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19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**
21 **OAKLAND DIVISION**

22 UNITED STATES OF AMERICA,

23 Plaintiff,

24 vs.

25 WALTER NG,

26 Defendant.

27 Case No. CR 13-00650 PJH

28 **DEFENDANT WALTER NG'S AND
KELLY NG'S STATEMENT
REGARDING INVESTOR
TESTIMONY**

Sentencing Hearing
Date: March 5, 2014
Time: 4:00 p.m.

29 The government has informed the Court that former investors in Walter and Kelly Ng's real
30 estate investment companies have contacted the government to determine whether they will be allowed
31 to speak at the defendants' sentencing hearing tomorrow. Counsel understands that these investors
32 contend they were defrauded by the Ngs' real estate investment companies and wish to raise matters

DEFENDANTS' STATEMENT REGARDING INVESTOR TESTIMONY

1 related to their investment losses with the Court at the sentencing hearing on the Ngs' convictions for
2 structuring of financial transactions.

3 The government agrees these individuals do not qualify as victims under the Crime Victims'
4 Rights Act ("CVRA") because they were not directly and proximately harmed as a result of the Ngs'
5 structuring offense. 18 U.S.C. § 3771(e). As such, they are not covered by the provisions of the CVRA
6 that give victims the right to be heard at sentencing proceedings. *See id.* at (a)(4). Nor do allegations of
7 wrongdoing at the Ngs' investment companies qualify as relevant conduct under the Sentencing
8 Guidelines. U.S.S.G § 1B1.3 (defining relevant conduct as conduct "that occurred during the
9 commission of the *offense of conviction*, in preparation for *that offense*, or in the course of attempting to
10 avoid detection or responsibility for *that offense*") (emphasis added.) The Information in this case does
11 not allege a connection between Walter's or Kelly's structuring offenses and the Ngs's real estate
12 investment companies. *See* Dkt. 1. The factual recitations in both plea agreements also make no
13 reference to the investment companies and do not allege any wrongdoing with respect to those
14 companies.

15 Although the parties agree the investors are not victims covered by the CVRA, the government
16 has filed a letter with the Court (Docket No. 25) stating that "[p]ursuant to 18 U.S.C. § 3661, the Court
17 may decide to receive and consider information concerning the background, character, and conduct of a
18 person convicted of an offense for the purpose of imposing an appropriate sentence."

19 Counsel for the Ngs submit it would be inappropriate and procedurally improper for the Court to
20 permit these individuals to testify about matters unrelated to the offenses of conviction. Regarding the
21 procedural issues, while 18 U.S.C. § 3661 affords the Court discretion to consider information regarding
22 the background, character and conduct of a defendant, the Court cannot do so without first providing the
23 defendant due process protections, such as the opportunity to refute the information. *See United States*
24 *v. Giltner*, 889 F.2d 1004, 100-09 (11th Cir. 1989) (due process protections apply to all information
25 presented at sentencing and requires that defendant be afforded an opportunity to refute information
26 provided against him); *United States v. Serhant*, 740 F.2d 548, 551-53 (7th Cir. 1984) (district court can
27 review victim impact statements so long as due process concerns are satisfied, *e.g.*, providing the
28 defendant an opportunity to rebut inaccurate information). Apart from the government's statement in its

1 letter that individuals “have reached out to the government to determine whether or not they may speak
2 at sentencing” (Docket No. 25), the Ngs and their counsel have received no information about who
3 would like to testify and what evidence they would like to present. On this record, the Ngs cannot
4 adequately prepare to refute the information that may be offered against them by the investors.

5 Allowing the investors to speak at tomorrow’s hearing would thus violate the Ngs’ due process rights.

6 Moreover, before the Court can rely on information presented under Section 3661, the court must
7 find that information accurate and reliable. *United States v. Brown*, 926 F.2d 380, 381 (4th Cir. 1991)
8 (“[W]here the reliability of evidence is an issue the court should conduct an evidentiary hearing to
9 determine the same.”); *see also United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010) (due
10 process may require clear and convincing evidence of uncharged conduct if that conduct forms the basis
11 for an enhanced sentence). Here, allegations regarding wrongdoing at the Ngs’ investment companies
12 have not been proven in this or any other court. The absence of any factual finding of the accuracy or
13 reliability of the allegations would create a significant evidentiary issue. When a witness testifies as a
14 victim of a crime for which a defendant has been convicted, there is no dispute that the allegations
15 concerning a defendant’s illegal conduct are accurate and reliable; that issue has been established by the
16 conviction. But when a witness testifies about matters that have not been resolved in this Court or,
17 indeed, any other court, the accuracy and reliability of the allegations have to be addressed, presumably
18 through testimony, cross-examination and other evidence.

19 For these procedural reasons, it would be improper to allow testimony of individuals who are not
20 victims of the defendants’ criminal conduct to testify at the sentencing hearing. But there are other
21 reasons to decline the individuals’ request. The issues about which the investors wish to testify are
22 currently the subject of a pending civil enforcement action brought by the Securities and Exchange
23 Commission (*see Securities and Exchange Commission v. Walter Ng, Kelly Ng, et al.*, Dkt. No. 3:13-
24 CV-00895) and of several other civil cases pending in state court. The investors will have the
25 opportunity to raise any concerns about the Ngs’ investment business in those cases where the
26 investment-related issues are being resolved. That is the proper forum, one where all sides will be
27 accorded due process and where all parties will have the opportunity to voice their positions. A
28 sentencing hearing on the Ngs’ structuring offenses, however, is not the proper forum to present and

1 resolve issues about investment losses that are factually and legally unrelated to the offense of
2 conviction.

3 For the foregoing reasons, counsel respectfully requests the Court decline the government's
4 invitation to hear from investors at sentencing.

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7 DATED: March 4, 2014

Respectfully Submitted,

8 _____
9 /s/

10 Edward W. Swanson
11 Britt H. Evangelist
12 SWANSON & McNAMARA LLP
13 Attorneys for WALTER NG

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16 DATED: March 4, 2014

Respectfully submitted,

17 _____
18 /s/

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20 ARGUEDAS, CASSMAN & HEADLEY
21 Attorneys for KELLY NG
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