

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Handwritten Signature]
FILED
JUL 5 2016
THOMAS G. BRUTON
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA

No. 16 CR 325

v.

18 U.S.C. § 1343

CLAYTON ANDREW COHN

Judge Jorge L. Alonso

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, ZACHARY T. FARDON, and defendant CLAYTON ANDREW COHN, and his attorney, DANIEL J. COLLINS, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The parties to this Agreement have agreed upon the following:

Charge in This Case

2. The information in this case charges defendant with wire fraud, in violation of Title 18, United States Code, Section 1343.

3. Defendant has read the charge against him contained in the information, and that charge has been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crime with which he has been charged.

Charge to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the information, which charges defendant with wire fraud in violation of Title 18, United States Code, Section 1343.

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charge contained in the information. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt and constitute relevant conduct pursuant to Guideline § 1B1.3, and establish a basis for restitution to investors described elsewhere in this Plea Agreement:

Beginning no later than in or about 2010 and continuing to in or about 2013, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant COHN devised, intended to devise and participated in a scheme to defraud his investment adviser clients and other investors, and to obtain and retain money and property by means of false pretenses, representations and promises, and by concealment of material facts, which scheme is described below.

In 2010, defendant Cohn gained control of an entity known as Marketaction, Inc., which became an investment adviser business. Defendant COHN, a person associated with an investment adviser, was then solely responsible for the activities of Marketaction, Inc., including soliciting funds from the public for

investment, making investment decisions, and controlling its bank and financial accounts.

In 2011, defendant Cohn formed and operated two other entities: Marketaction Advisors and Marketaction Capital Management, L.L.C. Marketaction Capital Management L.L.C. ("MCM") was a hedge fund and Marketaction Advisors ("MA") was an investment adviser that managed the activities of the MCM Fund, including offering and selling interests in the MCM Fund to the public. As a person associated with an investment adviser, defendant COHN was responsible for the activities of MA as well as the MCM Fund, including soliciting funds from the public for investment in the MCM Fund, making investment decisions, and controlling the bank and financial accounts of MA and MCM Fund.

Beginning no later than 2010 and continuing until approximately July 2013, defendant COHN fraudulently offered and sold more than \$1 million in investments in and through Marketaction, Inc. and the MCM Fund. In fraudulently obtaining and retaining these funds, defendant COHN misrepresented and caused to be misrepresented to investment adviser clients and other investors his use of invested funds, his success as a trader, the status of invested funds, the performance of the MCM Fund, and his personal financial interest in the Fund, and misappropriated a substantial portion of the funds

invested in Marketaction Inc. and Marketaction Capital Management for his own benefit.

For instance, defendant COHN falsely represented and intended to falsely represent:

- (a) that Marketaction, Inc was a thriving financial services firm and that it had numerous private equity investments when in fact Marketaction, Inc. provided few if any financial services and engaged in very little investment activity;
- (b) that investors' funds would be used to achieve the Marketaction, Inc. and MCM Fund's investment objectives. Defendant COHN described the objectives of the MCM Fund in various ways including achieving preservation of capital, short term generation income, and capital appreciation through investments in a variety of financial instruments, principally equity option credit spreads. In fact, defendant made minimal investments in financial or equity instruments;
- (c) that ordinarily, a "minimum" investment in the MCM Fund was required in amounts ranging between \$50,000 and \$200,000, but in almost all cases COHN told prospective investors that he would make an exception for them; and
- (d) that investors' funds would be invested as promised and that that MA would be paid fees only if trading in the MCM Fund was profitable under

identified criteria. In fact, defendant misappropriated the majority of investor funds to pay expenses of Marketaction, Inc. Marketaction Advisers, and the MCM hedge fund, and to pay COHN's substantial personal expenses, including maintaining his particular lifestyle.

Defendant COHN did not use the vast majority of investor funds as promised, but instead misappropriated for himself investors' money far in excess of the amount he had told investors and did not use these funds to make investments as he had represented. Defendant admits that he misappropriated to his own use at least \$800,000 to which he was not entitled.

Defendant COHN reviewed and approved promotional materials and purported MCM Fund trading track records for distribution to investors. Defendant knew these were misleading in important respects including that they falsely inflated the success of the defendant's trading for the MCM Fund and failed to disclose the actual and unsuccessful performance of the MCM Fund, including the adverse financial impact of defendant COHN's misappropriation of funds.

To obtain and retain the investors' funds and to lull investors into a false sense of security, defendant COHN used the internet and websites to make false and misleading account statements which purported to reflect the value of each investor's interest in the MCM Fund. The values of these investor accounts as shown on the websites were false and misleading in that they made it appear

that the MCM Fund and individual investors were making money when the MCM Fund as whole and almost all individual investors for whom defendant had established investment accounts had suffered losses. As but one example, in several of these reports, defendant COHN falsely claimed that the MCM Fund achieved a 200% return on investment in the year 2012, when he knew that was false.

Defendant COHN was responsible for false and misleading promotional and descriptive materials and representations to investors and prospective investors that the MCM Fund engaged a particular person as the “Fund Accountant,” to provide certain services including calculating the Net Asset Value of the Fund; a particular firm as the “Auditor” to audit the MCM Fund on an annual basis; and a particular law firm to provide legal advice. Defendant knew these representations were false.

Defendant COHN caused to be filed with the United States Securities and Exchange Commission false and misleading information about the MCM Fund. The false and misleading information included that the MCM Fund was subject to annual audits and that the MCM Fund had engaged an auditor for this purpose.

Defendant COHN was responsible for distributing false and misleading promotional and descriptive materials and otherwise made false and misleading representations to investors and prospective investors about defendant COHN's

personal financial interest in and commitment to the MCM Fund, his trading prowess, and that Marketaction, Inc. and the MCM Fund were profitable.

Defendant COHN was responsible for the creation and distribution of promotional and descriptive literature that told investors and prospective investors in the MCM Fund that redemption of their investments would be without “hassle,” “simple,” and “easy” and available on a monthly basis; but, when investors requested redemption, he made false and misleading excuses for his failures to make redemptions and did not disclose that there was no money to pay investors the money they were due because defendant COHN had misappropriated investor funds and the investments he did make resulted in losses.

As a result of the defendant’s scheme to defraud, defendant COHN obtained from investors in Marketaction, Inc. and the MCM Fund more than \$1,800,000 between 2010 and 2013, paid approximately \$300,000 to investors as part of the scheme, and ultimately caused a loss of approximately 1 million.

Defendant COHN acknowledges that he misrepresented, concealed and hid and caused to be misrepresented, concealed and hidden the purposes of the acts done in furtherance of the charged scheme.

Defendant COHN further acknowledges that as a consequence of his scheme, and as charged in the information, on or about September 2, 2011, investor JG invested approximately \$332,600 in the MCM hedge fund which

funds were transmitted by an interstate wire communication by way of the Federal Reserve system in interstate commerce from JG's bank account in Minnesota to a bank account of MCM in Chicago.

Maximum Statutory Penalties

7. Defendant understands that the charge to which he is pleading guilty carries the following statutory penalties:

a. A maximum sentence of 20 years' imprisonment. This offense also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. Defendant further understands that the judge also may impose a term of supervised release of not more than three years.

b. Defendant further understands that the Court must order restitution to the victims of the offense in an amount determined by the Court.

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$100 on the charge to which he has pled guilty, in addition to any other penalty or restitution imposed.

Sentencing Guidelines Calculations

8. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

9. For purposes of calculating the Sentencing Guidelines, the parties agree and disagree on the following points:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of sentencing. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2015 Guidelines Manual.

b. **Offense Level Calculations.**

i. The base offense level for the charge in the information is 7, pursuant to Guideline Section 2B1.1(a)(1).

ii. The government takes the position that pursuant to Guideline Section 2B1.1(b)(1)(I), the offense level is increased by 16 levels because the total amount of loss resulting from the offense is at least \$1.8 million, an amount that is greater than \$1.5 million, but less than \$3.5 million. Defendant agrees that his fraudulent conduct caused financial loss to investors, but does not agree with this loss calculation.

iii. Pursuant to Guideline Section 2B1.1(b)(2)(A)(i), the offense level is increased by 2 levels because the offense involved 10 or more victims.

iv. The government takes the position that pursuant to Guideline Section 2B1.1(b)(10)(C), the offense level is increased by 2 levels

because the offense involved sophisticated means. Defendant does not agree that this Guideline increase is appropriate.

v. Pursuant to Guideline Section 2B1.1(b)(19)(A)(iii), the offense level is increased by 4 levels because defendant was a person associated with an investment adviser. If the sentencing judge agrees that this Guideline Section applies, then pursuant to Application Note 15(C), Guideline Section § 3B1.3 (Abuse of Trust) is not applicable. Defendant understands that the government's position is that if Guideline Section 2B1.1(b)(19)(A)(iii) does not apply, then the defendant abused a position of trust under Guideline Section § 3B1.3.

vi. Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if defendant continues to accept responsibility for his actions within the meaning of Guideline Section 3E1.1(a), including by furnishing the United States Attorney's Office with all requested financial information relevant to his ability to satisfy any fine or restitution that may be imposed in this case, a two-level reduction in the offense level is appropriate.

vii. In accord with Guideline § 3E1.1(b), defendant has timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court

to allocate its resources efficiently. Therefore, as provided by Guideline § 3E1.1(b), if the Court determines the offense level to be 16 or greater prior to determining that defendant is entitled to a two-level reduction for acceptance of responsibility, the government will move for an additional one-level reduction in the offense level.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category pursuant to Guideline § 4A.1.1, based on the facts now known to the government, defendant's criminal history points equal zero and defendant's criminal history category is I.

d. **Anticipated Advisory Sentencing Guidelines Range.** Therefore, based on the facts now known to the government, and if the anticipated offense level is 28, which, when combined with the anticipated criminal history category of I, results in an anticipated advisory sentencing guidelines range of 78-97 months imprisonment, in addition to any supervised release, fine, and restitution the Court may impose.

e. Defendant and his attorney and the government acknowledge that the above guidelines calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that further review of the facts or applicable legal principles may lead the government to conclude that different or additional guidelines

provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final guideline calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

f. Both parties expressly acknowledge that this Agreement is not governed by Fed. R. Crim. P. 11(c)(1)(B), and that errors in applying or interpreting any of the sentencing guidelines may be corrected by either party prior to sentencing. The parties may correct these errors either by stipulation or by a statement to the Probation Office or the Court, setting forth the disagreement regarding the applicable provisions of the guidelines. The validity of this Agreement will not be affected by such corrections, and defendant shall not have a right to withdraw his plea, nor the government the right to vacate this Agreement, on the basis of such corrections.

Agreements Relating to Sentencing

10. Each party is free to recommend whatever sentence it deems appropriate.

11. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the

maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

12. Regarding restitution, defendant acknowledges that pursuant to Title 18, United States Code, Section 3663A, defendant is obliged to make and agrees to make restitution to the victims of defendant's scheme in an amount of to be determined at sentencing. Defendant acknowledges that the government takes the position that the amount of restitution due to investor victims is approximately \$1.5 million.

13. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant acknowledges that pursuant to Title 18, United States Code, Section 3664(k), he is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect his ability to pay restitution.

14. Defendant agrees to pay the special assessment of \$100 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

15. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

16. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 16 CR 325.

17. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

Waiver of Rights

18. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Right to be charged by indictment.** Defendant understands that he has a right to have the charge prosecuted by an indictment returned by a concurrence of twelve or more members of a grand jury consisting of not less than sixteen and not more than twenty-three members. By signing this Agreement, defendant knowingly waives his right to be prosecuted by

indictment and to assert at trial or on appeal any defects or errors arising from the information, the information process, or the fact that he have been prosecuted by way of information.

b. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charge against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt

beyond a reasonable doubt. The jury would have to agree unanimously before it could return a verdict of guilty or not guilty.

iv. — If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

viii. With respect to forfeiture, defendant understands that if the case were tried before a jury, he would have a right to retain the jury to determine whether the government had established the requisite nexus between

defendant's offense and any specific property alleged to be subject to forfeiture. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraphs. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

Presentence Investigation Report/Post-Sentence Supervision

19. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charge against him, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing.

20. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the Probation Office, and the United States Attorney's Office regarding all details of his financial circumstances, including his recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of his sentence for obstruction of justice under Guideline § 3C1.1, and may be

prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

21. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

22. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine and restitution for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office. Defendant will not object to a motion brought by the United States Attorney's Office for the entry of an order authorizing disclosure of documents, testimony and related investigative materials which may constitute grand jury material, preliminary to or in

connection with any judicial proceeding, pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i). In addition, defendant will not object to the government's solicitation of consent from third parties who provided records or other materials to the grand jury pursuant to grand jury subpoenas, to turn those materials over to the Civil Division of the United States Attorney's Office, or an appropriate federal or state agency (including but not limited to the Internal Revenue Service), for use in civil or administrative proceedings or investigations, rather than returning them to the third parties for later summons or subpoena in connection with a civil or administrative proceeding involving, or investigation of, defendant.

23. Should defendant engage in additional criminal activity after he has pled guilty but prior to sentencing, defendant shall be considered to have breached this Agreement, and the government at its option may void this Agreement.

Conclusion

24. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

25. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its

option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

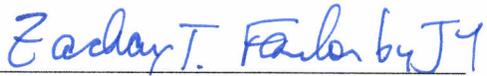
26. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

27. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

28. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

29. AGREED THIS DATE: _____

7-5-2016



ZACHARY T. FARDON
United States Attorney



CLAYTON ANDREW COHN
Defendant



DANIEL W. GILLOGLY
Assistant U.S. Attorney



DANIEL J. COLLINS
Attorney for Defendant