



U.S. Department of Justice

United States Attorney
Southern District of New York

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August 4, 2014

The Honorable Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Rudy Kurniawan, 12 Cr. 376 (RMB)

Dear Judge Berman:

Pursuant to the Court's request, we write to address the Sentencing Guidelines issue raised by the Court regarding the propriety of the two-level upward adjustment predicated on the determination that there were more than ten "victims" of the defendant's offense. In particular, we address whether certain of the individuals who were reimbursed by the defendant, or received refunds from Acker Merrall & Condit, should properly be counted as "victims," given that they were reimbursed, or made whole, and therefore not also counted as persons entitled to restitution. As we explain below, a reading of the pertinent Guidelines, application notes, and cases applying those provisions makes plain that there were more than ten "victims" of the defendant's offense.

Application Note 1 to U.S.S.G. § 2B1.1 provides that the term "victim" means any person who sustains any part of the actual loss under subsection (b)(1) of that Guideline. Applying this definition, there can be no legitimate argument that those identified on the Government's restitution chart --- David Doyle, Michael Fascitelli, Brian Devine, Andrew Hobson, Reid Buerger, William Koch, and Mission Fine Wines --- were "victims" because each of those persons or entities paid or forwarded funds to purchase wines from the defendant (either directly or indirectly), and received counterfeit wine in exchange. Moreover, all except Koch have not been reimbursed or otherwise reached a settlement with the defendant.

In addition to the foregoing, several other individuals identified by the Government in our earlier filings --- Donald Stott, Edward Milstein, Thomas Roberts, Pia Cattaneo, Gene Mulvihill, Tom Tuft, Robert Caine, Gary Hurvitz, Tom Evans, Jeffrey Levy, Benjamin Lewin, and David Solomon --- should properly be counted as "victims" because all of these individuals paid money for Kurniawan wines at Acker Merrall & Condit auctions and received counterfeit wines in exchange. The fact that all of these individuals were reimbursed after they determined they had

been defrauded does not alter the conclusion regarding “victim” status. That is so because, although Application Note 3 to U.S.S.G. § 2B1.1 gives a “credit against loss” with respect to monies returned by the defendant or others to victims, such credit is appropriate only if the monies were returned “before the offense was detected” by a victim or governmental agency. Here, what prompted the request for reimbursement was the determination by the victims that they had been defrauded by Kurniawan because they had received fake wines rather than the genuine wines promised by the defendant. Accordingly, the status of these individuals as “victims” within the meaning of Application Note 1 remains unaltered. See United States v. Philpot, 733 F.3d 734, 748-49 (7th Cir. 2013) (no credit for loss under U.S.S.G. § 2B1.1 because municipal victim determined it had been victimized prior to defendant’s return of improperly taken bonuses; “the fact that [defendant] ‘repa[id]’ the bonus ‘after the loss ha[d] been discovered does not change the fact of the loss; such fact merely indicates some acceptance of responsibility”); United States v. Peugh, 675 F.3d 736, 742 (7th Cir. 2012) (no credit against loss where defendant repaid funds to bank stemming from check-kiting scheme prior to being criminally charged but after bank had determined internally that defendant was involved in check-kiting; “victim can detect an offense without understanding its full scope”), rev’d on other grounds, 133 S. Ct. 2072 (2013).

In sum, the fact that the defendant, either directly or through Acker Merrall & Condit, caused “victims” of his offense to be reimbursed is irrelevant, as each of those reimbursed victims got their monies back only after they determined they had been defrauded --- that is, after they determined that that had paid money to the defendant for counterfeit wines based on the defendant’s false representations and promises.

Respectfully submitted,

PREET BHARARA
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