges in this matter, intending to violate the law. He argues the same thing in his submission regarding sanctions when he states he did not have ill intent or scienter; that he did not go looking for illegal investments; that there was no intent to engage in anything illegal when the meetings were set; and that

he and the CEOs he worked with had no premeditated plan to get involved in this fraudulent scheme.

In the same Sentencing Memorandum, however, Mr. Shah acknowledges that at some point in his dealings with the UA, “he knew it was not right and he continued to be involved in the illegal scheme” (*Id.*, p. 5); “[h]e was presented with an opportunity and instead of declining and doing it the right way, he chose to go down a path that was illegal” (*Id.*, p. 5); and [o]nce he became embroiled in the scheme, including getting a percentage of the kickbacks, he received a total of approximately \$5800” (*Id.*, p. 12). Mr. Shah, no longer represented by counsel, essentially acknowledges these same items in his current submission. He admits he received an additional fee from the UA, but states that he did not ask for it or think about it until it was presented to him. He states that none of the wrongdoing that occurred would have taken place if it had not been presented by the fund manager (i.e., the UA). And he admits that he made errors and overlooked details and acknowledges that he got involved in what turned out to be an illegal kickback scheme. Viewing his statements in context, the Division believes Mr. Shah is attempting to enter into the stipulation he has discussed with the Division.

Therefore, the Division submits that convening a telephone conference in this matter may present an effective means of resolving these issues. Assuming the Court is satisfied with the stipulation Mr. Shah is willing to agree to on the record at such a conference, it could also function as an opportunity for argument on the issue of sanctions.

B. Mr. Shah's Criminal Conviction Provides a Basis for the Court Imposing a Penny Stock Bar

As discussed in its initial Memorandum regarding sanctions, Section 15(b)(6)(A) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A), authorizes the Commission to impose penny stock bars in administrative proceedings. Like the statutory authority for federal courts, section 15(b)(6)(A) authorizes the Commission to impose the bar on “any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock.” In addition, section 15(b)(6)(A)(ii) authorizes the Commission to impose a penny stock bar when an individual has been convicted of certain specified offenses, including any felony or misdemeanor involving the purchase or sale of any security. Section 15(b)(6)(A) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A); Section 15(b)(4)(B)(i) of the Exchange Act, 15 U.S.C. § 78o(b)(4)(B)(i). Mr. Shah's convictions for wire fraud easily fall within this category of offenses. In addition, Section 15(b)(4)(B)(iv) of the Exchange Act, 15 U.S.C. § 78o(b)(4)(B)(iv) specifically enumerates wire fraud (18 U.S. C. § 1343) as an offense that triggers the Commission's authority to impose a penny stock bar pursuant to Section 15(b)(6)(A)(ii) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A)(ii).

The Division's initial Memorandum clearly established Mr. Shah's conviction, which he has not appealed. His submission on sanctions acknowledges his criminal conviction. Therefore, liability may be found and a penny stock bar imposed.

Dated: July 26, 2016

Respectfully submitted,

DIVISION OF ENFORCEMENT
through Counsel

//s// Martin F. Healey



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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Division of Enforcement's Reply Memorandum were served on the following on this 26th day of July, 2016, in the manner indicated below:

By Electronic Mail

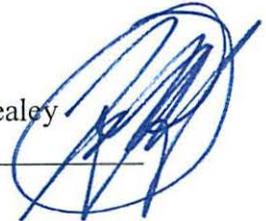
The Honorable Carol Fox Foelak
Administrative Law Judge
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By Overnight Mail:

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//s// Martin F. Healey

Martin F. Healey





UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

UNITED STATES OF AMERICA

Case No. 1:14-cr-10135 NMG

vs.

SANDIP SHAH

DEFENDANT SANDIP SHAH'S SENTENCING MEMORANDUM

TO: THE HONORABLE NATHANIEL GORTON, UNITED STATES DISTRICT
JUDGE; STEPHEN FRANK AND SARAH WALTERS, ASSISTANT UNITED
STATES ATTORNEYS; AND THE UNITED STATES PROBATION OFFICE

INTRODUCTION

Defendant Sandip Shah was arrested in February of 2014 and charged with nine counts of wire fraud in violation of 18 U.S.C. Section 1343 and 1349. Subsequently, at a jury trial held before this Honorable Court from May 10-15 of 2015, defendant Shah was convicted on all nine counts.

Having presided at trial, the Court is familiar with the details of the case so the defendant will only recite details that appear to be relevant for sentencing purposes. In March of 2011, Shah was contacted by an acquaintance from a prior business transaction, Hadi Aboukhater. Mr. Aboukhater discussed introducing him to a man in

Boston who had money to help small businesses grow. Shah was a consultant for a number of those type of companies and agreed to fly to Boston with the president (R.T.) of one of those companies, Advanced Defense Group. According to both the FBI interview of Mr. Aboukhater and his subsequent testimony, it appears that he did not give Shah and R.T. the full details of the scheme until they were having breakfast that morning before the meeting. Despite being told the details included kickbacks to the money source and taking money from an investment fund, Shah and R.T. agreed to go ahead with the meeting and enthusiastically participated while being told the full details of the scheme. They also readily agreed to provide the paperwork necessary to subsidize the kickback.

After returning back to California, Advanced Defense Group did in fact receive a check from the funding source which turned out to be an undercover FBI agent. There was no evidence that Sandip Shah received any of this money and the evidence at trial was that at that time of the first check he was not expecting any commission from the funding source for being involved.

Having been successful getting money for Advanced Defense Group, Shah approached Aboukhater about another company for which he had done consulting work, SOHM, Inc. A meeting was again set up in Boston with the undercover agent and with Sandip Shah and Shailesh Shah, the owner of SOHM. Again, the details of the scheme were laid out and both men agreed to participate. After the meeting ended, the undercover agent met with Sandip Shah alone and offered to pay him ten percent of the money he received in kickbacks for Advanced Defense Group and SOHM. Sandip Shah agreed.

Over a period of a couple of months, the FBI sent \$80,000 to Advanced Defense Group in three payments. They sent approximately \$50,000 in payments to SOHM. In addition, the FBI sent \$25,000 to a couple called COSTAS which was also owned by Shailesh Shah. COSTAS was added to the mix by a phone call with

Shailesh Shah, Sandip Shah and the undercover agent.

While the payments were coming to these companies, the company owners, R.T. and Shailesh Shah were in turn filling out the paperwork and sending the kickback money back to the undercover agent's fake account. The evidence showed that Sandip Shah was copied on these e-mail transactions and was aware of the activity, including the details of the kickback scheme. The evidence also showed that in one instance when things were slowed down a little, he stepped in to push Shailesh Shah to get the paperwork done. The evidence does not show, however, that any of the money sent to these companies was paid to Sandip Shah. Eventually, he was paid a sum of approximately \$5800 from the FBI for his percentage of the kickback checks.

Sandip Shah was convicted for his role in this scheme on May15, 2015. He now stands before this Court asking for leniency and for a sentence that is commensurate with the crime.

I.

SOCIAL HISTORY

A. Mr. Shah is a devoted family man.

First and foremost among Mr. Shah's history and his circumstances is his family. He has been married to Kiran Shah for fifteen years. They have two children, son Krish age 11 and daughter Roshni age 9. No one disputes that his family has been the single most important thing in his life. The letters of recommendation provided to the Court talk about his role as a father and his heavy involvement in his children's lives. By all accounts, he is a devoted father whose positive influence on his children has led them to excel in school and in extracurricular activities. When he was arrested and taken from his house, his major concern was the effect it would have on his children.

The aftermath of the arrest has been devastating on his family. His wife and he had been doing do very well for a number of years after he had given up drinking (discussed below). They had bought a house in a nice neighborhood and were viewed in the community as an upwardly mobile couple. However, shortly before the arrest, Shah began drinking again, after a ten-year period of abstinence, and his wife became upset over this development. They argued about it but were attempting to work things through when he was arrested. The arrest sent his life in a downward spiral in every single facet. From a family standpoint, his wife took the children back to India to live with her parents. Given his inability to travel, he has only been able to speak to them by phone with the exception of two times when his wife has brought them back for a few weeks to visit. His wife and children are back in India now. Sandip and his wife are continuing to talk and try to work things out so that the family does not fall apart. The talks are ongoing and obviously are going to be affected by whatever sentence he receives. In the meantime, his main goal after dealing with his punishment is to save his family and to put things back together but in a different career direction.

B. Shah was a good businessman who forgot his own values.

Mr. Shah had been a successful broker for a number of years when he decided to form his own consulting firm. He dabbled in a number of areas but found that he most liked working with small companies that were trying to expand. He put together a business model that included providing overall consulting services, not just raising capital, to help these companies become successful.

Mr. Shah was smart enough to understand that his future success and the success of his company rested on his reputation within the community for turning these small businesses around. As such, he would often forego compensation until the company was up on its feet and thriving. Although he was making a decent living from his business, he knew that his company needed to be able to show a number of significant successes for his own company and income to grow. He was willing to

sacrifice some at the front end for what he believed would be a bigger payoff on the backend.

That is what he was doing with both Advanced Defense Group and SOHM. His motivation in seeing the companies succeed was not to get an immediate financial reward. He sincerely wanted the companies to succeed not only to help them but because if they were successful it was going to strengthen his reputation in the community and put him on a different level amongst his colleagues. Just to make sure this is not misunderstood, the defendant is not arguing that he was not motivated by greed and the prospect of enormous success and respect among his peers. The defense just wants the Court to understand his mindset when he was approached with the deal.

When Shah was introduced to the undercover FBI agent and the scheme was laid out, Shah was not convinced any of it was true. He had been in a number of these meetings where venture capitalist wannabees promise the moon and deliver nothing. What he did believe was that whatever the undercover agent was proposing was likely illegal and that if it did come to fruition he would be participating in some sort of illegal activity (his initial thought was income tax fraud). When the payments actually materialized and the kickback scheme started, he began to believe that perhaps the undercover agent was telling the truth about being involved in the Seafin Group. Regardless, he knew it was not right and he continued to be involved in the illegal scheme.

This type of behavior was not how he was raised by his father nor is it a true reflection of his character. At this point in his life, Shah wanted to make a big splash, something that would separate him from just a run of the mill consultant or broker. He was presented an opportunity and instead of declining and doing it the right way, he chose to go down a path that was illegal. He accepts that it was his decision and his decision alone that has put him in this position. That singular decision has cost him his family, his career and now possibly his freedom. He has learned a very valuable lesson

about what is important in life and promises the Court that this will not happen again.

C. Shah has had an ongoing battle with alcoholism for years

As he told the probation office, Shah has been consuming alcohol since he was a teenager. He was drinking heavily for years after work and on weekends. After he was married, he drank for a time period until it became a source of friction in their marriage. Around 2002, he stopped drinking altogether for the sake of his family and did not start drinking again until ten years later. In 2012-2013, he was not drinking heavily but was doing it surreptitiously so that his wife would not find out. After a while he came out in the open and began drinking again in front of her which caused friction. As his work got more stressful, the alcohol consumption increased. He began meeting friends at bars and that led to a series of driving under the influence arrests. Even though he was attending counseling and AA meetings, he continued to drink until he was arrested for another DUI incident in November of 2014.

For clarification purposes, Shah is not blaming the alcohol for his poor judgment in choosing to go ahead with the illegal scheme. In fact, the buildup to the scheme and his subsequent arrest was more a case of the dog wagging the tail i.e. he was drinking because of the situation. Certainly the alcohol did not help matters while he was involved in the Seafin scheme, but it was not the cause of his involvement and he has never tried to blame the alcohol use for his poor judgment and his decision to be involved in a criminal scheme.

II.

LEADER/ORGANIZER ADJUSTMENT

The government asks for two additional points to be added to his sentencing guidelines calculation for his role as a leader/organizer of the scheme. (The government refers to the Prange case to support the contention. This reference to other

cases involved in the sting is ironic given the disparity in sentences discussed below). The probation office did not agree with his role as a leader/organizer and accordingly did not provide for the two-point upward adjustment.

Not surprisingly, the defense agrees with the probation office assessment for two reasons. First, the testimony from Aboukhater, as mentioned above, was that Aboukhater arranged the meeting for Shah and R.T. in Boston with the undercover agent, not Mr. Shah, and that he was the one who introduced them. Furthermore, he testified that he believes he may not have told them the full details of the scheme until they were in Boston eating breakfast that morning. It is not accurate to say that Mr. Shah organized this and knew the details when in fact it appears from testimony that he thought he was going to Boston to discuss funding for the company. Finally, Mr. Aboukhater's plea agreement specifically states that he is the organizer for both companies, Advanced Defense Group and SOHM and that he is the man who brought in R.T. and Shailesh Shah. In fact, the defense believes that he was assigned the two point upward adjustment for being the leader/organizer of the two men brought into the scheme. The fact that Aboukhater chose to cooperate with the government for leniency does not mean that the label can then simply be switched to another defendant.

Secondly, the government states that Shah was extensively involved in all the transactions with the FBI agent including that they received the wires expected, paid the kickbacks they owed and submitted fake invoices to the undercover agent. Although the defense does not deny that Shah was aware of the transactions and in a couple of incidents prodded the owners of the company to move the scheme along, it is overstating his position to say that he was organizing it. The evidence at trial showed that for the vast majority of transactions, Shah's only involvement was to be copied on emails. In fact, the emails showed that R.T. and Shailesh Shah were actively involved in discussions with the FBI agent and were doing their own work. Both of them regularly emailed with the FBI agent and received direction from him, not Mr. Shah.

Accordingly, the defense believes the two-point adjustment for leader/organizer is not warranted.

III.

THE AMOUNT OF LOSS ATTRIBUTABLE TO THE DEFENDANT

All parties agree that, based upon the ruling in *United States v. Prange*, 771 F. 3d 17 (1st Cir. 2014), the most reasonable estimate of loss attributable to the defendant is the amount actually received by the companies less the value of the shares that the companies provided to the undercover agent in exchange for the money. The variation in amounts between what the government argues is the attributable loss and what the defendant sees as the loss for which the defendant should be held responsible is based on one simple factor – when the Court determines it was reasonable for the government to have made an effort to sell the stock and what a reasonable value for the stock would have been at that time.

The other thing that all parties agree on is that placing a value on the stock and what it would sell for is a speculative proposition. The government's position, however, seems to be inapposite of both the spirit of the *Prange* holding as well as the normal, solid business practices that are adhered to every day in the marketplace. Specifically, the government states that the best time to determine value of the restricted stock is to measure it at the time it would have first been available for sale on the open market. They refer specifically to the government's expert witness, Peter Melley, who gave an estimate of approximately \$13,000 as the value of the stock for the three companies at that time.

However, this is a worst-case scenario that is not fair to the defendant to apply. First of all, their own expert witness testified on cross-examination that there are thousands of sales of restricted stock every single day on the market. The government position assumes that the restricted stock could not be sold until the restrictions were

lifted which is simply not the state of the market as admitted by their own witness.

Secondly, business law in virtually all areas whether it be real estate or corporate transactions puts a duty on a wronged party to mitigate their losses as much as possible. For example, a condo renter cannot discover a leak in the condo and not report it to the owner so that additional damages are incurred and so that he can sue for more money. The same should apply in this situation. The government should not be allowed to not sell the stock, wait until it crashes to its lowest point and then say the defendant should be responsible for their refusal to attempt to sell. This is particularly true in his case when the government's own actions, i.e the investigation and arrest of the owners of the companies, was publicized and made the value of the stock virtually worthless. Although the government's arrest of the parties involved was obviously not an attempt to drive down the value of the stock, it was certainly a foreseeable outcome. It seems patently unfair to wait until all the damage has been done and then say that is the date we should choose to determine the loss attributable to the defendant.

Nor should a random date be selected out of thin air. Again, everyone agrees this is a highly speculative endeavor for the Court to perform. But the defense position is that when a situation that is as speculative as this one is presented to the Court, the appropriate methodology for the Court to use is the one that errs on the side in favor of the defendant. For this reason the defense requests the Court choose to use the value of the restricted stock at the market price on the day that it was given to the government. The defense does not argue that this is a perfect system for determining value but it believes that it is the most fair.

Based upon that calculation, the defense believes the loss attributable to the defendant would be \$101, 976. That calculation is based upon the exhibit provided by the government and introduced at trial by Melley which shows the actual value of the stock for both Advanced Defense Group and Sohm at the time it was issued to the undercover agent. The value given to COSTAS is based upon the value of the date it

was last sold as provided by Melley. It breaks down as follows:

Advanced Defense Group -

March 16, 2011	25,000 shares value	-----	\$8,500	
April 7, 2011	38,462 shares value	-----	\$9,615	
May 2, 2011	50,000 shares value	-----	\$7,000	
Total stock value			-----	\$25,115

SOHM -

April 21, 2011	166,667 shares value	-----	\$4,666	
May 10, 2011	150,000 shares value	-----	\$3,600	
Total Stock value			-----	\$8,266

COSTAS

November 17, 2010	35,715 shares value	-----	\$19,643
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Total Value of all shares - \$53,024

When subtracted from the amount of money actually wired to the three companies, \$155,000, it leaves the total amount attributable to the defendant at \$101,976. That figure is below the \$120,000 level for the ten point addition under wire fraud and when applied would drop the assigned point value two points.

IV.

SENTENCING POSITION

The defense position is that the base offense level for 18 U.S.C. Section 1343 offenses is a level 7. The loss in this case is \$101,976 which is not more than \$120,000 so the offense level increase is +8. This leaves a total offense level of 15. Defendants' prior offenses should place him in a Category II criminal history, thus providing a range of 21-27 months.

One of the factors the Court is allowed to consider in determining sentencing is the disparity or potential disparity in sentencing between individuals in the cases related to the defendants. Along those lines, the probation department has provided the Court with twenty related cases and their outcomes. The sentences in these cases are not only instructive, they provide the Court with a strong basis for giving Mr. Shah a significant downward departure.

From the beginning of this case, the issue that has baffled the defense is why the government was not offering Mr. Shah anything close to what the majority of the other defendants were being offered. It was even conceded that Mr. Shah was less culpable than a number of the defendants who had already pled and had been involved with either more companies or more money. Furthermore, a number of these defendants were specifically targeted from the beginning as doing illegal activities versus Mr. Shah who was not one of the original targets. Defendants like Barry Hawk who was much more involved on every level than Mr. Shah was sentenced to 3 years probation and a fine. A similar situation is Gerard Haryman who also was sentenced to three years of supervised release. In fact, it appears that half of the defendants in the case, many similarly situated to Mr. Shah, have been given no jail time and supervised release. And of those serving prison time, only three of them have received the type of

prison time the government is requesting and the defense would submit that his culpability is nowhere close to those three.

The greatest irony of course is the sentencing of the three other people who were directly involved with Mr. Shah in his part of the scheme. Hadi Aboukhater, who admitted to being involved in a large number of companies, was listed as the leader/organizer of for Sandip Shah's deals and who was given two to three times more money than Mr. Shah was sentenced to two years of probation. Shailesh Shah participated in the meeting with the undercover FBI officer, filled out all the paperwork for two companies, e-mailed back and forth with the FBI officer, was deeply involved in every single transaction and was sent over \$75,000 (minus kickbacks) for the two companies he owned and used that money for his own purposes, was sentenced to 18 months probation. R.T. who owned Advanced Defense Group and who also participated in the meetings with the FBI officer and filled out the invoices and spoke to and exchanged emails to the FBI officer and who received \$72,500 (minus kickbacks) in money which he also spent was never charged.

On the other hand, Sandip Shah, who was initially not even offered a kickback, spent his own money for travel and his time to come to Boston to try and get money for these companies in an effort to help them and to help promote his business. Once he became embroiled in the scheme, including getting a percentage of the kickbacks, he received a total of approximately \$5800.

The defense would argue to this Court that a sentence in the range the government requests or even within the sentencing range the defense believes to be applicable is an excessive sentence in this case given all of the circumstances and the disparity with others in the related cases. The defense requests a sentence that would consist of home detention and three years of supervised release. The defense believes that this sentence is sufficient and reasonable under the circumstances of this case.

Respectfully submitted,

Sandip Shah

By his attorney

/s/ Pat Harris

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Certificate of Service

I hereby certify that a true copy of the foregoing was served upon counsel for the United States through the ECF system on August 7, 2015.

/s/ Pat Harris

Pat Harris, Esq.