IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 15-212
	)	Criminal No. 16-132
ABIGALE LEE MILLER	)	

UNITED STATES' SENTENCING MEMORANDUM

AND NOW comes the United States of America by Soo C. Song, Acting United States Attorney for the Western District of Pennsylvania, and Gregory C. Melucci, Assistant U.S. Attorney for said district, hereby submits the following:

INTRODUCTION

In the world of common fraud, a defendant typically employs deceitful means to steal money from a victim to complete the crime. The fraud often causes both an unlawful financial gain to the defendant, and a financial loss to the victim. In the world of bankruptcy fraud, the defendant commits the crime by concealing assets from the bankruptcy court, and *ipso facto*, intending to deprive creditors of what assets they are owed. The *concealment* of the asset is the commission of a crime, regardless of whether the concealment actually caused a financial loss to a creditor, and regardless of whether causing an actual loss was impossible. If a debtor knowingly concealed an asset, it can only be for the purpose of not wanting a creditor to have it. This is what the defendant/debtor Abigale Lee Miller intended to have happen in her Chapter 11 bankruptcy petition when she concealed hundreds of thousands of dollars in TV show income and other assets. And, because she knowingly concealed assets, she therefore intended to cause an economic harm to creditors. *See*, *United States v. Michael Free*, 839 F.3d 308 (3d Cir. 2016).

Summary Background Statement

In October, 2015, the debtor and defendant Abigale Lee Miller (hereafter, Miller) was indicted on 2 counts of a scheme to defraud the bankruptcy court and creditors, 5 counts of concealment of assets of the bankruptcy estate, and 13 counts of false declarations in bankruptcy schedules. The 34 page indictment describes a pattern of deceitful schemes to conceal by Miller both TV show revenue earned in 2011 and 2012 as the featured talent on the Lifetime Network reality show titled "Dance Moms", and to conceal tuition and merchandise sales income she earned in 2012 and 2013 in dance programs she hosted throughout the United States called "Masterclass" sessions (Indictment, Counts 1 and 2).

Indictment at Counts 3-7 detail the sources and amounts of the various types of revenue earned by Miller which she concealed throughout the entire bankruptcy approximately which included: "Dance Moms" and other TV shows related to revenue earned in 2012; Masterclass ticket sales through "Showclix"; 'same day' Masterclass ticket and apparel sales processed by Square, Inc.; ALDC.com "joint venture" online merchandise sales processed through PayPal; and, business revenue from on-site apparel sales at Masterclass sessions. Miller's concealed income was estimated at approximately $755,000.

Indictment at Counts 8-20 represent false declarations she made in both Original and Amended Monthly Operating Reports (MOR) in which both knowingly underreported or entirely concealed TV show and other business revenue, despite repeated verbal and written warnings from the Bankruptcy Court that she needed to disclose amounts and sources of all income.

Following the Indictment, federal investigators uncovered another deceptive fraud scheme in which Miller transported tens of thousands in foreign currency earned at MasterClass dance programs held in Australia, England and elsewhere in 2014 into the United States without making the required disclosures in U.S. customs records and U.S. Treasury reports. The evidence was that on several overseas trips, Miller orchestrated the transfer of foreign currency into the U.S. by directing others in her show to transport currency from overseas locations into the U.S. so as to avoid reporting requirements to the I.R.S.

On June 27, 2016, Miller, pursuant to a written plea agreement, agreed to plead guilty to Count 5 of the Indictment which charged her with concealment of same day Masterclass ticket sales and apparel sales in violation of 18 U.S.C. Section 152(1). She also agreed to waive indictment, and to plead guilty to a one count information which charged her with failing to make a transaction report when she transported over $10,000 in foreign currency from Australia into the U.S. in August, 2014 in violation of Title 31, U.S.C. § 5324(c)(1). The United States also sought forfeiture of approximately $120,000, which represented the total estimated amount of currency Miller transported into the U.S. from her Australia trip.

Among the commonly used language in plea agreements, Miller also agreed to the following plea language: that she would accept responsibility for the remaining counts of the Indictment (¶ A.4); to forfeit all property subject to forfeiture under 31 U.S.C. Section 5317(c) (¶¶ 7-9), but to contest the loss and certain other enhancements at sentencing.

I. <u>Abigale Miller's concealment of assets was intended to harm creditors</u>

> ***"… that doesn't eliminate the disclosure problem we had, okay. That's the had we had full disclosure up to this point, I'd be signing a confirmation order today and I'd be giving kudos and plaudits … the problem here is the fact that it looks to the Court as if she was hiding the ball, and until she got caught we wouldn't have known about this."*** Hon. Thomas P. Agresti (hereinafter T.P.A.) 2/1/13 Hrg. Tx. p. 9, lines 9-22.

In the recent decision in *United States of America v. Michael Free*, 839 F.3d 308 (3d Cir. 2016), the Third Circuit reaffirmed its prior bankruptcy fraud loss analysis as set forth in *United States v. Feldman*, 338 F.3d 212, 221-223 (3d Cir. 2003), as to how loss is determined in the context of bankruptcy fraud. In so, the Free court did not change the existing precedent that the measure of loss in any fraud case analyzed under USSG 2B1.1 is always the greater of the actual or intended loss. The court stated, *"we remand to allow the District Court to determine what, if any, loss to creditors Free intended, or gain he sought to committing the crime." Free*, supra, at 324, *citing Feldman*. In so finding, the Circuit Court reaffirmed the basic principle when the government seeks an enhancement for a loss amount, the court must make a specific finding of an intent by the defendant either to cause an economic harm to a victim, or the gain sought to be obtained. "Loss" as commonly used by courts and defined by the USSG is always "*the greater of actual loss or intended loss*." USSG 2B1.1 comment n.3 (A)(i). 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense. The *"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation or an insurance fraud in which the claim exceeded the insured value). Id., 2B1.1 comment n. (3)(A)(ii).*

The *Free* court's guidance to the district court in its determination of intent relied almost exclusively in its earlier decision in *Feldman*, which turned on the meaning of loss by a convicted bankruptcy debtor. A short revisit of the *Feldman* decision is useful here because its interpretation of loss was fully adopted by the *Free* court, and because the commission of the crime in Feldman is much like Miller's concealment.

In Feldman, the debtor Feldman pleaded guilty to counts of concealment of assets under 18 U.S.C. § 152(1) after it was discovered by the U.S. Trustee that during the Chapter 7 bankruptcy, Feldman concealed from the bankruptcy court valuable pieces of art and other antiques valued at approximately $1.2 million dollars that Feldman owned with his wife.

Additionally, Feldman concealed two Jaguar cars he owned individually. In his bankruptcy petition, Feldman claimed approximately $205,253 in credit card debt which he sought to have discharged.

When the concealment was discovered by the court, Feldman immediately amended the bankruptcy schedules to disclose the previously concealed artwork and assets, but claimed the bulk of the assets were exempt from creditors because they were jointly held with his wife. Additionally, Feldman grossly understated the value of his home. Creditors challenged the exemptions, which were ultimately resolved in a settlement agreement with the Trustee.

At sentencing, the government sought enhancements for loss under the former USSG §2F1.1 (now 2B1.1) in an amount which reflected the "stated liabilities," amount Feldman sought to have discharged in his petition of $203,784. Feldman countered that he never intended any monetary loss to creditors, and since he never caused an actual loss to creditors, the loss amount should be zero dollars. However, the district court rejected Feldman's zero loss argument and accepted the government's loss analysis that the intended loss amount was at least the stated amount on Feldman's Petition, and sentenced Feldman to 15 months incarcerations.[1]

Feldman appealed the sentenced, and argued that the district court wrongly concluded that Feldman intended to cause an economic harm. On appeal, the court examined the loss arguments beginning with the standard question of what Feldman sought to gain by committing the crime when he concealed assets, or more logically, what inference of intent existed that *Feldman* intended to cause harm to creditors, regardless of whether any harm actually occurred. It stated, "*thus, even if Feldman could not have caused any loss by concealing exempt assets, he could still*

[1] In 2003 the USSG loss range was $120,000 to $200,000. Feldman contended that if the court accepted the government's calculation, that it should be between $120,000 and $200,000, since only court fees placed the loss over $200,000.

be subject to a sentencing enhancement if he thought he would cause a loss by concealing the assets." Feldman, 338 F.3d at 221 (emphasis in original). In affirming the District Court's judgment of sentence, the appellate court relied on two significant acts by Feldman the court believed revealed his subjective intent to harm creditors: First, since Feldman concealed such a substantial amount of assets, it could only reasonably be inferred that it clearly was to deny creditors potential assets. "*While the government must prove Feldman's intent by a preponderance of the evidence, we conclude that intent can be inferred from the fact that Feldman concealed a large amount of property." Feldman*, 338 F.3d at 215. In so finding, the circuit court quoted the District Court judge at sentencing:

> *[W]e have to assume that no one would rob a bank that they knew had no money in it, right? I mean that's what he did here. He undervalued property because he was trying to defraud his creditors…I mean that seems to me –I don't see how anybody could argue to the contrary. So he intended that the estate be decreased by the amount that he was failing to disclose, right? Feldman, supra*, 338 F.3d 212 at 223.

Second, the fact that Feldman also concealed two Jaguars that were clearly not exempt was added evidence of his intent to deprive creditors. In rejecting Feldman's overall argument that the concealed assets were exempt, and therefore, it was impossible for any economic harm to creditors, the Third Circuit Court restated the rule that loss is always the greater of the actual or intended loss, regardless of whether the loss was impossible to have occurred.

The *Feldman* court concluded:

> *The District Court impliedly found that Feldman intended to inflict a loss in the amount of the entire debt from which he sought to be discharged, and that finding is supported by assumptions about the nature of Feldman's crime and the fact that he concealed other assets that were not even arguably exempt from bankruptcy. Therefore, the sentence imposed must be upheld.* Id., at 223 (emphasis supplied).

In the fall of 2016, the 3rd Circuit had the occasion to revisit a loss analysis in the context of bankruptcy fraud in *United States v. Michael Free*, 898 F.3d 308 (3rd Cir. 2016). In *Free*, the debtor Free claimed approximately $671,000 in liabilities, which he sought to discharge in a Chapter 13 petition bankruptcy. Meanwhile, Free concealed hundreds of thousands of dollars in rare firearms, and even sold some of them without court approval and hid the proceeds. Upon learning of the concealment, the bankruptcy court found Free's conduct vexatious and in bad faith, and converted the case to a Chapter 7 liquidation of assets.[2]

Free was then criminally charged with concealment of assets and a scheme to defraud the bankruptcy court, and was convicted at trial on all counts. At sentencing, the government argued for a loss level which reflected the estimated total value of the concealed firearms, over $1.83 million, which was later discounted to $833,000 by the court. Nevertheless, the government still sought a loss reflecting the value of the concealed weapons.

Free countered that since all creditors were paid in full, the loss amount should be zero. *Free*, supra, at 315. The District Court determined in fact that Free concealed assets in excess of $1.0 million dollars, but, stated that the 'victim' was the judicial system, not his creditors. Id., at 317. Yet, the District Court accepted a 14 level increase for loss as stated in the PSR, which reflected the total amount of concealed weapons by Free, but granted a variance and reduced the sentence to 24 months incarceration. Free appealed the loss finding.

On appeal, the Circuit Court remanded for re-sentencing following a lengthy analysis of the measure of loss in a bankruptcy case. In concluding that the District Court needed to resentence Free, the appellate court refused to entirely affirm the sentence due to the District Court's failure to make an *"explicit factual finding as to whom Free intended to harm or the gain he intended to secure by committing the offense"*. Id., at 323.

[2] Free was disrespectful and uncooperative with the court through the bankruptcy, and frequently defied requests from the court and Trustee. *Free*, at 311.

The *Free* court was concerned that the District Court focused on the non-pecuniary harm caused by Free to the integrity of the bankruptcy process by concealing assets. *Free*, supra, at 320, rather than a loss analysis. In so, Free found that the District Court's rationale for Free's sentence was "*inconsistent with the structure of the guidelines*," and did not make any finding of pecuniary harm – whether actual or intended that Free caused to creditors. *Id*., at 320, 322.

The *Free* court accepted *Feldman* analysis of loss or a determination of the greater of an actual or intended loss amount. It stated: *"Feldman requires such factual findings, and we thus remand to allow the District Court to determine what, if any, loss to creditors Free intended the gain he sought by committing the crime*". *Free* at 324.

But, the Free court did not welcome the defendant's contention that the absence of an actual loss automatically means a no loss cases.

> *"More generally, Free's argument depends on the proposition that debtors have blanket immunity to lie to the Bankruptcy Court so long as there are no creditors who suffer any out-of-pocket losses. Free points us to no authority for such a remarkable proposition, and we* are confident *in rejecting it*." *Free*, supra, at 320.

Nonetheless, the *Free* court did not seem unconcerned that upon remand the government would not be able to show the court evidence to support making such a specific factual finding, and stated:

> "*In the vast majority of cases the loss calculation will have precisely this effect because, generally speaking, the reason defendants conceal assets in bankruptcy is to benefit themselves at the expense of their creditors." Free*, supra, at 324.

In a footnote, the *Free* court added:

> "*In addition, the government appeared confident at oral argument that it could show that Free actually <u>did</u> <u>intend</u> to cause pecuniary harm to his creditors"* (citing to government appeals counsel's statement) that *"the only reason the creditors were paid 100% on the dollar is because the fraud was discovered and concealed assets were liquidated to pay off those creditors*." *Free*, Id., fn. 122. (emphasis in original)

As detailed by the Probation Officer in the Presentence Report, Miller knowingly concealed hundreds of thousands of dollars in income she earned during the bankruptcy. The evidence of this is incontrovertible. All the while, Miller was misrepresenting, lying and understating her assets as reported in bankruptcy filings, while continuously scheming to avoid disclosing income to the court. As the *Feldman* court recognized, the dizzying size of the concealed income-approximately $755,000, is powerful evidence that Miller intended to harm creditors. *Feldman*, supra, at 223.

Additionally, much more convincing evidence existed of Miller's intent to deny assets to creditors including misrepresentations in bankruptcy schedules and several incriminating emails which revealed Miller's designs to avoid disclosing income, while simultaneously enriching herself at the expense of the creditors.

Moreover, Miller's behavior during the bankruptcy-particularly her indifference to repeated demands by the Bankruptcy Court to disclose all income, evidenced a manifest disrespect for the integrity of the judicial process. Her continued disobedience in the face of court Orders to produce all evidence of earnings inferentially suggests indifference and intent to harm creditors which by itself is worthy of punishment under the guidelines. As noted by the *Free* court*:* *[A]"District Court may find it appropriate to depart on the basis that Free's conduct resulted in a significant disruption of a governmental function to reflect Free's flagrant disregard for the Trustee's instructions, the Bankruptcy Court's orders, and interference with the bankruptcy process*." *Free*, supra, at 325, *citing* USSG Sec. 5K2.7.

II. <u>Miller's intent to harm creditors is evidenced by the massive concealment of income</u>

"I realized that there's an awful lot of money coming into this plan, this case, and it hasn't been disclosed." T.P.A., Hrg. Tx. 2/1/13, attached as Govt. Ex. 2.

Unquestionably, Miller concealed an enormous amount of income. She admitted to it in pleading to Count 5 of the Indictment, and by accepting responsibility for it under the terms of her plea agreement. Indeed, between January and December, 2012 alone, Miller concealed approximately $394,479 in income, including $288,137 in 49 payroll checks she earned from TV show revenue from Dance Moms. Records show that by December, 2012, Miller earned revenue from multiple sources in excess of $700,000.

Throughout 2012, Miller agreed to accept weekly payroll and talent fee checks. Instead of reporting all TV show income in her Monthly Operating Reports, Miller notably, among other concealments, did not disclose 49 payroll checks for talent fees she earned between January and December, 2012. Miller clearly planned to conceal this income from creditors, since the revelation about the existence of this income would have gone undetected but for the fortuitous "channel surfing" by bankruptcy judge the Honorable Thomas P. Agresti, who early in December, 2012, shortly before confirmation of the First Amended Plan, saw a TV advertisement for another season or spinoff of "Dance Moms." This aroused Agresti's concern about Miller's honesty to the court such that he immediately cancelled the scheduled Plan Confirmation hearing, and issued a court order, and demanded that Miller file a "*supplement in support of a Chapter 11 Plan which contains any contracts entered into, income received, and future income to be received by the debtor…*" (Order of Court 12/13/12, Govt. Ex. 1). Miller suddenly produced $288,137.57 in 49 TV show paychecks which were promptly deposited into her attorney's escrow account on January 7, 2013. Also, Miller promptly filed 3 contracts detailing TV show income 'under seal' with the bankruptcy court, along with more favorable creditor terms in a <u>Second Amended Plan</u> on January 18, 2013.

Unbeknownst to Judge Agresti, Miller not only concealed substantial TV show income, but also concealed memorialized agreements between Miller and the show producer and the network for specific compensation for upcoming series and terms of "Dance Moms" in 2012, which were negotiated by Miller and her entertainment attorney.

Judge Agresti convened a hearing on February 1, 2013, at which time he strongly reprimanded Miller for not disclosing the hidden money and TV show contracts:

> *"All of a sudden $288,0000 appears in counsel's bank account, amended plans are filed, 100% to unsecured creditors. But back in December we went through a plan confirmation hearing and there wasn't one word about the new contracts and the monies. And if it wasn't for me channel surfing one night and seeing Abigale Miller's Ultimate Dance Competition on one of the TV stations…I realized that there's an awful lot of money coming into this plan, and it hasn't been disclosed."* (Hrg Tx. 2/1/13, pg. 3, Govt. Ex. 2)

Judge Agresti was clearly annoyed that Miller refused not only to disclose income she earned in 2012, but that Miller struck another TV show contract in July, 2012, with no mention of it in the Amended Plan filed in August, 2012. *"These deals were struck in July, and there's no mention in the Amended Plan at all about $25,000 per episode and extensions in 2013*". (2/1/13 Tx. Pg.4). At the hearing, Miller blurted out that she "*didn't even know about them*" (referring to the signed contracts). Id., p. 5. Judge Agresti was unpersuaded, and addressed Miller specifically with condemning words:

> "*And she can shake her head and protest all she wants and go through her TV face, that's not going to affect me ma'am, and I'd prefer you stop it, okay. Let's be a little stoic here. These are very serious problems you have, and a failure to disclose. You allowed the Court—you manipulated, it appears, your attorneys to go forward…"*

Later during the hearing, Agresti expressed astonishment at the unreported income Miller was scheduled to earn from TV show appearances when he read the terms of the suddenly produced "Binding Deal Term Sheet":

> "*That's $25,000 an episode. That's $250,000 that she is contracted for. Come August—come December when the hearing took place, she should have let the Court know, let you know so you could advise the Court that she had performed for at least 25--$250,000 worth of services that she was owed for…this is an honor system. You know, I can't be—if it wasn't for me just sitting down and channel surfing one night and coming across it, I would have never thought—I would have just…I would have confirmed a plan, and the unsecured creditors would be paid over five years, and the debtor would have $288,000, at least, in her pocket that wasn't disclosed to the Court. That's the point I'm making… The problem here is the fact that it looks to the Court as if she was hiding the ball, and until she got caught, we wouldn't have known about this. That's what I'm concerned about.*" Id., p. 8, lines 15-22.

Miller's plan to conceal assets to benefit herself at the expense of creditors was now uncovered. Indeed, Agresti's indignation and anger over Miller's concealed income and TV show contracts was justifiable <u>because</u> he knew the wrong it would cause creditors. Importantly, Agresti's words also echoed exactly what the *Free* court acknowledged as the necessary evidence the government needed to prove a subjective intent, that is, the discovering of a fraud upon the court, and then restoration of assets to creditors. As Judge Agresti stated: "*The problem here is the fact that it looks to the Court as if she was hiding the ball, and until she got caught, we wouldn't have known about this*". (Id., p. 9, lines 20-22). The Free Court echoed the same, "*As a matter of fact…the only reason creditors were paid 100% on the dollars was because the fraud was discovered and concealed assets were liquidated to pay off those creditors*". *Free,* supra, 839 F.3d at 325, fn. 122,.

Meanwhile, still unbeknownst to Judge Agresti, several months earlier Miller had been scheming to avoid paying creditors, as revealed in Miller's email correspondence:

• On September 27, 2012, Miller emailed her accountant, Kathy Nickel McFaden and entertainment attorney, Brian Raymond: "*Whoa guys, I am almost out of bankruptcy*" informing them that Collins Ave. and producer Michael Hammond are "*holding $ at my request…*" (9/27/12 email, Govt. Ex. 3).[3]

• On December 18, 2012, Miller's accountant, Kathy Nickel McFaden, emailed an attorney confirming an earlier conversation between Miller and her accountant about the creation of two subchapter S corporations, including the creation of a new company called "No More Tears" in which to deposit Collins Ave. TV payroll checks without court approval (12/18/12 email, Govt. Ex. 4).

• On December 25, 2012, Miller emailed her entertainment attorney thanking him for a gift basket, and informing him that she spoke with her bankruptcy attorney "*and realizing it was best to get my money ASAP I was looking forward to my Big check coming on Christmas Eve…*" (Govt. Ex. 5).

December 13, 2012, Judge Agresti promptly canceled the scheduled the <u>Amended Plan</u> confirmation hearing which was previously set for December 20, 2012. Between December 13, 2012, and the hearing on February 1, 2013, Miller, through her bankruptcy counsel tried to rectify the concealment:

• On January 7, 2013, Miller quickly retrieved 49 checks reflecting TV show revenue she earned in 2012 and deposited $288,137.57 plus $30,000 cash in hand into her bankruptcy counsel Donald Calaiaro's escrow account;

• On January 18, 2013, Miller filed a <u>Second Amended Plan</u> and <u>Disclosure Statement</u> in which she unlike the two prior Plans, proposed to pay unsecured creditors in full immediately, unlike earlier plans proposing 6 and then 5 year repayment-without interest. She also agreed to

[3] Neither McFaden, Raymond nor Collins Ave. <u>were</u> <u>ever</u> the subject of the grand jury investigation. Collins Ave. contended that Miller never submitted time cards to collect these checks for her earnings, even though she was asked to do so.

keep her Davenport, Florida home, as opposed to surrendering it to Chase Bank as she proposed in the Amended Plan.

• She filed 3 TV show compensation agreements, including the original "Participatory Agreement" and two other agreements which evidence Miller's agreements with Collins Ave. and the A&E network to produce "spin-off" "Dance Moms" programs and future terms of Dance Moms. However, Miller did not produce several 'Renewal Agreements' exercised by the network to produce Series 2, 2.5 and 3 of "Dance Moms" which included specific references to produce multiple episodes, with progressively increasing compensation to Miller per episode.

• Miller promptly filed previously unfiled Monthly Operating Reports for November and December 2012 which reflected significant income from TV show revenue.

Miller was privately outraged that she had been "dressed down" by Judge Agresti, and compelled to pay all unsecured creditors immediately, as she shared in email correspondence just 2 weeks after the February 1, 2013 court appearance. In an email to her accountant on February 15, 2013, she expressed her dismay in hard words for the court:

"Oh god I miss u. The judge was a dick! He hates me…I'm paying Everyone I owe 100% back in one big check! Who does that! Nobody in bankruptcy! But he won't just say look I hate you and I don't want to see u again pay everybody and go!

Now my Pgh atty are making Collins ave and the entertainment attorney jump through hoops!" (2/15/13 email, Govt. Ex. 6).

Later in the same email, Miller is seriously concerned that her plan to deposit income into the two subchapter S corporations would now be unraveled as well.

III. Despite Warnings from Court, Miller Persisted in Schemes to Conceal Income in 2013

> ***"…especially after the many times that I admonished you and her as to the need to be totally forthcoming with all the information, and then to float a plan that provided for long term payment of unsecureds until circumstances changed and the Court became aware".*** T.PA., 3/22/13 Hrg. Tx. p. 11, lines 5-10.

Following the February 1, 2013 court hearing, Judge Agresti issued a stern warning that Miller needed to be completely truthful in all disclosures to the court. Judge Agresti's Order expressed serious concerns about whether Miller had made full disclosure, and so he directed Miller to file detailed reports of all income earned from the reality TV show for past 12 months by February 18, 2013, *"since the court is concerned about the Debtor's good faith and fulfillment of her duty to disclose."* (Court Order 2/4/13, Govt. Ex. 7). Miller nonetheless continue to scheme to both conceal new streams of significant income from Masterclass Dance sessions, and from the sales of Abby Lee Miller.com merchandise sales.

The popularity of the Dance Moms reality TV series brought new streams of revenue to Miller in the form of spin-off TV programs, sales of Abby Lee Miller dance merchandise, and Masterclass Dance programs revenue. Criminal investigators uncovered approximately $467,355 in unreported income concealed in accounts at Wells Fargo, Showclix, and PayPal that Miller earned in 2013. She was careful not only to keep this revenue separate from the dance studio income, but also to keep her attorneys in the dark about it as well. In an email to her accountant on March 6, 2013, Miller feared premature disclosure to her bankruptcy attorney of her creation of two subchapter S corporations, and she instructed the accountant not to inform him about the corporations: *"Don't do anything at all!!! David does not know we already did those-I'm going to get killed! I just thought this would be all over!"* (email 3/6/13, Govt. Ex. 8). Barely a week later, her accountant advised her entertainment attorney that she (Miller) "*is [in] a little trouble* *with her bankruptcy attorney over having had money paid to No More Tears Productions, Inc."* (email 3/14/13, Govt. Ex. 9).

As the newer income flowed in, Miller was careful not to deposit cash into the bank, and so advised her accountant and her merchandise business partner Mark McCormick, in an introduction in an email on March 29, 2013 containing the header:

> *"LETS MAKE MONEY AND KEEP ME OUT OF JAIL"*
>
> *KATHY MEET MARK, MARK MEET KATHY…THIS SHOULD BE EASY, WE ALL KINDA COME FROM THE SAME BACKGROUND, SAME GENERATION, AND SAME NOT SO POLITICALLY CORRECT JOKES-SCARY!*
>
> *OK YOU TWO-BE SMART, BE HONEST, TRY NOT TO RAISE ANY RED FLAGS*
>
> *AND DON'T PUT CASH IN THE BANK!!!* (email 3/29/13, Govt. Ex. 10)

Later, in May, 2013, the TV show producer inquired from Miller's accountant about processing fees for one of the spin-off TV shows. Miller responded frantically in an email barely one day later to her accountant:

> *"I do not want to get paid these big psalms [sic] until the bankruptcy is over and I can make them out to the S corporations."* (email 5/7/13, Govt. Ex. 11).

Later, in October 2012, shortly before the <u>Second Amended Plan</u> Confirmation hearing, Miller was still directing others to keep any information about certain bank account activity away from the court.

In an email response to Mark McCormick, Miller stated "*What bank account? Judge shouldn't know about this???"* (email 10/8/13, Govt. Ex. 12). She then followed the next day anxiously wanting an extension for an unrelated business entity form so she would not have to disclose the business entity to the court, presumably "No More Tears". *"OMG can't we file for extension and it will be over b4 filing?"* (email 10/8/13, Govt. Ex. 13). The "it" Miller refers to is the completion of the bankruptcy and discharge which was set for October, 2013.

Finally, Miller drafted an incriminating email to her studio bookkeeper regarding preparation of the studio expense reports. The bookkeeper prepared the MORs for the bankruptcy schedules, in addition to bookkeeping services. Miller cautioned the bookkeeper that expenses should be turned into the accountant for tax purposes, but emphasized the simultaneous risk of disclosing MasterClass advance ticket sales processed through Showclix. She wrote: "*All of these expenses will be turned into Kathy Nickle for tax purposes although if I showed these I would also have to disclose the showclix deposits, which WE ARE NOT!* (email 10/13/13, Govt. Ex. 14).

What could be more compelling direct evidence of Miller's intent to deprive creditors of potential assets?

Moreover, it cannot be said that upon the filing of the Second Amended Plan on January 18, 2013, that any further concealments were irrelevant. The Second Amended Plan had yet to be approved, and was not formally approved by Judge Agresti until December, 2013.

Meanwhile, because Judge Agresti and creditors were nearly burned by Miller's presentment of the First Amended Plan, Judge Agresti continually issued orders throughout the spring and summer of 2013 in which he insisted on ongoing reports from Miller about her income, circumspect of Miller's "good faith", for example:

- On February 4, 2013, Judge Agresti ordered that Miller file a detailed Report of all income earned from the reality television show over the previous 12 months along with tax returns (Court Order of 2/4/13, Govt. Ex. 7);

- On June 19, 2013, Judge Agresti ordered that Miller file an accounting to provide details of all monies received by her and currently held in the escrow account of her attorney, as well as copies of her income tax return for the years 2010 and 2011 (Court Order of 6/19/13, Govt. Ex. 15);

- On July 26, 2013, Judge Agresti ordered that Miller supplement her Accounting filed on July 24, 2013, and to provide an explanation for the difference in total income between the monthly financial reports filed in the case and in the "Accounting" (Order of 7/26/13, Govt. Ex. 16);[4]

- On August 22, 2013, Judge Agresti issued an Order after observing discrepancies between the reported information, and notes that not all the debtor's income from the reality show was reported on the MORs. Agresti scheduled a hearing for October 17, 2013 and required the attendance of all parties, including the accountant, to answer the following questions:

> *Who was responsible for preparing the MORs? Who reviewed the MORs before they were filed with the court? Why was the reality show income not completely reported on the MORs? And, What was the extent of the unreported income?* (8/22/13, Order of Court, Govt. Ex. 17).[5]

And, Miller never filed the Amended MORs until she was compelled to by court order. Miller certainly must have believed that disclosing the hidden income might have impacted her Second Amended Plan, or otherwise what would have been the reason to conceal or divert it? The Bankruptcy Court certainly believed it would affect the Plan's approval, otherwise it would not have been such a watchdog over her reporting. And again, as correctly noted by the *Feldman* court, a debtor can still be found to have subjectively intended to cause a loss even if a debtor merely *thought* he would cause a loss by concealing assets. The chain of email correspondence above makes it apparent that Miller certainly thought she would have to surrender income to the court if she disclosed it. And, Judge Agresti still expressed suspicions at a hearing on March 22, 2013,

[4] Although Miller filed an "accounting" of her income as demanded by the court, the accounting specifically did not reflect MasterClass, Showclix, and merchandise sales income.

[5] Of course, Judge Agresti was completely unaware of the hundreds of thousands of unreported income from Masterclass, merchandise sales and the like, which were never disclosed on MORs.

about whether Miller was being completely honest with the court after Miller filed her Second Amended Plan, and the "*smoke and mirrors as far as the filings and what as being told*":

> *"…I'll be honest with you. You've led me to believe over the last three years that this was a struggling wannabe reality TV star and that's not the case at all now that I've reviewed the contracts and what the payment schedule is…" And, "the problem is she wasn't going to make it right until she got caught and that's the quandary I'm in right now…this is just basic honesty…and for her not to have disclosed this information is troubling to the court."* (T.P.A., Hrg. Tx. 3/22/13, p. 8, lines 8-13, Govt. Ex. 18).

And Judge Agesti was keenly aware of the harm Miller intended to cause creditors by her concealment, ultimately suggesting a referral to the United States Attorney:

> *And then only because of a coincidence do I find out that your gal is now this big, successful reality T.V. lady doing all this stuff. And coincidentally, when I demanded the documents, lo and behold she ' s making $40,000 an episode and all -- nothing that's ever been reported and it goes back to October -- you know, it goes back quite far. And if I had not raised that, I would the Court and the people in interest would never have known about, nor would the creditors have been paid their money, except over a five year Plan. Until I made you disclose that, that was your Plan, if you recall. It was only when the cat was out of the bag that all of a sudden now she's going to throw $100,000 at unsecureds and get them all paid up immediately. Can I just look the other way in light of that record, Mr. Calaiaro*? (T.P.A., Id., p. 6, lines 2-15).

> *"Then maybe I should turn this over to the U.S. Trustee and the U.S. Attorney, make a referral. Is that what you're telling me?"* T.P.A., Id., lines 22-24.

Later in the same hearing, Judge Agesti was particularly perturbed that despite his repeated demands, Miller was still 'hiding the ball' when it came time to disclose income in reports:

> *"THE COURT": No, no. It' s my perception of what happens here coupled with what I see, okay? I don't buy when she comes in here and starts crying and wailing and then immediately turns off the tears when she gets a beneficial ruling, to me, that lacks sincerity, okay? I've made my own judgment as to her credibility and demeanor -- by her demeanor, okay? So I ' m not -- but when you put everything in context, especially after the many times that I admonished you and her as to the need to be totally forthcoming with all the information, and then to float a Plan that provided for long-term payment of unsecureds until circumstances changed and the Court became aware, just by chance, that there was a whole different reality out*

> *there. And then all of a sudden she comes in and throws money at it -- at the situation, that's the problem.*
>
> *So let's not go off on the, you know, "Woe is me, poor Abby Miller." I mean, she ' s sophisticated enough to land this deal, to get as far as she has, to be making this kind of money. And this is just basic honesty. And this was her most important matter from a business point of view to get beyond this. And for her to have -- not disclosed this information is troubling to the Court.* T.P.A., Id., p. 10, lines 23; p. 11, lines 1-19.

IV. Miller's progressively "creditor friendly" Plans of Reorganization did not occur until after the fraud was uncovered.

> ***"…[R]eality here is she's got duties and obligations to the Court and full disclosure, and she breached those duties…And our whole systemis bent – built on good faith, honor and the integrity of the participants. And what happens is we get people like this in here and that's what gives the whole system a bad name".*** T.P.A., Id., pp. 9-10.

Miller proposed three Plans of Reorganization and accompanying Disclosure Statements; an Original Amended and Second Amended. The First Plan and Disclosure Statement filed in February, 2012, drew objections from the Trustee, secured creditor Chase Bank, and Penn Hills School District who were concerned that Miller was not disclosing sufficient income to pay creditors as proposed. Miller's Disclosure Statement represented that although she projected "*high income*" from the TV show, there were "*no[t] contracts guarantying these payments*" and that she was proposing a Plan that she believed she could fund without the "*volatile income from the show.*" The court agreed with the objections and denied approval of the Original Plan, and ordered that an Amended Plan and Disclosure Statement be filed by April 12, 2012.

The terms of Miller's First Plan were not particularly favorable to the creditors and their claims. At the time of the Original Plan, Miller was indebted in the amount of approximately $402,850 in claims to secured creditors, of which the two largest being Chase Bank, which held a mortgage on a condominium in Davenport, Florida and which was financially "underwater." The second was a mortgage held by PNC on Miller's dance studio in Penn Hills, PA, which was on the eve of a Sheriff's sale by Allegheny County for unpaid taxes. She also had various business tax claims, and unsecured claims as well. In the Original Plan, Miller proposed paying unsecured creditors over course of 6 years, with no interest. She also proposed "cramming down" the Chase Bank mortgage from approximately $245,000 to $150,000, and to reduce the interest rate from 7.8% variable rate to a fixed 4.0%. She proposed modifying the PNC mortgage payments lower to $811.00 monthly for ten years. The total savings to Miller was approximately $351,989.

After objections, on August 27, 2012, Miller filed her Amended Plan. Here, Miller now proposed surrendering the Florida home to Chase in satisfaction of the debt, at her proposed fair market value of $120,000, and keeping the other creditor terms the same as in the Original Plan-except that unsecured creditors would be paid over one year sooner. It would have resulted in a savings of approximately $367,696 to Miller. This was the Plan that was on the table ready for approval by the court when in December, 2012, Judge Agresti saw the ads for the spin-off show episodes and turned the tables on Miller. Unknown to the court was that over one month before she filed the Amended Plan earlier on July 16, 2012, Miller signed up with the network for an additional 10 episodes of "Abby's Ultimate Dance Competition" for a fee of $25,000 per episode, with a payment schedule to run from approximately August 1, 2012 until October 4, 2012. The existence of this agreement named the "Binding Deal Term Sheet" was conveniently hidden from the court.[6]

Of course, the December conflagration precipitated Miller filing the Second Amended Plan and Disclosure Statement on January 18, 2013. This proposed plan contained the friendliest

[6] A question in each of the disclosure statement asks the debtor about the existence of any "executory contracts." Miller denied the existence of executory contracts in the Original Plan and Amended Plan. However, Miller only later answered "yes" to this question, and attached the agreements, with the Second Amended Plan filed in January 18, 2013. The involuntary revelation of this contract caused Agresti great consternation at the February 1, 2013 hearing, which caused the issuance of the February 4, 2013 order.

creditor terms of the three plans, particularly to unsecured creditors, whom now Miller agreed to pay immediately and in full on the Plan effective date. She also proposed to keep the Florida home, at the original fair market value, and to renegotiate mortgage terms to the same fixed rate of 4%. This plan had the least cost-savings to Miller, totaling $259,067. In so doing, PNC lost approximately $97,320, and Chase lost approximately $148,680 over the terms of their original loan agreements but at a cost savings and gain to Miller.

The point of this is not to prove an actual loss, or restitution owed, but that Miller's pre-fraud Reorganization Plans benefitted her significantly more than the post fraud discovery. This evidence was considered material to the *Free* court in the District Court's determination of whether a debtor intended to cause a pecuniary harm and Judge Agresti was keenly aware also. Of course, Miller also obtained multiple additional benefits that are not necessarily quantifiable in money when a debtor seeks protection in bankruptcy from creditors. Certainly, creditors are enjoined by an automatic stay provision from recovering their losses until authorized by the court. Secondly, the debtor is in control of the Plan of Reorganization, as opposed to a Trustee in a Chapter 7 case.

<u>United States' Responses to Miller's Objections to the PSR</u>

Miller has raised objections to certain paragraphs of the PSR. The government's responses are as follows.

<u>Paragraph 26</u>

Miller contended that the <u>Second Amended Plan</u> was approved by the bankruptcy court with full disclosure and no objections. However, when Miller filed the <u>Second Amended Plan</u> in January, 2013, she was well into the concealment of income relative to Masterclass revenue and merchandise sales revenue. The "Amended" Monthly Operating Reports were not filed until October 4, 2013, literally at the "11th hour" before the <u>Second Amended Plan</u> approval hearing which occurred on October 17, 2013, hardly providing creditors sufficient time to determine what Miller's assets were. And, of course, even in the Amended MORs (which the Court barely had an opportunity to review), Miller still either grossly underreported, or failed to report income earned from Masterclass and other revenue sources beyond the TV show, beginning October, 2012, through October, 2013, as alleged in Counts 8-20 of the Indictment.

<u>Paragraphs 27 and 28</u>

Miller contended that the "Participatory Agreement" negotiated between Miller and TV show producer Collins Ave. did not "guarantee" income, but provided for pilot episodes of "Dance Moms", subject to the network A&E's right to exercise options for future series, obviously based upon the TV show's success. However, the 'Participatory Agreement' executed April 8, 2011, authorized the network the option to exercise multiple seasons and terms, which it did exercise several times between April, 2011, through December 2012. In fact, in October, 2011, Miller executed an <u>Amendment</u> to the 'Participatory Agreement' called a "Talent Services Agreement" in which the network was agreed to exercise the options for Series 2, 3, and 4 of the show, with escalating compensation to Miller for each series from $8,000, to $12,500, and then to $15,000 per episode. Of course the network did exercise its options and the shows were produced and aired, and Miller was paid.

Yet, although Miller produced only 3 agreements (these agreements were filed under seal), which included the 'Participatory Agreement', the 'Binding Deal Term Sheet', and a '360 Agreement' she in fact had entered into 7 other agreements for the production of future episodes of Dance Moms and related "spin-off" programs including 'Talent Services Agreements', 'Episode Renewals' for additional seasons of Dance Moms, and 'Reunion Episodes' and a 'Studio

Refurbishment Agreement', all which detailed future compensation. None of these were disclosed to the court, in contravention of the December 13, 2012 court order.

Paragraph 30

Miller indeed denied the existence of contracts in several ways. First, when she responded "no" to the question asked in the 'Disclosure Statements' about the existence of executory contracts; second, in the Disclosure Statements summary, she stated there were "*no[t] contracts guarantying these payments*"; third, when she announced at the February 2, 2013 hearing that she "*never seen them*" when the court asked about the existence of television show contracts. By December, 2012, Miller in fact executed or negotiated approximately 10 agreements for new TV show episodes and spin-off television programs and compensation.

Paragraph 35

Miller contented that there is no 'intended loss' since the creditors received what they claimed. Again, this entrenched position by the defendant ignores the principle asserted earlier in this Memorandum that no actual loss to creditors is necessary to establish that a debtor intended to deprive a creditor of assets. *See Free* and *Feldman*, supra. Clearly from the direct evidence and acts of concealment, Miller developed a plan at some point early in the bankruptcy to conceal assets for fear that they would be taken by the court and used to pay creditors. The fact that Chase Bank did not seek a deficiency claim on the mortgage is irrelevant to the court's determination of loss.

Paragraph 43

The stated liabilities are certainly a proper measure of loss, and neither the *Free* nor *Feldman* said otherwise. In fact, the *Feldman* District and Circuit court opinions clearly accepted the use of stated liabilities as a measure of loss. Miller and *Feldman* are not factually different in terms of how a court measures loss in a substantial concealment of assets bankruptcy fraud. There is absolutely no distinction between a Chapter 7 liquidation, and a Chapter 11 Reorganization. An intent to deprive assets is analyzed the same for both. Indeed, Miller's reliance on *Feldman* is perilous, since there was no direct evidence of *Feldman*'s intent to deprive creditors of assets beyond a massive concealment of assets. However, Miller's intent is memorialized in incriminating emails and duplicitous bankruptcy filings in addition to concealing almost $750,000 from the court and creditors.[7]

<u>Paragraph 44</u>

This argument has been addressed above. An intended loss can be readily determined under both *Free* and *Feldman*.

<u>Paragraphs 48-49</u>

The preponderance of the evidence will be that Miller structured foreign currency into the United States from Australia and other countries. There will be evidence also that minors transported currency for Miller also.

<u>Paragraphs 55 and 57</u>

The government will present sufficient evidence supporting the loss calculations under both 2B1.1, 2S1.3 and 3B1.4 as explained in the PSR.[8]

[7] Miller argued that the concealment of a large quantity of assets does not always prove intent to "short change" creditors. As recognized by both courts in *Feldman*, it's impossible to explain another non-criminal reason for a debtor to hide assets other than to short change creditors. If the debtor prefers that the loss should instead be measured by the gain to Miller, then a potential loss could be as high as $750,000.

[8] In paragraph 55 of the PSR, the PSR author correctly recognized, as pursuant to the plea terms, that the government will seek a 2 level enhancement under Section 2S1.3(b)(2). However, the USSG only required the transportation of "more than $100,00 in a 12-month period…" It does not require two separate occasions of unlawful activity.

The PSR correctly calculated the loss and the guideline range of 24-30 months incarceration.

In a fraud case, the government bears the burden of establishing the amount of loss for purposes of sentencing by a preponderance of the evidence. The court need only make a "reasonable estimate" of the loss incurred. *Free*, supra; *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011); USSG 2B1.1, comment. n. 3(C); 18 U.S.C. Sec. 3742(e) and (f).

Following the guidance in *Free* and *Feldman*, the evidence as explained above demonstrated an intent by Miller to deny assets to creditors. No other reasonable explanation exists for Miller's massive concealment of assets. It follows then that the *Free* court's instruction on how to determine the loss is the dollar figure reasonably determined to be the amount Miller thought she would have discharged by way of the bankruptcy, or reorganized in a Chapter 11 case. The most compelling evidence of when Miller sought to deprive creditors is the concealment committed up to the uncovering of the fraud in December, 2012. At this point, Miller sought to reorganize $356,466 in both secured and unsecured debt. Miller would have completely reorganized that debt but for the uncovering of the fraud upon the court. See Hon. Judge Agresti's comments in 3/22/13 transcript, pp. 10-11, Govt. Ex. 18. Under *Feldman*'s guidance, an acceptable loss figure is the stated liability amount the debtor intended to have discharged or reorganized. In this circumstance the *Feldman* court accepted the government's loss figure that the intended loss was what *Feldman* sought to have discharged, or approximately $203,784. In so, the court rejected *Feldman*'s "zero loss" argument.[9] Likewise, the United States agrees with the *Feldman* analysis, and believes the loss level is Miller's stated liabilities in the bankruptcy petition. And, importantly, this view is supported by both *Free* and *Feldman* courts. *"In our view, this*

[9] The court did not determine whether administrative fees should be added to the loss level, which would have increased the loss to above $200,000 under the old USSG since the USSG would have been the same whether increased by 7 or 8 levels. Clearly though, the court accepted the government's loss figure as the stated liabilities in the bankruptcy petition.

conduct supported the conclusion that Feldman intended to inflict a loss in the amount of the entire debt from which he sought to be discharged.” Free, supra, citing *Feldman,* 338 F.3d at 216.

There is absolutely no language in *Free* that the intended loss amount cannot be stated liabilities. Indeed, it can be any loss the government believes it can provide.

The Guidelines also suggest the <u>gain</u> to a defendant as an alternative measure of loss if the loss reasonably cannot be determined. USSG 2B1.1 comment n. 3(B). *“The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.” Free* suggested this as a possible option to the district court upon remand. “…[W]*e thus remand to allow the District Court to determine what, if any, loss to creditors Free intended, or the gain he sought by committing the crime” Free,* supra, at 324, citing *Feldman,* supra, at 221-223.

Indeed, but for Judge Agresti’s fortuitous weekend channel surfing, Miller would not only have reorganized her entire debt, but at a savings of approximately $351,989 in secured debt. Chase Bank would have swallowed $95,573 in principal on the mortgage. Similarly, PNC would have swallowed approximately $133,733 by restructuring the mortgage on the dance studio in Penn Hills. So, the secured creditor’s loss is Miller’s gain in the amount of $351,989. This is an actual “gain” figure of course. It would not affect the USSG calculation since it is within the same guideline range of $250,000 to $550,000 loss, see 2B1.1. The exclusions from loss in the form of interest and penalties would not apply here, since Miller’s “gain” is the elimination of both principal and interest payments on her mortgages.

<u>The Structuring Charge Conviction</u>

The PSR accurately summarizes the offense conduct at docket 16-132 involving Miller’s unlawful transportation of foreign currency into the America following a lengthy trip to Australia in 2014 with members of the dance show. In addition to witness testimony, the government obtained a cell phone photograph of the Australian notes which were transported (photograph, Govt. Ex. 19). Miller used other members of the trip to transport Australian currency into the U.S. in violation of U.S. structuring laws under Title 31. The United States estimates the equivalent of approximately $120,000 in Australian currency was transported into the U.S. Although the United States charged one count of Structuring International Monetary Instruments, the United States will present evidence of other instances when Miller structured foreign currency in excess of $10,000 into the America without reporting it.

Miller was quick to hide this money soon after she returned from Australia when she emailed her banker in October, 2014, *"We have all this cash / need a little money laundering…"* (text, Govt. Ex. 20).

<u>The 3553 Factors Justify a Sentence of Incarceration</u>

Under § 3553(a), "[t]he Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). Those purposes are "(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." 18 U.S.C. § 3553(a)(2). In determining that sentence, this Court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), "the kinds of sentences available," § 3553(a)(3), the Guidelines and Guideline range, § 3553(a)(4), the Guidelines' policy statements, § 3553(a)(5), "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6), and "the need to provide restitution to any victims of the offense," § 3553(a)(7).

A Guideline sentence is warranted here because the other relevant § 3553(a) factors strongly support a sentence within the Guidelines range. First, the Guidelines calculation here reflects "the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). Indeed, Miller committed multiple offenses for which she accepted responsibility in the context of the bankruptcy. She both schemed to defraud the court, conceal assets, and falsify bankruptcy schedules while under oath. See *United States v. Greenidge*, 495 F.3d 85, 103 (3d Cir. 2007) (sentencing courts should consider "the factual basis underlying a defendant's sentence enhancements" in determining the seriousness of the offense.) In addition, the seriousness of defendant's offense is shown by the other "nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), namely, the blatant disregard of repeated instructions from the bankruptcy court to provide full and honest responses regarding her income as described above. The court in *Free* recognized that this type of behavior showed a lack of respect for the law. *"Moreover, the District Court may find it appropriate to depart on the basis that Free's "conduct resulted in a significant disruption of a governmental function" to reflect Free's flagrant disregard for the Trustee's instructions, the Bankruptcy Court's orders, and interference with the bankruptcy process." Free*, supra. And, because the guideline range is a Zone D sentence, the USSG prohibits a non-incarceration sentence. USSG Sec. 5B1.1, comment (n.2).

Additionally, it is extremely troubling to the United States that this defendant refused to be deterred by the court's admonitions. Soon after the bankruptcy concluded, Miller returned to her scheming ways again when she transported tens of thousands in foreign currency from overseas locations into the U.S. in violation of U.S. structuring laws. To do so, she needed to enlist others, putting them at risk for criminal prosecution. It is apparent that Miller is not easily deterred by threat of criminal prosecution, even standing before a federal judge.

For the reasons set forth above, a guideline sentence is a sufficient but not greater than necessary sentence in this case.

Respectfully submitted,

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