Sentencing Issues in White Collar Cases

Sherry Levin Wallach, Esq., (Moderator)
Bashian & Farber, LLP, White Plains

Jillian B. Berman, Esq.
Levine Lee LLP, NYC

Xavier Donaldson, Esq.
Donaldson & Chilliest LLP, NYC

Lisa Peebles, Esq.
Federal Public Defender, Northern District of New York, Syracuse

Jodi Avergun, Esq.
White Collar Defense & Investigations Practice,
Cadwalader, Wickersham & Taft, LLP, Washington, DC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. GAVIN HAMELS, *Defendant*.	Case No. 15-cr-643 (PKC) ECF Case

DEFENDANT GAVIN HAMELS' SENTENCING SUBMISSION

LEVINE LEE LLP
Jillian B. Berman
Seth L. Levine
650 Fifth Avenue
New York, New York 10019
(212) 223-4400
jberman@levinelee.com
slevine@levinelee.com

Attorneys for Defendant Gavin Hamels

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Defendant Gavin Hamels, by and through his counsel, respectfully submits this memorandum and the accompanying exhibits to assist the Court in sentencing.

PRELIMINARY STATEMENT

Gavin Hamels stands before the Court ready to accept the consequences of his actions. He is here because of his own poor decisions and makes no excuses for his conduct. Gavin has disappointed himself, his family and friends, his community, and society at large. He is, however, a first-time offender, and his criminal conduct is an aberration in his otherwise law-abiding life. Indeed, the Government, Probation Department, and his family and friends all agree on the same fundamental principle about Gavin: his mistakes stand in stark contrast to his good character and his otherwise exemplary life. Accordingly, the Probation Department recommends a sentence of probation, and we submit that this is an appropriate sentence.

Gavin's conduct is so at odds with his character and how he has otherwise lived his life that, after having engaged in the misconduct, Gavin took responsibility for his actions promptly. And he has continued doing so throughout this case. He has assisted and cooperated with the Government since making the most severe mistake of his life. In September 2010, within days of completing the conduct to which Gavin has pleaded guilty in this case, Gavin reported to his employer what he had done, resulting in his termination. Several years later, when federal law enforcement asked to speak with Gavin, he agreed to speak with them voluntarily, and did so twice and spoke truthfully. He also provided documents and materials evidencing his actions. He continued to cooperate after he was indicted: proffering with the Government; pleading guilty pursuant to a cooperation agreement; continuing to provide information to the Government; testifying at trial of a co-defendant; and, in total, providing substantial assistance in the Government's prosecution of other individuals. The Government details Gavin's substantial

cooperation in its sentencing letter.[1] (Letter from the Government to the Court (Oct. 3, 2017) ("Government Sentencing Letter") at 5-6.) These actions reflect that Gavin's aberrational criminal conduct stands in stark contrast to his strong character and sense of personal responsibility.

Gavin is also different from many other cooperating witnesses that appear before the Court for sentencing. Gavin's criminal conduct was not motivated by greed or desire for personal profit. He received no profits or proceeds from his actions. Rather, he acted in desperation—and he acknowledges, wrongly—to try to preserve client investments and the reputation and future of the business his best friend built, where Gavin hoped to also build a future. Compared to the other co-defendants in this case, Gavin's conduct was more limited in scope. Indeed, because Gavin immediately reported his misconduct to his employer, his clients were made whole and did not suffer financial loss.

Gavin deeply regrets his criminal conduct and he has learned from his mistakes. In addition to accepting responsibility for his conduct, Gavin has been devastated by the harm he has caused to his family, friends, and community, and he has been working diligently to restore the trust and respect others had for him. He is fully committed to his family, friends, and community, and has begun building a new career in a different profession.

For all of these reasons, we respectfully request that the Court follow the recommendation of the U.S. Probation Department and sentence Gavin to probation.

PROCEDURAL BACKGROUND

On September 21, 2015, Gavin was charged in three counts of a nine-count criminal indictment. (ECF No. 2 (the "Indictment").) Count One charged Gavin with conspiring to commit

[1] The Government has indicated its intention to move for a downward departure at Gavin's sentencing pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). (Government Sentencing Letter at 1.)

securities fraud, in violation of Title 18, United States Code, Section 371; Count Two charged him with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, 17 C.F.R. Section 240.10b-5, and 18 United States Code, Section 2; and Count Five charged him with investment advisor fraud, in violation of Title 15, United States Code, Sections 80b-6 and 80b-17, and Title 18, United States Code, Section 2. On March 22, 2016, Gavin pleaded guilty to these charges pursuant to a cooperation agreement with the Government.

RELEVANT SENTENCING CONSIDERATIONS

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crimes and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). The factors to be considered in fashioning an appropriate sentence, outlined in 18 U.S.C. § 3553(a), have taken on renewed vitality in the aftermath of *United States v. Booker*, 543 U.S. 220 (2005), which "requires sentencing courts to treat the [Sentencing] Guidelines only as a starting point, and then to craft an appropriate sentence taking full account of 'the history and characteristics of the defendant.'" *United States v. Preacely*, 628 F.3d 72, 84 (2d Cir. 2010) (Lynch, J., concurring) (quoting 18 U.S.C. § 3553(a)(1)). Sentencing courts "may not presume that the Guidelines range is reasonable" and "extraordinary circumstances" are not required "to justify a sentence outside the Guidelines range." *Gall v. United States*, 552 U.S. 38, 47, 50 (2007); *see also Rita v. United States*, 551 U.S. 338, 351 (2007).

Section 3553(a) "instruct[s] district courts to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)). Thus, the Court, in fashioning an appropriate sentence, shall consider the following:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; [and]
>
> (2) the need for the sentence imposed –
>
> > (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.

U.S.C. § 3553(a)(1), (2); *see United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (directing district courts not to "presume that a Guidelines sentence is reasonable" and requiring courts to perform an "independent review of the sentencing factors" in each case); *Rita*, 551 U.S. at 367 (Stevens, J., concurring) (the Guidelines are "truly advisory").

Upon consideration of the Section 3553(a) factors, the Probation Department recommends that the Court sentence Gavin to probation—which is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a). (*See* PSR at 28-29.) Probation makes this recommendation because, among other reasons, Gavin had limited access to the scope and structure of the overall offense; Gavin's offense was limited to a three-month period; Gavin notified his employer of his conduct; Gavin's motivation and failure in judgment was out of desperation to preserve client investments, not greed; Gavin is a first-time offender with a strong network of family and friends, and poses a low risk of recidivism; and Gavin's co-defendants received below-Guidelines sentences. (PSR at 29.) The Probation Department also notes—in further support of its recommended sentence of probation—Gavin's substantial assistance to the Government in its prosecution of others (*id.*), which is set forth more fully in the Government's Sentencing Letter.

For these reasons and others, we respectfully submit that the recommended sentence of probation is appropriate, and that a variance from the applicable Guidelines range is appropriate. To the extent that the Court must consider the Guidelines range—which in this case is 63 to 78 months, based predominantly on an intended loss amount of $5.2 million—this range does not resemble a reasonable sentence here. First, the Guidelines range does not capture relevant sentencing factors, including (among other things) Gavin's substantial cooperation, his motivations and limited knowledge of the overall offense, his lack of personal profit, his personal characteristics and history, and that no purpose of sentencing would be served by a period of incarceration. Second, the Guidelines range disproportionately and unreasonably tethers Gavin's culpability to a loss amount where no actual loss was realized, in large part due to Gavin's own conduct.

I. GAVIN'S OFFENSE CONDUCT AND HIS SUBSTANTIAL COOPERATION WITH THE GOVERNMENT MERIT A SENTENCE OF PROBATION

A. Gavin's Participation in the Galanis' Criminal Scheme Was Short-Lived and Not Motivated by Greed

As the Government agrees, Gavin's participation in the Galanis' criminal scheme was not motivated by greed. "Unlike many of his codefendants, [Gavin] had not sought out a life of crime or an easy dollar." (Government Sentencing Letter at 5-6.) Rather, Gavin participated in the scheme "under pressure to rescue Martin Kelly [Capital] from its investments in [ ] Westmoore." (*Id.* at 6.)

In early March 2007, after spending four years working in institutional research sales at C.E. Unterberg, Towbin ("Unterberg"), most recently in New York, Gavin had an opportunity to pursue a childhood dream: working back home in San Diego and close to family; working with his best childhood friend, Bill Crafton; and working in an area related to sports. Crafton had formed an asset management company, Martin Kelly Capital ("Martin Kelly"), which provided

investment advisory services to professional athletes. Taking a substantial leap of faith in Crafton, Gavin gave up his lucrative and promising career at Unterberg to work for Crafton. Gavin believed so strongly in his friend that he worked for free during his first nine months at Martin Kelly, with the hope that he could help Crafton grow the business and, in time, Gavin could build his professional future at Martin Kelly as well. In the ensuing years, Gavin earned only a modest salary—approximately $60,000 and $70,000 a year in 2008 and 2009 respectively—and in January 2010, Crafton sold his business to SunTrust Bank. (PSR ¶¶ 102, 104-105; Government Sentencing Letter at 2.)

When Gavin arrived at Martin Kelly in 2007, Crafton had already invested many of the firm's clients in certain funds run by Matthew Jennings, collectively operating under the name "Westmoore." By 2009, nearly 25 percent of Martin Kelly's clients' assets were invested in Westmoore funds. (Government Sentencing Letter at 2.) In June 2010, the SEC brought an action against Jennings and Westmoore and obtained an emergency court order freezing the Westmoore investments. (*Id.*) Desperate, Gavin and Crafton recognized that clients would panic if the value of their investment portfolios declined, or if clients could not liquidate their investments. Within days, Jennings introduced Gavin and Crafton to Jason Galanis. Galanis proposed a plan that, in Gavin's view, would protect the Martin Kelly clients and Martin Kelly. (PSR ¶ 44.) While the plan evolved, Gavin and Crafton agreed to invest approximately $5 million of client money in a security called Gerova through market orders. In exchange, Galanis would arrange for the Martin Kelly clients with exposure to Westmoore to receive shares of two thinly-traded public entities. (*Id.*) Gavin and Crafton had minimal information from which to perform due diligence on these companies. Galanis also agreed to provide up to $1 million in cash for affected clients who had immediate liquidity needs. (Government Sentencing Letter at 3.) Neither Gavin nor Crafton

informed their clients or anyone at SunTrust—which by that point in time had acquired the Martin Kelly business from Crafton—about their agreement. (*Id.*; PSR ¶ 44.)

Significantly, Gavin did not know then—and learned only many years later after he was indicted along with his co-defendants—that Galanis had orchestrated the formation of Gerova through fraudulent means. Nor was Gavin aware at the time that Galanis had fraudulently caused the issuance of the Gerova shares he directed Gavin to purchase. (Government Sentencing Letter at 3.) Indeed, recognizing that, when the Government charged this case it stated that Gavin was "fraudulently induced" by Jason and Jared Galanis to enter the conspiracy. (*See* Press Release, U.S. Attorney's Office, S.D.N.Y., Sept. 24, 2015, available at https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-charges-against-seven-individuals-multimillion-dollar (in announcing arrests and describing scheme charged in this case, stating that "JASON GALANIS and JARED GALANIS also fraudulently induced investment advisers, including GAVIN HAMELS and others, to purchase shares of Gerova stock in the investment advisers' client accounts by offering compensation and/or other benefits to the respective investment adviser").)

To be clear, while unaware of the broader scheme, Gavin knew that what he had agreed to do, and subsequently did, was wrong. He does not minimize these actions. Between July 6, 2010 and September 10, 2010, Gavin used client funds to purchase approximately 903,086 shares of Gerova on the open market, for a total of $5,305,901. (PSR ¶ 47.) While Gavin did not know at the outset that the scheme required him to purchase Gerova securities in a coordinated fashion, shortly after he started purchasing Gerova on his own, Jason Galanis directed Gavin to speak to his brother "Jared," an attorney.[2] Jared then started directing Gavin when to purchase Gerova, at

[2] Years later, after Gavin was charged, he learned through these legal proceedings that the person he had been communicating with was most likely John Galanis. (*See* Government Sentencing Letter at 3 n.3.)

what price, and how many shares. Gavin thereafter coordinated purchasing the remainder of the Gerova trades with Jared. Gavin never met Jared in person, but they spoke over the telephone and communicated via email. Gavin followed Jared's instructions until he had purchased the agreed-upon $5 million worth of Gerova, on September 10, 2010. Gavin also worked with Jared to get shares of Rineon and WLMG deposited into Martin Kelly client accounts. (Government Sentencing Letter at 3.) Gavin did not tell the Martin Kelly clients about the quid pro quo arrangement or the agreement to purchase shares of Gerova in exchange for shares of Rineon and WLMG. (*Id.*)

B. Gavin Reports His Misconduct to SunTrust

Four days later, on September 14, Gavin called SunTrust and reported his misconduct. (Government Sentencing Letter at 4; PSR ¶ 49.) He also advised Jared Galanis that he was doing so. (PSR ¶ 49.) Gavin then had several conversations with SunTrust, including an in-person meeting, and provided it with documentation on the trading activity and clients. After Gavin reported his misconduct, SunTrust terminated Gavin and Crafton. SunTrust then promptly removed the Gerova shares from client accounts and made the clients whole. (Government Sentencing Letter at 4.) After that, SunTrust sold the Gerova shares from the Martin Kelly client accounts in the open market.[3] (*Id.*) There is no indication that SunTrust suffered any loss. (*Id.* at 4 n.6.)

While Gavin's involvement in the criminal scheme with Galanis was limited and occurred from June to September 2010 (PSR ¶ 19), the criminal scheme his co-defendants were involved in

[3] The PSR states (at ¶ 49) that SunTrust "attempted" to liquidate the Gerova holdings in the open market. Consistent with the Government's representation that based on its review of records, SunTrust appears to have liquidated its holdings (Government Sentencing Letter at 4), we request that the word "attempted" be stricken from paragraph 49.

was more extensive in scope. As noted above, Gavin was not a part of the larger scheme orchestrated by Jason Galanis to fraudulently cause the issuance of more than $70 million of Gerova shares to Ymer Shahini, a foreign nominee controlled by Galanis. (*Id.*; Government Sentencing Letter at 2 n.1.) Nor was he a part of the criminal scheme that continued after September 2010. None of the approximately $20 million in profits that the Government demonstrated was generated from the broader scheme went to Gavin. (PSR ¶¶ 19, 50.)

In recommending a sentence of probation, the Probation Department agrees that Gavin had limited access to the scope and structure of the overall offense; his involvement was limited to a three-month period; and his conduct was due to a failure in judgment in that Gavin was motivated by desperation in wanting to recoup client funds. (*Id.* at 29.) Probation also acknowledges that Gavin may be regarded as the least culpable of the participants in the offense. (*Id.* at 26.)

C. Gavin's Substantial Cooperation with the Government

Gavin has been a model cooperating witness. In addition to disclosing his misconduct to his employer SunTrust, Gavin provided early assistance to the Government. He voluntarily met with federal prosecutors twice before he was charged. The U.S. Attorney's Office for the Southern District of California first interviewed Gavin in August 2013. (Government Sentencing Letter at 5; PSR ¶ 62.) While this interview was focused on Westmoore and not Gerova or Galanis, Gavin provided truthful information about the transaction that was the focus of the interview. (Government Sentencing Letter at 5.) Gavin later agreed to a second voluntary interview with prosecutors from the U.S. Attorney's Office for the Southern District of New York in October 2014, during which he spoke truthfully about his agreement with Galanis and his use of Martin Kelly clients' assets to coordinate trading in shares of Gerova. (*Id.*; PSR ¶ 62.) Following that meeting, Gavin voluntarily produced documents to the Government demonstrating not only his involvement in the criminal conduct, but the conduct of others. (Government Sentencing Letter at

5.)

Gavin was indicted on September 21, 2015, and self-surrendered to the Government. He continued a path of cooperation, proffering with the Government and eventually pleading guilty pursuant to a cooperation agreement. As the Government has explained, from the outset Gavin has been forthcoming and credible and has "never attempted to excuse or justify his behavior." (*Id.* at 5-6.) Further, the Government commends Gavin because he "accepted full responsibility for his criminal conduct and did not attempt to minimize his understanding that [his conduct was] wrong and illegal." (*Id.* at 6.)

Gavin has also provided substantial assistance to the Government in its prosecution of others. Gavin was the first of his co-defendants to plead guilty, and his information and anticipated testimony "undoubtedly contributed" to both Jason and John Galanis' decisions to plead guilty. (*Id.* at 6 ("The fact that Hamels stood ready, willing and able to testify undoubtedly contributed – at a minimum – to both Jason and John Galanis's decision to plead guilty.").) Gavin's information also played a role in the Government confirming or clarifying the role of Jared Galanis. Specifically, Gavin described to the Government his interactions with the individual Gavin thought was Jared Galanis. He explained the basis for that understanding, including the introduction by Jason Galanis and emails to "Jared" at an address associated with Jared Galanis' law firm. However, Gavin never met Jared in person. Unquestionably, the Government used this information when deciding how to proceed in its prosecution of the actual Jared Galanis (as well as John Galanis, who we now understand may have been impersonating his son). (*See id.* at 3 n.3.) Gavin's honest, truthful information—and the fact that he did not exaggerate his own knowledge—speaks volumes about Gavin's credibility and is the hallmark of a valuable Government cooperator.

Finally, Gavin provided powerful, credible testimony at Gary Hirst's trial. He was the only investment advisor of several involved in the coordinated trading scheme to be charged and cooperate with the Government and, at trial, he was the only investment advisor to provide information to the jury about the nature and mechanics of the coordinated trading that was an integral part of the broader scheme that Gavin's co-defendants pursued. The Government notes the importance of Gavin's testimony because he "explain[ed] to the jury in clear terms the methods used to dispose of the Shahini shares and to fraudulently prop up the market for those shares." (*Id.* at 6.) Gavin "was able to make the jury understand both the mechanics of the matched trading and the reason for it." (*Id.*) His testimony enabled "the jury to see some of the real harms of the Gerova fraud, which not only pillaged a publicly traded company, but which also defrauded investment adviser clients whose money was used to buy those shares at artificially inflated prices." (*Id.*) Gavin's testimony was "clear, useful, and credible." (*Id.*) Even Mr. Hirst's counsel remarked upon, and did not mount an attack on, Gavin's credibility, stating instead, "I credit largely everything [Gavin] said. We were not questioning his veracity on the stand at all.") (*Id.* (quoting Trial Tr. at 922).)

In short, Gavin was an exemplary cooperator. He demonstrated clear acceptance of responsibility early by self-reporting his conduct to his employer well before authorities were involved. When law enforcement did become involved, he provided truthful, candid, and incriminating information and evidence well before indictment. Gavin then cooperated after indictment, providing truthful, credible information that was used by the Government to convict others and to identify the limitations of its case against others. Gavin took his role as a cooperating witness seriously. His wife Naomi, who witnessed Gavin's commitment first-hand, describes her observations:

> [T]aking responsibility . . . to Gavin is not just accepting and regretting, but doing everything in his power to make right from his wrongdoing. He committed himself to assisting the government as it pursued others potentially involved in misconduct, and he took this role incredibly seriously. He provided materials and information. He flew back and forth across the country to meet with his lawyers and the government, whenever needed and always prepared. He testified. And he did all of this without one complaint and without any doubt that this was the correct path.

(Letter from N. Hamels, Ex. 2 at 2.) For these reasons, and considering the Government's motion for a downward departure pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), we respectfully submit that a non-incarceratory sentence of probation, as recommended by the Probation Department, is appropriate.

II. GAVIN'S PERSONAL HISTORY AND CHARACTERISTICS SUPPORT LENIENCY

Gavin's aberrant and short-lived criminal conduct is a departure from how he has otherwise lived his life and carries himself. This is evident from the many letters submitted on his behalf, which speak to Gavin's strong character, integrity, work ethic, and humility, as well as Gavin's commitment to his family, friends, and community. Gavin is devoted to his family and friends, and he plays a critical role in their everyday lives. Likewise, his family and friends are unwavering in their support of him. Gavin and his wife, Naomi, are each other's rocks, as shown most powerfully by how they have weathered these difficult times together. And most importantly to Gavin, he is, and wants to remain, a constant, positive presence for his children. Any absence—even a short period of incarceration—would inflict unnecessary damage on his family.

A. Gavin's Personal History, Education, and Career

Gavin was born and raised in San Diego, California, along with his sister KC, by John and Elizabeth Hamels. Although Gavin's parents divorced when he was a teenager, he remained close with both parents, who instilled in him and KC strong family values and work ethic. Family always came first. Gavin was raised to understand and value the importance of hard work, responsibility,

respect for others, and earning one's own way through life. His mother describes how Gavin "never had a traffic ticket or an accident, never tried drugs, never had a problem in school," and "[h]is teachers always commented that he was reserved, respectful and a hard worker, [and] he impressed coaches with his worth ethic and respectfulness." (Letter from E. Hamels, Ex. 3 at 1.) Gavin witnessed first-hand how his mother worked tirelessly to make ends meet financially and to provide her children with opportunities, and he in turn "worked hard and never complained." (*Id*.) Gavin is grateful for the opportunities he has had, and has worked hard to provide for himself and his family. He has done this, and recognized many accomplishments, with unusual humility. (*See id*. ("He is humble, focused and hard working.").)

At a young age, Gavin was committed to both academics and sports. While a strong athlete, he recognized the importance of education and being able to support a family. He spent his first two years of college at Boston College, where he did well academically and earned admission his junior year to Harvard College. Gavin graduated from Harvard in 1998 with a degree in economics. (PSR ¶¶ 92-93.) In addition to a heavy academic load, Gavin became a valued member (as a walk-on) of the football team, where he continued to demonstrate his strong work ethic. His teammate Jake Heller recalls his first impression of Gavin, who "exhibited a quiet confidence and his natural ability and tremendous work ethic were exceeded only by his humility and class." (Letter from J. Heller, Ex. 20 at 1.) Another teammate, Thomas Giardi, recounts that Gavin "faced several challenges in his new environment including meeting and fitting in with new teammates and coaches and grinding through a difficult course load," but in classic Gavin fashion he "always had a smile on his face" and went above and beyond. (Letter from T. Giardi, Ex. 18 at 1.) Without complaint, Gavin "would wake up at 5:30 am every day in the cold/snow/rain/heat to go to football practice," stay "after nearly every practice to work on his throws," and show "up

early to study extra film" all while managing "to get good grades and have a social life." (Letter from KC Hamels, Ex. 5 at 2; *see also* Letter from J. Heller, Ex. 20 at 1.)

Following college, Gavin worked for several years at a small investment advisory firm in San Diego. (PSR ¶¶ 108-109.) Based on his high level of performance, the firm paid for Gavin to attend business school at the University of Southern California, after which Gavin continued to excel professionally, spending four years working in institutional sales at Unterberg, first in San Francisco and then in New York. (PSR ¶¶ 91, 106-107.) Gavin carried out his job with "professionalism and integrity." (*See* Letter from T. Brinkman, Ex. 14 at 1.) Gavin's strong work ethic continues today, as he rebuilds himself professionally. (*See infra* at III.B.)

B. Gavin's Devotion to His Family

Gavin is devoted and loyal to his family, and plays an integral role in their everyday lives. He puts family first. This is evident to others and reflected in the numerous letters submitted in support of Gavin. Gavin's college friend and teammate describes how he "developed a great deal of respect for Gavin because his priorities were always, in my opinion, squared away and he knew that family and friendship were the most important things in life. While a driven, hard worker on the football field and in the classroom, Gavin's family was always of the utmost importance to him." (Letter from T. Giardi, Ex. 18 at 1.)

Gavin's commitment to Naomi and their two children, [redacted], takes precedence over everything else in his life. Naomi's mother, who of all people has "the right to be most angry" as "Gavin's error has changed the life of . . . Naomi forever," describes how when she "let[s] go of my anger, I see with clarity what hasn't changed. Gavin's ability to put the welfare of his children and family first. Always with unselfishness and integrity. . . . Throughout the past two years, I have watched him be an amazing father" to his young children. (Letter from H. Haskell, Ex. 7 at 2.)

Gavin met Naomi when they both worked at Unterberg in 2005, and they married in 2009. Gavin and Naomi are true partners in every sense of the word, each the number one supporter of the other. They have stood side-by-side through good times and bad, rejoicing when they became parents upon the births of their beloved children, and standing strong and united through Gavin's legal troubles and conviction, his loss of a job and career, and his fears as he faces the unknown. While this ordeal has brought with it an enormous amount of worry and stress, it has also made their relationship stronger. Gavin treats Naomi "with the love and affection that such a remarkable woman deserves, and in addition he views her as an equal." (Letter from R. Lang, Ex. 21 at 1.) As he did previously, Gavin has continued to promote Naomi in her career, and while he has always been a present, involved father, he remains focused on his children and being a constant, positive part of their everyday lives and formative years.

Gavin's love and commitment to his children is genuine. "[E]ver since" his sister KC "can remember, Gavin wanted to be a dad." (Letter from KC Hamels, Ex. 5 at 2.) It is rare for young men to think about fatherhood at a young age and well before marriage, but Gavin did, even thinking about what career he wanted to choose that would also allow him not just to provide for, but have time to spend with, his future children. Gavin's stepmother, Diana, recalls an early conversation with Gavin. When she "asked him about his ultimate career goal, he told me by his 40th birthday, he wanted to be working in a situation that allowed him the opportunity for a flexible schedule. I expected him to say this was because he wanted the freedom to travel or pursue hobbies. At the time, he didn't have a girlfriend, so I was surprised when he told me he wanted to be able to coach his kids' soccer games, watch them play T-ball and enjoy being a husband and dad. It was during that conversation when I realized he was an exceptional young man." (Letter from D. Bercham, Ex. 6 at 1.)

A close friend of Gavin's mother-in-law, who has come to know Gavin well, agrees that while "[p]eople use the term 'family man' loosely, . . . in Gavin's case, it's a description that fits perfectly. It's as if he waited a very long time to take on the responsibilities that have been his since 2009, when he and Naomi married. Clearly, he finds comfort and pleasure in his role as husband and father." (Letter from J. Bernstein, Ex. 13 at 1.)

Naomi and Gavin's friends confirm that Gavin's "true calling is being a father. He is gentle and patient. He is silly and playful. His children cheer with joy when he walks in the door, knowing that a night full of fun and hugs awaits them." (Letter from G. Arnay, Ex. 10 at 1.) Naomi's oldest friend, Lauren Menkowitz, describes Gavin as "a fiercely committed and loving husband [who] would go to the end of the earth for Naomi." To her, beyond Gavin's commitment to Naomi, it is "even more wonderful [ ] to watch Gavin as a father. He is someone who was born to be a dad. He has endless patience for and devotion to his children, and is an incredible role model for them." (Letter from L. Menkowitz, Ex. 26 at 1.)

Gavin never wanted to, and does not, take a back seat to Naomi in the parenting of their children. He is a "hands-on, loving, patient, and silly father," (Letter from N. Hamels, Ex. 2 at 2), and at home, Gavin is regularly "the one managing, often more than just his children, constantly cleaning and washing dishes, putting together the sippy cups, cutting fruit and packing snacks for outings, wiping tears and preparing bedtimes." (Letter from A. Demmler, Ex. 16 at 1.)

Remarkably, and in a testament to Gavin, he has not let the stress he is currently under to affect his children, whose interests he puts above all:

> Despite the stress, fatigue and angst that Gavin has been living with on a daily basis, he has never once let that show to our children—never let it hinder his patience, involvement, playfulness or deep love towards them. Despite the restless nights, and unceasing anxiety, he has never let it keep him from involvement at their preschool, making it to all of their events, spending the weekend watching and coaching their activities, and reading them books at bedtime every night. And when

> I have to go on business trips, he has been right there—packing their star shaped sandwiches for lunch, picking out their clothes for the day, cooking dinner—all while encouraging and supporting me as I grow my career. He continues to be the father, and husband he has always been—full of love and devotion—and a partner in every way.

(Letter from N. Hamels, Ex. 2 at 2.) This is a true demonstration of Gavin's selflessness, resilience, and devotion to others. Naomi's mother, through this trying time, sees "the resilience of this young couple. The strength of their marriage. The tone of a happy home despite angst, fear and regret that lingers." Mrs. Haskell "recognize[s] that the source of the happiness that still exists despite all of this hardship comes largely from Gavin's ability to be strong, optimistic and positive." (Letter from H. Haskell, Ex. 7 at 2.)

Religion provides another example of Gavin's commitment and devotion to his wife and family. Gavin was raised, and still is, Catholic. Naomi is Jewish, the granddaughter of Holocaust survivors. Even as a young child, Naomi "carried the overwhelming responsibility to marry a Jewish man as a testament to [her grandparents'] survival" of the Holocaust, and as she became an adult, she remained committed to fulfilling this responsibility. (*Id*. at 1.) That became difficult, however, when she met Gavin, "[a] quiet, humble, loyal, sensitive, honest and gentle young man, who is devoted to family and friends and who makes his love of them a priority." (*Id*.) Naomi accepted that she was in love with, and wanted to marry, Gavin, though he was not Jewish. Naomi had to break the news to her family, who were initially disappointed and reticent about Gavin. Her cousin explains:

> We have a small, very close family and have been raised with some of the residual trauma that is not uncommon amongst survivor families. This has led to . . . a bit of a distrust of outsiders so when Naomi brought home [Gavin] . . . I was initially not entirely sure how he would fit into our family.

(Letter from M. Liebermann, Ex. 23 at 1.) Naomi's grandparents were "disappointed and leery" when they were first told about Gavin, as they "wanted their legacy to be a strong, brave Jewish

family." (Letter from H. Haskell, Ex. 7 at 1.) However, Naomi's family overcame their reluctance immediately when they met Gavin, and witnessed his kind-hearted nature, and his love and support for Naomi. Indeed, Naomi's grandparents "fell in love with [Gavin] very quickly and saw that he is a man of character. They knew that she couldn't find a better human being than Gavin with whom to build a life. And despite him taking their only granddaughter to the 'other coast' they were joyful that she had met a man who loved her more than anything and would always put her and family first." (*Id.*) Naomi's brother confirms this:

> Gavin's wonderful qualities were immediately apparent to everyone. He is gentle, responsible, attentive, and patient. I will never forget how he and my sister got along. He had a quiet sense of chivalry, treating my sister and all around him with consideration and respect. . . . This quick picture of a focused, considerate, humble man ultimately proved to be a perfect litmus test for him as a human; we have known Gavin for ten years and he has never, ever demonstrated anything to contradict his first impression.

(Letter from D. Haskell, Ex. 9 at 1.)

True to his character and commitment to Naomi and her family, Gavin is a full-time participant with them in celebrating Judaism and raising their children Jewish. Even before having children, Gavin spent months learning Hebrew to recite his vows at their wedding. (*See* Letter from M. Bailey, Ex. 11 at 2.) "Since they have had children, . . . Gavin say[s] the prayers for wine and challah on Friday night, take[s] the children to various activities at the Synagogue and [has] become a member of the Jewish community." While Gavin remains Catholic, he "has never faltered in his commitment to the agreement made about bringing the children up Jewish." (Letter from D. Haskell, Ex. 8 at 2.)

Naomi's family accepted Gavin into their family a decade ago, and their continued support of him today, without reservation and despite his misconduct, speaks to Gavin's strong character, integrity, and devotion to his family. A close friend of Naomi's parents attests to their unwavering support of Gavin. While Gavin's misconduct is "so remote to [his] nature, it can, as you know,

rip apart the entire family. Gavin made certain this would never happen. If anything, he has redoubled his efforts to be the best husband to Naomi and the best father to [redacted] he can be. Over the course of these troubled times, I see how they relate, and how Gavin continues to be loved by Hinda and Eric. You cannot fake that; it is either real or it is not." (Letter from S. Wolf, Ex. 32 at 2.) Naomi's father, recognizing Gavin's error, nonetheless "cannot imagine a son-in-law with more character, kindness, stability and love for his family." (Letter from E. Haskell, Ex. 8 at 1.) These words speak volumes about Gavin, and any time apart from his family will cause unnecessary pain, as "he is such a force in their daily life." (Letter from E. Hamels, Ex. 3 at 2.)

C. Gavin's Commitment to Friends

Gavin's loyalty also extends to his friendships spanning decades. Gavin has had a remarkable ability to touch the lives of the people he has encountered, and he has developed and maintained friendships with individuals near and far—his commitment to maintaining his friendships is a testament to his kind and genuine nature. That so many friends and family have stood by Gavin despite learning about his misconduct is a testament to Gavin's character and integrity. While one close friend describes her shock when she learned about the charges against Gavin, she nonetheless "wholeheartedly believe[s] that [Gavin] is one of the good ones" in life. (Letter from G. Arnay, Ex. 10 at 1.)

Gavin is close with Naomi's cousins, Melissa and Erez Liebermann. During the last few years, as Gavin has stayed with them at their home when he has come to New York for legal matters, Gavin's relationship with them has deepened from that of "not just a family member" to that of a friend as well. (Letter from M. Liebermann, Ex. 23 at 2.) Melissa notes that "family celebrations are sometimes short and chaotic," but through Gavin's additional visits they "had time to talk late into the evenings . . . about his stress about the future and his love for his family. These conversations and this extra time we had to share with him solidified to me that . . . Gavin is truly

one of the best human beings I know." (*Id.*) Erez wholeheartedly agrees: "[I]f there is a silver lining to the prosecution, it is that I have had more opportunities to talk to Gavin and to see him when he came to the New York region" for matters related to this case. (Letter from E. Liebermann, Ex. 22 at 1.) Notwithstanding Gavin's focus on his legal issues during these visits, "Gavin took the time to talk with my kids. He took breaks from our discussion to play with my boys outside, and even to give us some pointers about throwing a football. And through it all, I learned again that this is Gavin. A great guy." (*Id.* at 2.)

Gavin's friend Mike Mahoney and his wife "face the challenges of [redacted] Mike describes Gavin's support, in the form of "a quick call or note," or "participating in fundraisers, or even delivering food at our doorstep during hospitalizations." Mike has paid Gavin the highest compliment, noting that it "is because of this selflessness and genuine caring that my wife and I have often commented that if God forbid something were to happen to us, Gavin and Naomi would be near the top of the list for people we would want raising our daughter. That is how highly we think of Gavin as a person, a husband, and a father." (Letter from M. Mahoney, Ex. 25 at 2.)

Several other friends feel the same strength of conviction about Gavin. Jim Woods, Gavin's friend from Boston College, writes that Gavin's "humility and kindness are what draw people to Gavin. . . . [I]f anything was to ever happen to my wife and I, Gavin and Naomi would be the first people that I would want to see raise my daughter. And that is not even something I would need to hesitate to decide. His moral compass and beliefs are always pointed in the correct direction and I would trust Gavin with anything in my life." (Letter from J. Woods, Ex. 33 at 2.) Thomas Giardi, another college friend, similarly describes how "[w]hether work, family, or anything else, Gavin has always been a friend I could lean on and share even the most difficult

times with. [redacted] Throughout that difficult time Gavin and I talked frequently and I relied on our friendship a great deal to get me through it all. . . . I now have three children, . . . I can't think of someone I would rather have my boys grow up to emulate more than Gavin." (Letter from T. Giardi, Ex. 18 at 2.) When Gavin's friends Anna and David Zupon were having a difficult time following the birth of their daughter, Gavin "packed up his family, extra food and baby gear, and drove several hours to show up at our doorstep, offering to help in whatever way he could. . . . [T]his is how Gavin treats the people he loves." (Letter from A. & D. Zupon, Ex. 34 at 1.) Naomi's cousin describes how when her mother "has had a serious health scare, as she did a couple of times in the last year, I would hear not only from Naomi, as you would expect as she is my cousin, but I would also get personal texts and calls from Gavin to check in on my mother and let me know that she was in his prayers. . . . [Gavin] is someone we know we can count on when life takes a difficult turn." (Letter from M. Liebermann, Ex. 23 at 2.)

Gavin's compassion and empathy extends even beyond his family and friends. When Gavin's mother tutored children with learning disabilities at their home, Gavin would sit and talk to these students. One of them, [redacted], "who had social problems, asked five girls to the prom and they all declined. Gavin agonized over [redacted] rejection much more than [redacted]." (Letter from E. Hamels, Ex. 3 at 2.) Close family friend Jane Bernstein describes how remarkable Gavin is with [redacted] (Letter from J. Bernstein, Ex. 13 at 1.)

Similarly, Erez and Melissa Liebermann describe Gavin's respect for [redacted] (Letter from M. Liebermann, Ex. 23 at 2.) [redacted] They say that a hallmark of a person or a society is how they treat the most vulnerable, and there is no question Gavin's true character and humility is an example in this regard for all of us." (*Id.*; *see also* Letter from E. Liebermann, Ex. 22 at 2 (describing how Gavin goes out of his way to talk to Erez's special-needs brother-in-law).)

D. Gavin's Commitment to His Community

Gavin has also been committed to helping and improving his community. Both as a student and an adult, Gavin has been involved in tutoring, community service, and charitable fundraising. His business school professor, who remains close with Gavin despite the passage of more than a decade since he graduated, describes how Gavin was "a go-to student when it came to community service—if a student needed a tutor or mentor, or a class needed to learn about careers in finance, or a school needed participants in a career day, or a classroom needed to be painted, or school grounds needed to be cleaned up, Gavin was there." (Letter from M. Bailey, Ex. 11 at 2.) Gavin also tutored young, at-risk students while in school (*id.*), and he participated in other fundraising events. For example, Gavin helped organize, and participated in, a "pier-to-pier swim between two local beach community piers," which raised money for an organization called Challenge for Charity ("C4C") and has become "an annual C4C fundraising event" that continues to this day. (*Id.*) Gavin and Naomi also support the Challenged Athletes Foundation. For each of the past six years, they have raised money and "participated in the grueling San Diego Triathlon Challenge to raise awareness and much needed funds for physically challenged athletes." (Letter from S. Ludwig, Ex. 24 at 1; *see also* Letter from E. Bellquist, Ex. 12 at 1.)

Gavin has also committed his time and energy to helping young athletes learn not only sports but the "skills of life." (*See* Letter from J. Brogan, Ex. 15 at 1.) He has done this by volunteering his time over the past decade with JB Academy, an organization started by Jim Brogan decades ago, and in which Gavin participated as a child. JB Academy teaches kids motivational strategies, discipline, and techniques for goal setting. Gavin has participated in the clinic as a volunteer, helping teach kids some of the strategies that Gavin employed as a child to become a successful athlete and student. He has been an "instrumental part of this Academy. The difference he has made cannot be measured." (*Id.*)

Finally, Gavin is involved in his community through his and Naomi's temple, where their children also attend school. Among other things, Gavin and Naomi assist with fundraisers and other community events at their temple, and Gavin is a "committed parent[ ] . . . who is constantly involved in the [Early Childhood Center] programing" at the temple. The Cantor at the temple observes that it "is clear Gavin is committed to and supporting his family, good deeds in this world and involvement in the community." (Letter from W. Tiep, Ex. 31 at 1.)

E. Gavin Is Deeply Remorseful for His Criminal Conduct, Which Represents Aberrational Behavior in an Otherwise Exemplary Life

Gavin, who appears before this Court with no prior criminal record, makes no excuses for his criminal conduct. He exercised poor judgment and acted out of character. The Probation Department recognizes that Gavin's involvement with the Galanis family was aberrant behavior from an otherwise law-abiding life, and that Gavin committed the crime out of desperation, not greed. (PSR at 29.) The Government agrees. (Government Sentencing Letter at 5-6.) That Gavin for this period acted so out of character is evidenced by his immediate recognition of wrongdoing, prompting him to report his conduct to his employer. He thereafter continued this remedial conduct by cooperating with the Government.

Gavin not only accepts full responsibility for his actions, but does so with great remorse and humiliation. The sincerity of this is reflected in the many letters submitted on Gavin's behalf, Gavin's own statement to the Court, the PSR, and the Government Sentencing Letter. (*See, e.g.*, Government Sentencing Letter at 6 (stating that "in the Government's view Hamels's remorse for his criminal conduct has been deep and sincere"); *see also* Letter from G. Hamels, Ex. 1 at 2-3 (Gavin describing how he is "utterly consumed with thoughts of how my actions will impact (and continue to impact) those I have hurt," how he "truly ha[s] no excuse" and "will forever regret this" and "how ashamed and remorseful" he is, "wear[s] that pain [ ] every day" and "will spend the rest of my life making amends").) Gavin torments himself for his actions and has confided to a friend that he "[wakes] up every morning drenched in sweat." (Letter from S. Ludwig, Ex. 24 at 2.) He has let down himself, his family, his friends, and others who trusted him. The consequences have included, among other things, the loss of his "job and the end of a career in finance"; "shame and embarrassment in the community and among peers"; and "a felon status that will forever hinder his ability to lead a normal life." (Letter from M. Mahoney, Ex. 25 at 1.) Gavin's father describes his "gut wrenching conversations" with his son that "have taken years off both our lives. Gavin admits he made a horrible mistake that is inconsistent with his morals and integrity." (Letter from J. Hamels, Ex. 4 at 1.)

However, in keeping with his strong character, Gavin has handled this situation with poise and resilience, and "has shown courage, gained wisdom, learned humility and took ownership for his mistakes." (*Id.*) Gavin "has continued to put one foot in front of the other, working tirelessly and diligently to start rebuilding a career, and using everything he has learned from his mistakes to guide him as he moves forward. He is exhausted, and stressed, and scared, but he impresses me every day with his focus and dedication to a positive future." (Letter from N. Hamels, Ex. 2 at 2-

3.)

III. THE REMAINING SECTION 3553(A) FACTORS FURTHER SUPPORT A SENTENCE OF PROBATION

Consideration of other Section 3553(a) factors further demonstrates why an appropriate sentence—one "sufficient, but not greater than necessary" to comply with the purposes of sentencing—is a sentence of probation. 18 U.S.C. § 3553(a).

A. A Sentence of Probation Will Provide Sufficient Deterrence, Protect the Public, and Is Just Punishment

The Court must fashion a sentence that "afford[s] adequate deterrence to criminal conduct," "protect[s] the public from further crimes of the defendant," and is "just punishment for the offense." 18 U.S.C. § 3553 (a)(2)(A), (B) & (C). Probation satisfies those requirements. Gavin's disclosure to SunTrust of his misconduct, voluntary meetings with the Government before being charged, and extensive cooperation with the Government following indictment, demonstrate that he understands the gravity and consequences of his actions, which he will "forever regret." (Letter from G. Hamels, Ex. 1 at 2.) Gavin reflects that "[t]his has been a hard, painful lesson, and I have no one to blame but myself. While the consequences are ruthless and lifelong, I know I earned them, but I will not make that mistake again." (*Id.* at 3.) He does not pose a genuine risk of repeat criminal conduct. The Probation Department agrees (PSR at 29 (noting that Gavin appears to pose a low risk of recidivism)), as does the Government, which notes that "[u]nlike many of the defendants . . . in this very case, [Gavin] is poised to put his criminal activities behind him and to return to being a law abiding and productive member of society." (Government Sentencing Letter at 6.) Indeed, Gavin's punishment has already started and its effects are severe. Pursuant to his settlement with the Securities & Exchange Commission ("SEC"), he is barred from (among other things) working as or associating with an investment advisor. The career he dedicated over a decade to building is finished. As a result, he and Naomi face serious financial difficulties as they

attempt to rebuild their lives.

In addition, Gavin's misconduct has caused severe emotional suffering and stress—something Gavin is trying to overcome, put behind him, and never endure again. (*See* Sentencing Letter from G. Hamels, Ex. 1 at 3.) Yet he remains haunted by what he did, and the consequences will follow him for the rest of his life. Erez Liebermann, Naomi's cousin and a former federal prosecutor, describes how this matter has "affected [Gavin's] very core" for years, and Gavin's self-inflicted "sentence" began years ago. (Letter from E. Liebermann, Ex. 22 at 2.) The shame Gavin feels will always remain with him, and deter any future wrongdoing. Thus, there is no legitimate risk that Gavin will engage in criminal conduct in the future, and a sentence of incarceration is not necessary to advance that goal. *See, e.g.*, Sentencing Tr., *United States v. Gupta*, No. 11 Cr. 907 (JSR) (S.D.N.Y. Oct. 24, 2012) (Ex. 35 at 54:3-6) ("As to specific deterrence, it seems obvious that, having suffered such a blow to his reputation, Mr. Gupta is unlikely to repeat his transgressions, and no further punishment is needed to achieve this result.").

Moreover, sentencing Gavin to a period of incarceration is not necessary to further general deterrence. Gavin is a convicted felon with an SEC bar. Gavin's conduct and conviction is public and has been covered by the press. Consequently, he has lost his career, reputation, and income; he has incurred substantial debt; and he has brought shame to himself and his family for which he will forever need to answer. His situation will provide a cautionary tale to others about the consequences of breaking the law—even for those not motivated by greed. Gavin has suffered tremendously, and this will further general deterrence.

Finally, a sentence to probation is itself a significant punishment and provides specific and general deterrence: "[I]t bears emphasis that when a judge chooses between a prison term and probation, she is not choosing between punishment and no punishment. Probation is less severe

than a prison term, but both are punishment." *United States v. Leitch*, No. 11 Cr. 00039 (JG), 2013 WL 753445, at *12 (E.D.N.Y. Feb. 28, 2013). The Supreme Court has recognized that probation is a significant punishment:

> We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual 'special conditions' imposed by the court.

Gall, 552 U.S. at 48-49 (other internal quotations and citations omitted). Here, probation will serve as just punishment for Gavin's offense.

B. Society Will Not Benefit from Gavin's Incarceration

No benefit would be served by an incarceratory sentence; nor does Gavin need educational or vocational training or other correctional treatment. Instead of shutting his family, friends, and community out of his life because of his mistakes, Gavin has doubled-down on the fundamental values that matter. He has remained, and recommitted himself to being, an engaged and loving family member, friend, and member of his community. Every day he works hard at this: making sure he stands strong and puts on a happy and cheerful face for his children, wife, and others so as not to worry to them.

Gavin also has poured his energy into building a new career and livelihood at United Surf Brands ("United Surf"), a private start-up company that manufactures and sells surfing apparel and equipment. Gavin is combining his business skills with his passion for surfing and sports, and over the past eleven months, he has been working full time at United Surf. Gavin serves an integral role there as it gets its brand off the ground. He is managing day-to-day operations, including order fulfillment, shipping, and purchasing, and also focusing on the strategic direction of the

company. Gavin has not received compensation for his work thus far, but he hopes to once the business becomes profitable.

Gavin's efforts and hard work in rebuilding his life will be derailed if he is incarcerated. Given how difficult it is for someone with a felony conviction to build a successful, much less meaningful, career, we urge the Court to impose a sentence that allows Gavin to continue this work so that he can prove to himself, his family and friends, and this Court, that he is a contributing and valuable member of society.

Gavin's strength and commitment to rebuilding his future draw admiration from his friends and family. An old friend remarks how Gavin has "navigated the situation with composure, humility and optimism. I have never heard [Gavin] blame anyone else or feel sorry for himself. Another thing I learned about Gavin, something that can only be learned in the face of adversity, is his remarkable resilience. After accepting that he could not work in securities, he quickly pivoted to other career options he would find rewarding. My admiration for Gavin has continued to grow as I've seen his resilience in action." (Letter from L. Schrotberger, Ex. 29 at 1.) Gavin's childhood friend of almost thirty years describes how proud he is of Gavin's perseverance and decision to take responsibility for his prior mistakes. (*See* Letter from S. Terry-Lloyd, Ex. 30 at 1.)

For these reasons, society would not benefit from a period of incarceration, and indeed, it would undermine the progress Gavin has already made toward rebuilding his future.

C. The Need to Avoid Unwarranted Sentencing Disparities Supports Probation

In determining the appropriate sentence for Gavin, this Court must also consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Avoiding such disparities is a key aspect of this Court's duty to "impose a sentence sufficient, but not greater than necessary, to comply"

with Section 3553(a). In recommending a sentence of probation, the Probation Department recognizes that compared to his co-conspirators, Gavin had limited access to the scope and structure of the overall offense. (PSR at 29.)

All of Gavin's co-defendants—save for Jason Galanis, the mastermind of the criminal scheme—received sentences below their respective sentencing Guidelines ranges. (*Id.*) This was the case for co-defendants whose involvement in the criminal scheme was more extensive than Gavin's; for co-defendants who had substantial criminal histories or were predicate fraud offenders (Gavin has no criminal history); and for co-defendants who profited from the criminal scheme (Gavin did not).[4] (*Id.*)

Moreover, other individuals who engaged in similar conduct to Gavin in the Gerova scheme were not charged with this criminal activity. The Indictment references other investment advisors who, like Gavin, unlawfully engaged in coordinated purchases of Gerova. (*See, e.g.*, Indictment ¶ 49). Yet, these other individuals (referred to in the Indictment as CC-1, CC-2, and CC-3) were not charged with the conduct relating to Gerova that they committed with Galanis. Given that none of these individuals faced criminal prosecution for this conduct—much less incarceration—the most appropriate way to avoid unwarranted sentencing disparities would be to impose the Probation Department's recommended sentence of probation.

IV. THE GUIDELINES' DISPROPORTIONATE EMPHASIS ON LOSS RESULTS IN A SENTENCING RANGE THAT OVERSTATES GAVIN'S CULPABILTY AND DOES NOT REFLECT A FAIR SENTENCE

As calculated by the Probation Department and the Government, Gavin's offense level is

[4] Jason Galanis had a Guidelines range of 135-168 months, and received a 135-month sentence. John and Derek Galanis each faced Guidelines ranges of 97-121 months, and each received sentences of 72 months. Gary Hirst had a Guidelines range of 168-210 months, and received a 78-month sentence. Jared Galanis pleaded guilty to a lesser offense, misprision of a felony, which carried a Guidelines range of 30-36 months, and he received a sentence of 150 days' imprisonment.

26, and his advisory sentencing Guidelines range is 63 to 78 months. (PSR ¶¶ 76, 121; Government Sentencing Letter at 4-5.) This range is driven predominantly by an 18-level enhancement attributed to an "intended loss"[5] amount of $5.2 million—the approximate amount of Martin Kelly client money used to purchase Gerova securities. (PSR ¶ 67; Government Sentencing Letter at 5; U.S.S.G. § 2B1.1(b)(1)(J).) Gavin's clients did not suffer actual loss, however, because after Gavin promptly reported his conduct to SunTrust, SunTrust reimbursed the clients. (PSR ¶¶ 49, 58; Government Sentencing Letter at 6 (noting that "SunTrust reimbursed the Martin Kelly clients for their investments in Gerova").) SunTrust then itself sold the shares of Gerova in the market, and there is no indication that it suffered a loss. (Government Sentencing Letter at 4, 6.)

While the Sentencing Guidelines direct that "loss is the greater of actual loss or intended loss" (U.S.S.G. § 2B1.1, Application Note 3(A)), using "intended loss" as a metric here—which escalates the Guidelines range from 4 to 10 months to 63 to 78 months—is an unfair and inaccurate measure of Gavin's culpability. It fails to account for the purposeful steps that Gavin took to remedy his error, which led to his clients being made whole. Indeed, given Gavin's conduct, the facts here bring this situation within the scope—and certainly the spirit—of an application note to the loss guidelines that provides for credits against loss. Specifically, Application Note 3(E) to U.S. Sentencing Guidelines § 2B1.1 sets forth the U.S. Sentencing Commission's position that "[l]oss shall be reduced by . . . [t]he money returned . . . by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." (U.S.S.G. § 2B1.1, Application Note 3(E).) That is the thrust of what happened here. Gavin reported his actions to

[5] "Intended loss" is "the pecuniary harm that the defendant purposely sought to inflict; and [ ] includes intended pecuniary harm that would have been impossible or unlikely to occur." U.S.S.G. § 2B1.1, Application Note 3(A)(ii).

SunTrust four days after he completed the illegal Gerova trades, and he supplied SunTrust with information about the clients on whose behalf he had purchased Gerova. SunTrust promptly reimbursed Gavin's clients and removed the Gerova securities from client accounts. The Government confirms that records reflect that SunTrust then sold the Gerova shares from the Martin Kelly accounts in the open market. (*See* Government Sentencing Letter at 4.)

We accept that the Government and the Probation Department do not consider this a "credit against loss" for purposes of the Guidelines calculations—presumably because they would take the position that Gavin was not working jointly with SunTrust to provide reimbursements to clients. But whether or not Application Note 3(E) technically applies so as to reduce Gavin's Guidelines range, Gavin's actions and conduct bring him within the spirit of this provision. This demonstrates why the Guidelines range is exaggerated, and why the substantial variance recommended by the Probation Department is appropriate.

Moreover, even aside from the facts presented here warranting probation, it is well recognized that the Sentencing Guidelines generally place too great an emphasis on the loss or gain amount resulting from the offense. *See, e.g.*, *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) ("The Guidelines' calculations for [securities fraud cases] . . . reflect an ever more draconian approach to white collar crime, unsupported by any empirical data. . . . By making a Guidelines sentence turn, for all practical purposes, on this single factor [the amount of monetary loss or gain occasioned by the offense], the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, and, by contrast, effectively guaranteed that many such sentences would be irrational on their face.") (internal citations omitted).

This unfair anchoring of the Guidelines on loss has led courts in this Circuit to conclude

that the Guidelines can lead to unreasonable sentencing ranges in fraud cases. *See United States v. Corsey*, 723 F.3d 366, 378-79 (2d Cir. 2013) (Underhill, J., concurring) (recognizing that "the loss guideline is fundamentally flawed," and noting that district judges are "without meaningful guidance in high-loss [fraud] cases"); *see also United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (condemning the "excessive weight on [the fraud loss] factor" and noting that loss is a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence"). The U.S. Sentencing Commission recognized that the Guidelines are not aligned with a defendant's culpability in economic crimes, noting "loss amounts" as an area of the Guidelines in need of review. *See* U.S. Sentencing Commission Press Release (August 14, 2014), available at https://www.ussc.gov/about/news/press-releases/august-14-2014. But, aside from increasing the amount of gain or loss associated with certain offense levels, the Commission did not change the overwhelming reliance that the Guidelines' calculation places on the loss and gain tables.

Courts continue to recognize this problem as a significant detriment to achieving fair sentences. Judge Rakoff recently observed that the case before him "once again demonstrates the absurdity of the sentencing guidelines" as they relate to loss and gain enhancements. Sentencing Tr., *United States v. Stefan Lumiere*, 16 Cr. 483 (JSR) (S.D.N.Y. July 17, 2017) (Ex. 36 at 27:24-28:3). He observed that "[t]hese draconian penalties bear no relationship, in the Court's view, to any of the factors set forth in Section 3553(a): just punishment, the nature of the person's offense, and the nature of the person's character, the need for specific and general deterrence or not." *Id.* at 28:12-16.

This case demonstrates that point. A Guidelines range of 63 to 78 months for Gavin—which absent a loss enhancement would be 4 to 10 months—fails to account for virtually all the

relevant sentencing factors set forth above, including that (1) Gavin received no gain or profit from his criminal conduct, nor was he motivated by greed (Government Sentencing Letter at 6); and (2) Gavin promptly reported his conduct to his employer, which led to his clients being made whole. These facts demonstrate the unfairness of measuring Gavin's culpability by reference to a Guidelines range driven primarily by intended loss.[6]

CONCLUSION

For the foregoing reasons, we respectfully request that the Court impose a non-custodial sentence of probation, which is sufficient, but not greater than necessary, to comply with the sentencing goals set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

Dated: November 14, 2017

LEVINE LEE LLP

/s/Jillian B. Berman
Jillian B. Berman
Seth L. Levine
650 Fifth Avenue
New York, New York 10019
(212) 223-4400
jberman@levinelee.com
slevine@levinelee.com
Attorneys for Defendant Gavin Hamels

[6] The growing recognition of the disconnect between the Guidelines and culpability led the American Bar Association to commission a task force ("ABA Task Force") several years ago to propose an amendment to the economic crimes Guidelines. The ABA Task Force published a report in November 2014, in which it offered a substitute method, shifting from a focus on "loss" to "culpability." *See* A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (Nov. 10, 2014), *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.authcheckdam.pdf. While this substitute method was not adopted by the Sentencing Commission, it reflects the growing support in the legal community that sentences should be fair, appropriate and based on a variety of factors—and not overwhelmingly based on the loss amount. Application of the ABA Task Force's recommended set of factors reveal that Gavin is an ideal candidate for a sentence of probation. He is a first-time offender whose conduct resulted in no actual loss and who was not motivated by greed; he acted under duress and pressure from Jason Galanis when he was in a vulnerable situation; and victim impact was minimized because he voluntarily ceased his offense conduct before it was detected.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 15 Cr. 643 (PKC)

GAVIN HAMELS,

Defendant.

----------x

November 29, 2017
11:15 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
BY: REBECCA G. MERMELSTEIN
Assistant United States Attorney

LEVINE LEE LLP
Attorneys for Defendant
BY: JILLIAN B. BERMAN
SETH L. LEVINE

Also present: SHANNON BIENIEK, FBI

(Case called)

THE DEPUTY CLERK: For the government.

MS. MERMELSTEIN: Good morning, your Honor. Rebecca Mermelstein for the government. With me is Special Agent Shannon Bieniek of the FBI.

THE COURT: Good morning to you both.

For the defendants.

MS. BERMAN: Good morning, your Honor. Jillian Berman and Seth Levine, of Levine Lee, on behalf of Gavin Hamels, who is here today.

THE COURT: Good morning to you both.

And good morning, Mr. Hamels.

Ms. Berman, the first thing I am going to do is I am going to go through the materials I have, and the question will be whether I have everything I should have.

I have a presentence report, recommendation and addendum, revised by probation on October 27, 2017. I have the unredacted version of the November 14, 2017 sentencing memorandum, which was prepared by you and Mr. Levine. I also have a volume of exhibits. In the main, they are letters of support. There are also some excerpts from certain transcripts that are in there. I should mention I also have the redacted pages that you also sent me. I have a letter dated October 3, 2017 from the government. And that is what I have on sentencing.

Do I have everything I should have?

MS. BERMAN: You do, your Honor. Thank you.

THE COURT: Same question for Ms. Mermelstein.

MS. MERMELSTEIN: Yes, your Honor.

THE COURT: Has the defendant read, reviewed and discussed with you the presentence report, the recommendation and addendum and the government's letter of October 3?

MS. BERMAN: He has, your Honor.

THE COURT: Does the defendant have any objections to the facts set forth in the presentence report?

MS. BERMAN: Your Honor, we have one request of the Court to clarify or strike one word. I do not think there is an objection from the government over this. It relates to paragraph 49 of the PSR. The last sentence describes how SunTrust also attempted to liquidate the Gerova holdings. We ask that the Court strike the word "attempted" because we understand that it did liquidate the Gerova holdings.

THE COURT: Any objection to striking, in the third to the bottom line of paragraph 49, the words "attempted to" and changing the word "liquidate" to "liquidated"?

Ms. Mermelstein.

MS. MERMELSTEIN: No, your Honor.

THE COURT: So that change will be made.

One change that I noted is in paragraph 10. It asserts that Mr. Hamels pleaded guilty without a plea

agreement. I don't believe that's correct. I believe he had a plea agreement dated March 10, 2016. Is that correct?

MS. BERMAN: That is correct, your Honor. I have been advised at times it appears, when there are cooperation agreements, sometimes probation prepares it this way, but you are correct, he did plead pursuant to a plea agreement.

THE COURT: So the word "without" will be stricken and the words "pursuant to" will be inserted in its place in paragraph 10.

Any objection, Ms. Mermelstein?

MS. MERMELSTEIN: No, your Honor.

THE COURT: Does the government have any objections to the facts set forth in the presentence report?

MS. MERMELSTEIN: No, your Honor.

THE COURT: Does Mr. Hamels have any objections to the facts set forth in the government's letter of October 3?

MS. BERMAN: No, your Honor.

THE COURT: I adopt as my findings of fact the facts set forth in the presentence report as well as the facts set forth in the government's letter of October 3.

Does the defendant have any objections to the guideline calculation set forth in the presentence report?

MS. BERMAN: No, your Honor.

THE COURT: Does the government have any objections to the calculation?

MS. MERMELSTEIN: No, your Honor.

THE COURT: I will now hear very briefly the government's motion pursuant to 3553(e).

MS. MERMELSTEIN: Yes, your Honor.

The government formally moves that the defendant be sentenced in light of Section 5K1.1 of the sentencing guidelines and 18, United States Code, 3553(e). I don't know that I have an enormous amount to add to what your Honor already knows about this defendant and what the government has said in its letter.

As your Honor knows, this is a defendant who has done, I think, everything the government can ask from a cooperator, which is to say that he came in early, he came in before he was charged, he was honest from the very get-go. He cooperated against many defendants, a significant number of whom were significantly more culpable than he is, and he testified at a trial, as your Honor knows, before your Honor.

I will note that, as we say in our letter, and I think the defense echos, this is a defendant who, notwithstanding the clear criminality of his actions, acted not out of personal greed, but out of sort of desperate circumstances, and while that's not an excuse, I think it's a relevant factor here.

Lastly, I would just say that your Honor obviously saw Mr. Hamels testify. The government spent much more time with him. And he is clearly remorseful, and I have, I would say, as

much confidence, if not more than I have ever had with a cooperator, that he is not going to be back here or with any interaction with the criminal justice system again. We don't recommend, as your Honor knows, any particular sentence, but I would be hard-pressed to say that the recommendation of probation and of defense counsel is unreasonable on all the facts here.

THE COURT: Let me ask you to just explain to me -- I realize that Mr. Hamels was what is described as a third-party cooperator in the Central District of California in a matter relating to another individual, and that was in or about August 2013, and then in October of 2014 he was interviewed in this district. Tell me how that came to pass. Literally, did your office contact the U.S. attorney's office in the Central District of California or did you reach out to Mr. Hamels directly or to his lawyer, or perhaps you don't know the answer to that question.

MS. MERMELSTEIN: May I have one moment, your Honor?

THE COURT: Sure.

MS. MERMELSTEIN: Your Honor, I apologize, I actually was not on this matter at the time that that first communication happened, and I don't know, although Ms. Berman may, how it is that SDNY contacted Mr. Hamels following his proffer in California in connection with third-party cooperation.

THE COURT: Ms. Berman, do you have any light to shed on that?

MS. BERMAN: Yes, your Honor, I do have some light to shed on it.

It was sort of, in our view, part and parcel of the same thing. The initial proffer that occurred was with prosecutors out in California, and involved related matters, and as the Court knows, Mr. Hamels agreed to speak, spoke truthfully. He was later contacted again. I believe the Southern District of New York prosecutors reached out through the prosecutors in California and communications were made, and Mr. Hamels again agreed to speak voluntarily, and at that time spoke with the prosecutors from New York, and that actually occurred in California.

THE COURT: I should note for the record that the government's motion is granted without opposition.

So, Ms. Berman, I will give you an opportunity to speak on behalf of Mr. Hamels, and then I will give Mr. Hamels an opportunity to speak.

MS. BERMAN: Thank you, your Honor. Do you mind if I go to the podium?

THE COURT: No. That's fine.

MS. BERMAN: Your Honor, thank you very much for giving me the opportunity to address the Court about Mr. Hamels, who I have come to know very well over the past few

years. I have also come to know very well his wife Naomi, who is sitting back here amongst many family and friends who have come today in support of him.

As the Court knows, Mr. Hamels violated the law; he committed serious crimes. He has otherwise led a law-abiding life, but in this instance he made a grievous error in judgment. As his mother very eloquently described in her letter, "this was a doozy." And it was, your Honor, and Gavin has acknowledged his wrongdoing, he has accepted responsibility for his actions, and, your Honor, he has been punishing himself for years.

Now, I know the Court needs to decide today what further punishment is appropriate, and is sufficient but not greater than necessary to further the purposes of sentencing, and as you heard from the government just now, probation has recommended a sentence of probation. We agree. We believe that is an appropriate sentence here. I think there is a lot of agreement in the room on that point.

Now, I am not going to focus on the offense conduct today because I know your Honor is well aware of it and you have heard Gavin testify about it before the Court. So instead of focusing on what he did wrong, I would like to focus just for a few minutes on who Gavin is as a person and what he has done right.

I want to talk about how Gavin reacted in the face of

knowing that he did something wrong, on how Gavin has been doing everything in his power to right his wrongs, and on how he has otherwise lived a life to a standard that others aspire to achieve. Because, your Honor, when you consider this, his exemplary character, apart from this short-lived criminal conduct, and how he has gone on to fully and completely accept responsibility for his actions, including providing substantial assistance to the government, we think it is clear that the recommended sentence of probation is appropriate and that no additional punishment beyond that would serve any legitimate interest in this case. And as the government wrote in its letter and just said to the Court, unlike many of the defendants the Court has sentenced in this very case, Gavin is poised to put his criminal activity behind him and to return to being a law-abiding and productive member of society.

I just want to point out to the Court, although I know you have read our papers, what did Gavin do and how did he react in the face of his wrongful conduct? He took steps directly against his own self-interest. Just four days after he completed the purchases of the Gerova shares that were at issue that he testified about, he called up his employer and he told them what he had done, and this was well before, years before any law enforcement was involved. And Gavin ultimately and shortly thereafter, after providing additional information to SunTrust about his actions, he was fired, but he had

accepted responsibility for what he had done, and SunTrust then went back to his clients and gave them their money back and sold off the Gerova.

But Gavin then continued to accept responsibility and acknowledge his actions. As your Honor just asked about, on two occasions when he was approached by law enforcement officers, he agreed to speak to them. He did so voluntarily. He did it before any criminal case was brought. He provided helpful, useful information, incriminating information about himself and others. He sent them documents. Gavin then continued to cooperate after he was indicted, and ultimately he pled guilty in this case early. He pled guilty publicly, pursuant to a cooperation agreement. His codefendants in this case knew he was cooperating, they knew he was prepared to testify, and ultimately many of them pled guilty, including Jason Galanis, the architect of this much broader scheme, much of which Gavin knew nothing about.

Gavin then continued as the case evolved to provide substantial cooperation to the government, including talking about the role and scope of others. He provided information, to the extent he knew it, for example, about Jared Galanis, and information that we think was credible, was truthful, he obviously didn't exaggerate, and that was very helpful to the government in clarifying the scope of its case against Jared Galanis as well as the others.

Obviously, your Honor, you saw him testify at the trial of Gary Hirst. He was credible. He was direct. He looked the Court and the jurors in the eyes. He looked the government in the eyes. He looked Gary Hirst's defense counsel in the eyes. And I don't think there is any dispute. His testimony was powerful. It was credible. Ultimately, your Honor, he has been, as Ms. Mermelstein just said, everything the government could expect or should expect out of a government cooperator. He is the kind of cooperating witness prosecutors want to have.

I am going to speak for a few minutes in a moment about the need for punishment and deterrence and why I think that is satisfied by the recommended sentence of probation. But I also know, and the Court is well aware, it is important to recognize the role that important cooperating witnesses play in our criminal justice system and to recognize that in the sentence that you impose upon Gavin.

Now, I just want to speak about Gavin a little bit more broadly because I think it explains why he did what he did and why he reported himself to SunTrust, why he then agreed to speak to prosecutors, why he was truthful every step of the way, why he ultimately cooperated.

The short answer, your Honor, is this is who he is, this is how he has lived his life. The criminal conduct that he engaged in and that he testified about, that was an anomaly.

It was brief aberrant behavior -- I think the government agrees, probation agrees -- in a 41-year life that Gavin has otherwise lived with honor, integrity, high moral values and doing the right thing, this is how he has led his life and strives to lead his life.

We have provided in our submission the Court with dozens of letters submitted in support of Gavin, and these letters are from people who know him from all different walks of life. They are childhood friends, they are relatives, they are people at the family temple and his children's school. They represent teachers, lawyers, people who work in the financial services industry; they represent people from all different perspectives. Those are all people who are here in support of Gavin, many of them actually are in this courtroom today, and they know Gavin, and they have known him for a long time, and so they have described for the Court, in their own very, very powerful words, what an exceptional, extraordinary person that Gavin is, and how out of character this conduct was.

Your Honor, I am not exaggerating when I tell you that when I read these letters, I was brought to tears because they were so moving and so genuine, and I learned so much about who this person is. And so I really embrace these letters and all of these people who have gone out of their way, without any reason other than that they just feel so strongly about Gavin.

Some of the things we see in the letters that describe Gavin, they talk about how he is someone who goes out of his way to help other people. He helps family and friends. When children are sick, when people are ill, he will bring food, he will pack up his car and bring items. He will run errands. He does this without anybody asking because it is who he is.

He has tremendous respect for people in society who are more vulnerable. His mother, who is sitting in the front row in the blue shirt, she has devoted her life to teaching children with special needs, and Gavin grew up in a household where he was surrounded by these children, and he paid special attention to them. And we have several people who wrote letters describing how, at family events and other occasions, Gavin is the one standing off to the side of the room talking to their relative who has special needs or disabilities, because he genuinely cares. This is not contrived. It is who he is.

Gavin adores children. He has spent time over the years tutoring and mentoring kids and trying to be a role model to children, as he had role models in his life. And he routinely puts the needs of others before his own. And what I have observed, as we spent a lot of time together, is despite the stress and the enormity of all of this and what he has done and dealing with the consequences of that, he is desperately trying to shield others from the burdens that he is feeling

that weigh upon him.

I just want to speak briefly about Gavin's relationship with his wife Naomi and his young children. He is such a devoted husband and father, and everybody who knows him describes this about him. This journey that he and Naomi have endured over the past number of years, it has not been easy, but his relationship with his wife has grown even stronger, and Naomi has described for the Court so eloquently how much she admires her husband as he has tried desperately to make right from his wrongdoing, as he has accepted responsibility, as he has refused to let his stress, his anxiety, his fatigue hinder his patience, involvement, his playfulness, his deep love for his children and his family.

And Gavin has continued to support Naomi every step of the way as she grows her career. They are true partners in life. They are equals. Gavin is an amazing father. Friends describe how he was born to be a dad and that being a father was his true calling. And Gavin's stepmother Diana, who is also here, describes the conversation she remembers many years ago, well before he met Naomi and had children, and how Gavin said to her, I want a career that gives me flexibility; not so he can run around and travel the world or do fun things, but so he could enjoy and spend time with his future wife and children, because that is what he wanted in life.

Gavin has made such an impact on others in the way he

carries himself, the way he is as a father and husband, that several of his friends have paid Naomi and him the highest compliment. One of them, Jim Woods, is also in the courtroom today. He said, If something were to happen to me and my wife, I would want Naomi and Gavin to take care of our daughter.

Your Honor, Gavin's depth of character, integrity, selflessness, devotion to others, these are traits described by virtually everyone who knows him. These are traits that define him as a person. And his mistake in judgment, his bad judgment, his short-lived criminal conduct here, that does not define him. It should not define him. I respectfully submit that his personal characteristics overwhelm the person before him, and those support the sentence that probation has recommended.

Lastly, your Honor, I just want to address briefly the need for just punishment and deterrence. Those are important considerations for the Court, and I feel very strongly that the sentence of probation advances those interests. It serves those interests. Gavin has been punishing himself for years. He is so burdened by his conduct, and the emotional weight of that is something he has been carrying with him.

And on top of that, there is the tangible consequences. He has lost his career. He has an SEC ban. He has lost his livelihood in the financial services industry. He has lost his ability to financially support his family at this

time, which is something that one of his friends described eloquently as "his most cherished responsibility." Gavin and Naomi, who prioritize saving for their family and for their children, they have been depleting their savings, they have incurred substantial debt, all because of his actions. And he has been publicly and privately shamed, his reputation ruined, and he is so embarrassed by what he did.

On top of that, the additional sentence recommended of probation provides further punishment. As the Court knows, as other courts have found, probation is punishment. It is a severe restriction on Gavin's liberty. The Court can fashion conditions. He will be required to report to probation before he makes routine decisions in his life. His home will be subject to unannounced visits, and there will be any other conditions the Court may impose. But we respectfully request that that term of probation, coupled with what he has endured, is just punishment here, given who Gavin is and given how he responded in the face of his wrongful actions.

A sentence of probation also furthers the goals of specific and general deterrence. I think there is no question that Gavin has been specifically deterred. I think the government spoke to that. Probation agrees with that. His conduct was so out of character, as Ms. Mermelstein said, I think there is no risk that he will reoffend, your Honor, that he will reappear before the Court. His actions prove that.

General deterrence is also served by probation. I don't think you can look at Gavin, I don't think someone on the outside who is contemplating committing a crime can look at Gavin and say, I want to be him, I want to be in his shoes. He has suffered. He has endured. Probation will further that punishment.

For all those reasons, your Honor, I respectfully urge you to follow the recommendation of the probation department. It is a fair and appropriate sentence in this case and it is sufficient but not greater than necessary to further the purposes of sentencing. To impose a harsher sentence is unnecessary punishment in this case.

Thank you, your Honor.

THE COURT: Thank you, Ms. Berman.

Mr. Hamels, this is your opportunity to speak, to address the Court directly, to bring to my attention any facts or circumstances that you believe I should take account of in passing sentence on you today. If there is anything you wish to say, this is the time to say it.

THE DEFENDANT: Yes. Thank you, your Honor.

I appreciate the opportunity to address the Court today.

I am embarrassed and ashamed for my actions, and there really is no excuse for what I did. I had every opportunity to live as a law-abiding citizen and make good choices in my life,

and in this case I clearly failed. And I let people down -- my family, my friends and colleagues, and the people that put their trust in me.

I am very fortunate and grateful that I have a strong support network of family and friends who have stood by my side despite my actions. Many of those people are here today continuing to support me at this most critical time in my life.

I tried to take responsibility and make amends and make things right for my poor decisions for the last few years, and I know you need to sentence me on those poor decisions I made, but I hope you can also see how I have otherwise tried to live my life, as a good person in the community, a good brother and son, a loyal friend, and most importantly now, a devoted husband to my wife Naomi and a good role model and loving father to my children.

So as the Court decides my sentence, I humbly ask that you, while you consider my poor judgment, you also consider the good things I have done in my life, and that you would please temper justice with mercy in this case.

Thank you.

THE COURT: Thank you, Mr. Hamels.

Is there anything further the government wishes to say?

MS. MERMELSTEIN: No, your Honor.

THE COURT: I have one question. Has the government

reached out to SunTrust as a victim to notify them of today's proceeding and to invite their participation if they wish?

MS. MERMELSTEIN: We have repeatedly attempted to contact SunTrust with respect to the possibility of restitution. In light of their decision not to respond to those inquiries, I don't know that they have been specifically notified of this proceeding, because as they haven't alleged any specific loss, they are not deemed a victim and part of the system, but they have not indicated any interest in participating in the proceedings.

THE COURT: I suppose that's correct that their status as victim is not established in this case.

MS. MERMELSTEIN: I think that's right, your Honor.

THE COURT: This is the Court's statement of reasons for the sentence to be imposed on Gavin Hamels.

In sentencing Mr. Hamels, I have considered each of the materials and items that I referenced at the outset. I considered the very thoughtful comments of Ms. Berman, the sincere comments of Mr. Hamels, and the helpful observations of Ms. Mermelstein. I have considered each of the factors under the sentencing statute, which is Section 3553(a). I need not recount all that I have considered, but I have considered all of the factors, and I will mention some of them.

With regard to the nature and circumstances of the crime, the defendant has entered a plea of guilty to

participating in a conspiracy to commit securities fraud and to engage in a scheme to defraud as well as -- well, strike that -- to commit actual securities fraud, and specifically, in Count Five, aiding and abetting a fraud by a number of investment advisers, one of whom was Mr. Hamels himself. So the other defendants aided and abetted and Mr. Hamels engaged in investment adviser fraud.

More specifically, after placing his clients at Martin Kelly into an investment that turned out to be a disaster, Mr. Hamels was looking for a way to make his clients whole, and Jennings, who had been the individual with whom the disastrous investment was made, introduced Hamels and Bill Crafton to Jason Galanis, and that was the beginning of Mr. Hamels' problems that brings him to this courtroom today.

Galanis proposed a transaction which had the potential of making some of Mr. Hamels' clients whole, or perhaps all of them whole, or at least recouping some of their losses, and on its face it's not apparent to me that the transaction that was initially proposed was inherently unlawful. The problem was the terms of the arrangement were not disclosed to Mr. Hamels' clients and it became apparent to Mr. Hamels along the way that he would be assisting others in engaging in matched trades in which insiders, Jason Galanis and his co-conspirators, would sell shares in Gerova at approximately the same time that Mr. Hamels would make purchases for his clients' accounts, and this

took place between July 22, 2010 and September 10, 2010, and on approximately 50 occasions, sell orders were made from the Shahini accounts and Hamels' buy orders were placed within ten minutes of the sell orders, and at times even within seconds apart.

The conduct is different in kind and character than what the Court often sees, in that there was not a motive of greed on the part of Hamels; it was a misguided effort to mitigate injury to his clients. The form of mitigation was itself a criminal conduct. But shortly after the last of the matched trades occurred, which was on or about September 10, Mr. Hamels, on September 14, reported his conduct to SunTrust, his employer at the time, and was terminated shortly thereafter. And he was contacted and assisted the United States Attorney's Office in the Central District of California in a different criminal investigation, and ultimately cooperated with the government in the investigation which led to his indictment and cooperation agreement.

Mr. Hamels testified in my courtroom, and I found his testimony to be truthful. Not only did I find it to be truthful, but my recollection having been refreshed in the sentencing memorandum of the defendants, it appears that defense counsel conceded before the jury that Mr. Hamels' testimony was truthful. He did not attack his credibility.

A judge receives a substantial volume of letters,

particularly in cases of this sort -- securities fraud, white collar crime and the like -- but the letters were consistent in their portrayal of Mr. Hamels as a good person, someone who followed rules, and was a good family man, and in this instance, he was caught up in the criminal activities of Jason Galanis and his confederates. He did the right thing when he told his employer, and he did the right thing in agreeing to cooperate with the government and to testify in the Gary Hirst trial, and his cooperation was also influential, one might suppose, in the guilty pleas of other defendants in this case.

I agree with Ms. Berman there is virtually no chance that I can imagine or see that Mr. Hamels will reoffend.

There is the consideration of just punishment and the need to deter others. Here, Mr. Hamels has given up his ability to participate in the securities industry. According to paragraph 95 of the presentence report, his financial licenses were revoked and he has been barred by the SEC from certain activities.

In this case, considering the level of cooperation, the level of remorse, the fact that I am convinced on this record that the conduct was atypical and aberrational and was not motivated by greed or narcissism or self-aggrandizement, but was initially borne of a legitimate concern for his clients, I conclude that a sentence of two years' probation, a fine of $10,000, and a special assessment of $300 is sufficient

but not greater than necessary to achieve the purposes of Section 3553(a).

Does the defendant or his counsel have any objection to the Court's proposed sentence or to the statement of reasons for that sentence?

MS. BERMAN: No, your Honor. Thank you very much.

THE COURT: Same question for the government.

MS. MERMELSTEIN: No, your Honor.

THE COURT: The defendant will please stand and I will pronounce sentence.

Gavin Hamels, it is the judgment of this Court that you are hereby sentenced to a term of two years' probation, with the following terms and conditions:

You must not commit another federal, state or local crime, nor unlawfully possess a controlled substance.

You must refrain from any unlawful use of a controlled substance.

You must cooperate in the collection of DNA as directed by probation.

You must pay the assessment imposed in this case.

You must comply with the standard conditions 1 through 13.

You must provide the probation officer with access to any requested financial information while your criminal penalties remain unpaid. You must not incur new credit card

charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

It is further ordered that you must pay to the United States a special assessment of $300, which shall be due immediately.

Based on the submission of probation and the statements of the government, restitution is not an issue in this case. With regard to forfeiture, the defendant has agreed to forfeit, and he does forfeit, any and all property, real or personal, that constitutes or is derived from the commission of the offenses alleged in Counts One, Two and Five.

The fine of $10,000 is imposed, taking account of defendant's known financial resources, and the fine amount shall be paid in monthly installments of $450 commencing 90 days from today.

Mr. Hamels, you have the right to appeal the sentence I have imposed on you. If you cannot afford the cost of an appeal, you may apply for leave to appeal as a poor person. The time limits for filing a notice of appeal are brief and they are strictly enforced. If you request, the clerk of court will prepare and file a notice of appeal on your behalf immediately. Do you understand all that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Please be seated.

Is there anything further from the government?

MS. MERMELSTEIN: Your Honor, I would just note for the record, with respect to forfeiture, that while the defendant agreed to forfeiture in his plea agreement, in light of the Supreme Court's decision in *Honeycutt*, there is no forfeiture here. So the amount then for the forfeiture is zero.

THE COURT: So noted and so adopted as the order of this Court.

Anything further, Ms. Berman?

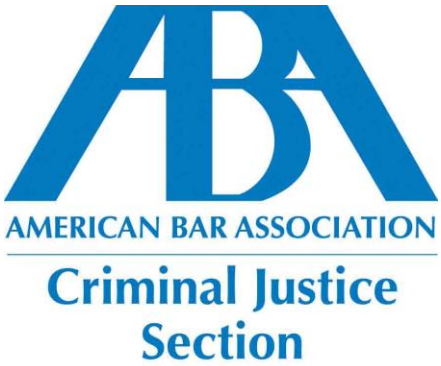
MS. BERMAN: No, your Honor. Thank you very much for your careful consideration.

THE COURT: Mr. Hamels, this is the closing chapter of this event. You have to serve the two years on probation, and I know that you will do that and there will be no issue there. But you have had a lot of people who have stood by you in this time of need and difficulty in your life, and I know that your concerns, from reading the letters, have been with others, but you need to continue to make amends and continue on the path which is the right path and a good path of being a devoted husband, father, and son and family member. I wish you the best.

THE DEFENDANT: Thank you, your Honor.

THE COURT: We are adjourned.

oOo



A Report on Behalf of The American Bar Association Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes

Final Draft

November 10, 2014

- *The views stated in this submission are presented on behalf of the Criminal Justice Section. The report has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

The American Bar Association Criminal Justice Section
1050 Connecticut Avenue, NW, Washington, DC 20036
202-662-1500 • crimjustice@americanbar.org
www.americanbar.org/crimjust

Economic Offenses

(a) **Base Offense Level**: [6-8]

(b) **Specific Offense Characteristics**

(1) **Loss**. If the loss exceeded $20,000, increase the offense level as follows:

(A) More than $20,000	add [4]
(B) More than $100,000	add [6]
(C) More than $1,000,000	add [8]
(D) More than $5,000,000	add [10]
(E) More than $10,000,000	add [12]
(F) More than $50,000,000	add [14]

(2) **Culpability**

(A) Lowest culpability	subtract [6-10]
(B) Low culpability	subtract [3-5]
(C) Moderate culpability	no change
(D) High culpability	add [3-5]
(E) Highest culpability	add [6-10]

(3) **Victim Impact**

(A) Minimal or none	no increase
(B) Low	add [2]
(C) Moderate	add [4]
(D) High	add [6]

(c) **Special Offense Considerations**

For offenses of a kind specified in Section 2B1.1(b)(3) through (9), (11) through (14), or (16) through (18), the court should consider those offense characteristics to the extent they are appropriate in determining culpability or victim impact. Where the offense presents a special concern of the kind intended to be addressed by these subsections, and where the concern has not been addressed in determining the offense level, increase by 2 offense levels. [incorporate specific Congressional directives].

(d) **Offense level cap of 10 for non-serious offenses by first offenders**

If the defendant has zero criminal history points under Chapter 4 and the offense was not "otherwise serious" within the meaning of 28 U.S.C. § 994(j), the offense level shall be no greater than 10 and a sentence other than imprisonment is generally appropriate.

Application Notes:

1. *Loss*:

   [To be incorporated from current 2B1.1 with the modification that loss means actual loss].

2. *Culpability*:

   Consideration of the various culpability factors

   The guideline has 5 levels of culpability that range from lowest to highest. The appropriate culpability level for any given case will depend on an array of factors. These include, but are not limited to: the defendant's motive (including the general nature of the offense); the correlation between the amount of loss and the amount of the defendant's gain; the degree to which the offense and the defendant's contribution to it was sophisticated or organized; the duration of the offense and the defendant's participation in it; extenuating circumstances in connection with the offense; whether the defendant initiated the offense or merely joined in criminal conduct initiated by others; and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The list is not exclusive. Other factors may also bear on the culpability level.

   Because of the nature and number of these culpability factors, as well as the almost limitless variety of possible combinations, there is no workable formula for assigning values to each individual factor. Rather than assign a numeric score to each individual culpability factor, the court instead arrives at one of five culpability levels after considering the combined effect of all culpability factors. The weight that each particular culpability factor plays in a given case will vary. In some cases, the defendant's motive will be the factor most indicative of the defendant's culpability. In other cases, extenuating circumstances will play the most prominent role. Also, these various factors will often overlap. A less culpable motive, or a less culpable nature of the offense, will sometimes be evident in the extenuating circumstances that prompted the defendant to commit the offense.

   The end result of the court's analysis should be a culpability level that "ranks" the defendant in the hierarchy of five levels of culpability for all defendants sentenced under this guideline. By definition, all defendants sentenced under the guideline are to some degree "culpable." The court should not be reluctant to find a mitigating culpability value out of concern that it will signal a lack of opprobrium for the offense – the point of the analysis is to accomplish proportionality by meting out sentences that are sufficient but not greater than necessary to accomplish the purposes of sentencing in the light of each defendant's culpability when compared with all

other defendants sentenced under this guideline.
As a way of assisting the court in making the culpability assessment, it is anticipated that the middle culpability category – "moderate culpability" – would account for the largest number of defendants sentenced under the guideline. A defendant seeking an assessment of "low" or "lowest" culpability bears the burden of proof to establish this, while the government bears the burden to prove either "high" or "highest" culpability.

In assigning a culpability level, the court should be careful not to "double count" the amount of loss or the victim impact, each of which is a separate specific offense characteristic. Although in some circumstances there may be overlapping considerations bearing on each factor, loss, culpability, and victim impact are each intellectually distinct concepts warranting individualized assessment. Thus, a high loss or significant victim impact may result from conduct reflecting mitigated culpability by some or even all of the criminally responsible participants. Conversely some cases may present aggravated culpability resulting in more limited loss or victim impact.

There is also overlap between the considerations that inform the defendant's level of culpability and those that bear on the defendant's role in the offense as determined under Chapter Three. Nevertheless, as with the relationship of culpability to loss and victim impact, role in the offense is also intellectually distinct from culpability and requires separate inquiry. Where it is necessary for the court to weigh the same considerations governing role in the offense in its assessment of culpability, this may in some circumstances require a sentence outside the range resulting from a cumulative application of the culpability and role adjustments.

The court should also recognize that this guideline is intended to address *offense* characteristics. The court should continue to consider *offender* characteristics at sentencing in accordance with 18 U.S.C. § 3553(a). Although aspects of offender characteristics may overlap with culpability considerations, these are intellectually distinct concepts requiring separate consideration.

(A) *Motive/Nature of Offense*

One factor in the culpability level is the defendant's motive or the nature of the offense. The following examples occur frequently in cases sentenced under this guideline.

> (1) *Predatory* – These offenses are intended to inflict loss for the sole or dominant purpose of generating personal gain to the defendant or to others involved in the criminal undertaking. These offenses – accompanied by no legitimate purpose – are among the most culpable types of offenses sentenced under this guideline.

(2) *Legitimate ab initio* – These offenses often arise from otherwise legitimate efforts that have crossed over into criminality as a result of unexpected difficulties. Even though such offenses may be intended to cause loss for the purpose of generating personal gain to the defendant or to others involved in the criminal undertaking, they rank lower on the culpability scale than predatory offenses.

(3) *Risk shifting* – These offenses are not specifically intended to cause loss. Instead, they shift the risk of any potential loss from the defendant (or from others involved in the criminal undertaking) to a third party, such as the victim of the offense. Examples include false statements for the purpose of obtaining a bank loan that is intended to be repaid. Such offenses are generally less culpable than those where loss is specifically intended.

(4) *Gatekeeping* – These offenses are not specifically intended to cause loss or even to shift the risk of loss. Instead, they violate so-called "gatekeeping" requirements intended generally to prevent practices that create potential loss or a risk of loss. Examples include billing Medicare for medically necessary goods and services that are actually provided without the appropriate third-party verification of medical necessity. Such offenses are generally at the lower level of culpability under this factor.

There may be cases where the nature of the offense fits more than one of these descriptions. And there may be cases for which none of these categories is appropriate. Whether or not these descriptions fit a particular case, the court should take them into account when considering how the defendant's motive (including the nature of the offense) compares, for culpability purposes, to that of other defendants sentenced under this guideline whose offenses match these descriptions.

(B) *Gain*

Another culpability factor is the gain to the defendant or to others involved in the criminal undertaking.

(1) *Commensurate with loss* – Where the defendant and others involved in the criminal undertaking derive a gain from the offense in an amount that is roughly commensurate with the loss, this ordinarily indicates a higher degree of culpability.

(2) *Less than loss* – Where the defendant and others involved in the criminal undertaking derive a gain from the offense in an amount that is less than the loss, this ordinarily indicates a lesser degree of culpability than (1).

(3) *Minimal or Zero* – Where the defendant and others involved in the criminal undertaking derive little or no gain from the offense, this ordinarily indicates a lesser degree of culpability than (2).

The extent to which the defendant *personally* gained may also be relevant to the culpability level. For example, an accountant convicted for participation in a securities fraud scheme would be less culpable (on the factor of gain) than an officer of the company who personally gained more than the accountant. Also, a small amount of gain in relation to the loss may not always mean a lower level of culpability. For example, a defendant who intentionally inflicts a large loss on others for the purpose of achieving a small gain would be more culpable with respect to the gain factor than someone who did not intend the loss. The degree of culpability in this example varies depending on the extent to which the loss was foreseeable to the defendant.

(C) *Degree of sophistication/organization*

Criminal undertakings involving a high degree of sophistication and/or organization generally reflect a greater threat of harm and a higher level of culpability. The reverse is also true – where the offense is executed in a simple manner without the involvement of large numbers of participants, this generally reflects a lesser threat of harm and a lower level of culpability. The court should also consider the extent of the defendant's contribution to the offense's sophistication or organization. A defendant with less responsibility for the offense's sophistication or organization would be less culpable, all other things being equal, than one with greater responsibility for these characteristics.

(D) *Duration*

As with sophistication and organization, the duration of the offense and the defendant's participation in it also frequently reflects differences in culpability. Criminal undertakings that extend over several months or longer suggest a greater degree of culpability, while those that occur in a single event or over a shorter period of time in many circumstances reflect a lower level of culpability.

(E) *Extenuating circumstances*

Some defendants will commit an offense in response to various circumstances, such as coercion or duress. There are many extenuating circumstances that could contribute to the commission of an offense, and the extent of their contribution will also vary from case to case. A defendant's culpability will be affected by the nature of these extenuating circumstances and the extent to which they played a part in the commission of the offense.

(F) *Efforts to mitigate harm, including voluntary cessation, self-reporting, or restitution*

A defendant will sometimes take steps that help mitigate the harm or otherwise reflect a lower level of culpability. Where the defendant voluntarily ceases the offense conduct prior to its detection, this generally indicates a decreased level of culpability. Self-reporting of the offense is also a sign of lower culpability, as is voluntary restitution. In considering the significance of restitution, care must be taken not to punish a defendant more severely as a result of a lack of financial resources.

The court may consider a defendant's cessation of criminal conduct even if it does not qualify as a legal defense to conviction for conduct that occurred after the defendant's involvement ceased. For example, the court may consider the fact that a defendant ceased taking part in a conspiracy even though the legal standard for withdrawing from the conspiracy was not met.

3. *Victim Impact*:

The guideline has four levels of victim impact: (1) minimal or none; (2) low; (3) moderate; and (4) high. As with the culpability levels, there are many factors to consider in arriving at the appropriate level of victim impact. The court should consider how the combination of these factors places the defendant's offense in comparison to victim impact in other cases under this guideline. The court should also be cognizant that the amount of the victim(s)' loss is already accounted for and should not be counted again in the context of victim impact. An additional score for victim impact is appropriate only where there is a harm beyond that inherent in the amount of the loss.

(A) *Vulnerability of victims*

Where victims are identified and targeted because some particular vulnerability they suffer, this may indicate a higher degree of victim impact (and/or culpability). The court should be careful not to "double count" the vulnerability of the victims in assessing culpability, victim impact, and the special adjustment in Chapter Three for vulnerable victims, 3A1.1(b). Nevertheless, there may be some circumstances in

which the vulnerability of victims results in a peculiar degree of impact, particularly where that impact was foreseeable to the defendant, that would warrant an increase in the victim impact adjustment as well as an enhancement for vulnerable victim in Chapter Three.

(B) *Significance of loss*

Where the victim suffers losses that threaten the victim's financial soundness, this generally indicates a higher degree of victim impact. This may be more common where the victims are individual as opposed to institutional. It is assumed that in most offenses involving an institutional victim, the impact is measured principally by the amount of the loss such that no additional victim impact adjustment would ordinarily be appropriate in the absence of the failure or bankruptcy of the institution.

(C) *Other non-economic harm*

Where the victim has suffered a significant non-economic harm, this may not be captured in the loss adjustment, and thus the guideline may understate the seriousness of the offense under some circumstances in the absence of an upward adjustment reflecting victim impact.

(D) *Victim inducement of offense*

In some circumstances the victim has contributed to the offense in some manner. This may include inducing the commission of the offense or some lesser degree of conduct. Under such circumstances it may be appropriate to partially discount the impact on the victim as a measure of offense severity.

4. *Offense level cap for offenses that are not "otherwise serious"*:

The Sentencing Reform Act provides as follows: "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…." 28 U.S.C. § 994(j). Many of the offenses falling within this guideline are not "otherwise serious."

In determining whether an offense is not "otherwise serious," the court should consider (1) the offense as a whole, and (2) the defendant's individual contribution to the offense. For example, a low level employee who is peripherally involved in what would be an "otherwise serious" offense as to other defendants may nevertheless qualify for this offense level cap.

Factors to be considered in determining whether the offense is one for which a sentence of probation is appropriate include the following: the amount of the loss; whether loss was intended at the outset of the offense conduct; whether the defendant's gain from the offense is less than the loss; whether the defendant's

offense conduct lacked sophistication (including whether it was committed in a routine manner or without the involvement of a large number of participants); whether the defendant acted under duress or coercion; the duration of the offense conduct and the defendant's participation in it; whether the defendant voluntarily ceased the offense conduct before it was detected; and the nature of the victim impact caused by the offense. Where the defendant has no criminal history points, and where the circumstances of the offense support a finding that the offense was not "otherwise serious," the offense level under this guideline shall be no greater than 10, and a sentence other than imprisonment is generally appropriate.

Reporter's Notes

A. Members of the Task Force and Principles of Consensus.

In April 2013 the Criminal Justice Section of the American Bar Association assembled this Task Force to evaluate the reforms needed in the sentencing of federal economic crimes and to draft a proposed federal sentencing guideline to effectuate those reforms. The Task Force consists of five professors, three judges, six practitioners, two organizational representatives, and observers from the Department of Justice and the Federal Defenders:

- Stephen Saltzburg (Chair)
  Professor of Law, George Washington University School of Law
- James E. Felman, Esquire (Reporter)
  Kynes, Markman & Felman, P.A.
- Sara Sun Beale
  Professor of Law
  Duke University School of Law
- Barry Boss, Esquire
  Cozen O'Connor
- David Debold, Esquire
  Gibson Dunn & Crutcher
- The Honorable Nancy Gertner
  Professor of Law
  Harvard Law School
- The Honorable John Gleeson
  United States District Court
  Eastern District of New York
- A. J. Kramer (Observer)
  Federal Defender
  District of Columbia
- Gary Lincenberg, Esquire
  Bird, Marella, Boxor, Wolpert, Nessim, Brooks & Lincenberg
- The Honorable Gerard Lynch
  United States Court of Appeals for the Second Circuit
- Jane Anne Murray
  Practitioner in Residence
  University of Minnesota Law School
- Kyle O'Dowd, Esquire
  Associate Executive Director for Policy
  National Association of Criminal Defense Lawyers
- Marjorie J. Peerce, Esquire
  Ballard, Spahr, Stillman & Friedman, P.C.
- Mary Price, Esquire
  Vice President and General Counsel
  Families Against Mandatory Minimums
- The Honorable Jed Rakoff
  United States District Court
  Southern District of New York
- Neal Sonnett, Esquire
  Neal R. Sonnett, P.A.
- Kate Stith
  Professor of Law
  Yale Law School
- The Honorable Jonathan Wroblewski (Observer)
  Director, Office of Policy and Legislation
  United States Department of Justice

After a number of meetings and telephone conferences, the group arrived at a consensus proposal subject to a number of important caveats. These caveats are an essential aspect of the proposal to avoid misunderstanding its nature and scope.

First, we feel more strongly about the structure of the proposal than we do about the specific offense levels we have assigned. We assigned offense levels in the draft because we think it is helpful in understanding the structure, but the levels have been placed in brackets to indicate their tentative nature. Indeed, in some instances we have bracketed a range of levels, although as noted below in the discussion of the "Twenty-Five Percent Rule" we recognize that a final guideline likely could not include such a range. We have performed no research and have no empirical basis for the levels we assigned in the draft.

We have applied the proposal to an array of specific case scenarios, and this exercise was very helpful to us on a number of levels. We were reassured about the structure of the proposal – we felt the proposal captured the offense characteristics most relevant to sentencing, and it placed appropriate weight on the considerations of loss, culpability, and victim impact in relation to one another. We also felt that the proposal is sufficiently clear and specific that it leads to reasonably uniform application. Although the culpability and victim impact considerations do not lend themselves to exact quantification in the same way as measuring the amount of loss, we were able to reach consensus on the application of the proposal to the scenarios without undue difficulty or disparity. Most us were comfortable with the range of outcomes that result from the levels assigned in the draft, but it should be understood that we devoted the bulk of our efforts to structural improvements and less time to issues of optimal punishment severity, in part out of a recognition that there are inherently political components to such judgments.

Second, we discussed but did not fully resolve the question of whether certain categories or types of offenses should be sentenced under a separate guideline in light of the very wide array of offenses sentenced under this guideline. We believe, in particular, that certain types of securities offenses where changes in the value of market capitalization drive the loss calculation may be especially suited for consideration under a separate guideline.

Third, the proposal is submitted as a consensus product in accordance with the following limiting principles:

1. It is assumed that, for the foreseeable future, the current structural framework dictated by statute will remain in place, including the 25% rule (28 U.S.C. § 994(b)(2)), and that the Commission therefore will still find it necessary to assign fairly specific numeric values to sentencing considerations. The draft proposal is written to comply with that assumed structural framework, although it should be noted that the American Bar Association supports the repeal of the 25% rule. ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommission ReportsFinal.pdf).

2. This structural framework (both the 25% rule and the guidelines' overly arithmetic approach) is not ideal because it can be unduly rigid and lead to the arbitrary

assignment of values and the overemphasis of considerations that are more easily quantified to the detriment of equally relevant considerations that are less easily quantified. There is also a risk under the current structural framework that a guideline will appear to carry more empirical or scientific basis than is present.

3. A better structural framework would (a) place less emphasis on arithmetic calculations and those few sentencing considerations that lend themselves to exact quantification; and (b) allocate greater sentencing authority to the judiciary.

4. The Task Force is not necessarily of one mind regarding the ideal allocation of sentencing authority between the Congress, the Sentencing Commission, the Judiciary, and the Executive Branch, but it was not deemed necessary to achieve consensus on this point as this proposal is premised on the assumption that the current structural framework will remain in place.

B. Intent of the Proposal Within the Existing Guidelines Structure

The proposal is intended as a free-standing substitution in the Guidelines Manual for the existing Guideline Section 2B1.1. There are two aspects of this substitution that bear particular emphasis.

First, we understand that Subsection (c) of the proposed guideline regarding Specific Offense Characteristics ("SOCs") would need to be tailored to comply with specific Congressional directives to the Sentencing Commission. Many of these directives are open-ended, and require only that the Commission "consider" amending the guidelines as necessary in light of specific legislation. We believe our proposal accommodates those directives by instructing the court to apply the SOCs in the existing guideline that resulted from such directives where the offense presents a special concern of the kind intended to be addressed by these SOCs, and where that concern has not otherwise been addressed in determining the offense level under the guideline. But we also recognize that there have been a handful of Congressional directives that required specific amendments to the guideline. An example of such a specific directive is that contained in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606, 124 Stat. 119, 1006 (2010), which directed new offense level increases for higher loss frauds involving government health care programs. Our proposal would need to be conformed to these specific directives if adopted by the Sentencing Commission.

Second, the proposal, like all provisions of Chapter Two of the Guidelines, is intended to deal solely with *offense* characteristics. The court should continue to consider *offender* characteristics at sentencing in accordance with 18 U.S.C. § 3553(a). Although aspects of offender characteristics may overlap with culpability considerations, these are intellectually distinct concepts requiring separate consideration.

C. Compliance with the "Twenty-Five Percent" Rule

Title 28 U.S.C. § 994(b)(2) provides: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." Early in the life of the Sentencing Commission, it decided to construe this statutory limitation to apply not only to the final sentencing range resulting from the guidelines computation, but also to each adjustment along the route of that computation. While this construction of the statute does not appear to be compelled by its terms, our proposal is drafted on the assumption that the Commission will not revisit this question. Accordingly, we recognize that adoption of our proposal would require the Commission to select a specific numeric value for the base offense level and each of the culpability categories. As noted above, we elected to include a range of possible values in our proposal to illustrate the range of possible outcomes under it, depending on the levels ultimately selected by the Commission. We are confident, however, that if a specific value is inserted for the base offense level and each of the culpability levels, our proposal would then comply with the statute. We have heard some outside comment that because the culpability consideration groups together a wide array of factors and thus results in such a wide array of ultimate offense level outcomes, this renders the proposal violative of the statute. We do not agree with this view, and find support for our position in the observation that role in the offense also groups together a wide array of potential considerations and can result in an eight-level swing in the range resulting from those considerations. *See* U.S.S.G. §§ 3B1.1, 1.2.

D. Case Scenarios

These scenarios are intended to illustrate application of the proposal and the manner in which it might diverge from the current guideline. They are intended as a rough illustration of how the proposal would operate based on a very general level of detail. A much wider array of facts would frequently be relevant to a court's consideration of an appropriate sentence. Also, the scenarios do not include information regarding the history or characteristics of the offender under the assumption that these very important sentencing factors will be considered by the court in fashioning a reasonable sentence pursuant to 18 U.S.C. § 3553(a). Finally, the scoring of the scenarios continues to utilize a range of offense levels for the base and culpability factors, but we recognize that adoption of the proposal would require the selection of a specific numeric value for these factors in accordance with the "twenty-five percent" rule in 28 U.S.C. § 994(b)(2).

Case Scenario 1

The defendant was an organizer and leader of a fraudulent "lottery" scheme in which elderly persons were identified and contacted by telephone, advised that they had won a lottery award, and told that to obtain the award they must first pay advance fees to cover matters such as taxes, insurance, bonding, or other matters. After the victims submitted the requested fees, they were advised to expect the delivery of their winnings via armored car to their homes at specific dates and times. When the armored car did not arrive, the victims' efforts to contact those to whom they had remitted the fees were not successful. The scheme victimized 14 individuals, most of whom were 70 years old or older. For six of the victims, the losses represented their life savings. The fees paid ranged from $20,000 to $175,000, with a total loss to all victims of roughly $1.7 million. The majority of these funds were obtained by the defendant and converted to his personal use.

Score under current guideline:

Base Offense level:	7
Loss:	+16
more than 10 victims/mass marketing:	+2
Vulnerable victim	+2
Role in the offense	+4
	31

Score under ABA proposal:

Base Offense level:	6-8
Loss:	+8
Highest culpability:	+6-10
High victim impact:	+6
Vulnerable victim	+2
Role in the offense	+4
	32-38

This scenario presents a predatory offense where the defendant's gain was roughly commensurate with the loss. Although the scenario does not specify the degree of sophistication or duration of the offense, some sophistication and duration is implicit in the nature and extent of the scheme. No extenuating circumstances or efforts to mitigate harm are specified. This presents a "highest culpability" offense. The victim impact is also "high" in light of the significance of the loss to six of the victims. The scheme targeted the victims based on their elderly status, and if some of them were unusually vulnerable for that reason this would be additional support for findings of high victim impact and highest culpability. It is assumed that for purposes of Chapter Three this scenario would also score adjustments for both vulnerable victim and leadership role in the offense. These adjustments are the same under both this proposal and the existing guideline as this proposal does not address Chapter Three.

Case Scenario 2

The defendant was the owner of a legitimate business for many years and financed the operations of the business through a line of credit secured by the inventory and accounts receivable of the business. When the business came on difficult times, the defendant caused the submission of false information to the lender regarding both inventory and accounts receivable, thus enabling the business to borrow more than it would otherwise have been permitted to borrow. The defendant also attempted to support the operations of the business by liquidating his personal assets and investing the proceeds into the business. The lender discovered the fraud and caused the termination of the business. After mitigating its losses by selling the inventory and collecting legitimate accounts receivable, the lender was left with a loss of approximately $6.9 million. A forensic accounting revealed that during the period of the fraud the defendant contributed more funds to the business than he withdrew from it in salary and other compensation.

Score under current guideline:

Base Offense level:	7
Loss:	+18
More than $1 Million in gross receipts:	+2
Role in the offense	+4
	31

Score under ABA proposal:

Base Offense level:	6-8
Loss:	+10
Low culpability:	-3-5
Low victim impact	+2
Role in the offense	+4
	17-21

This scenario presents a mixture of legitimate ab initio and risk shifting fraud. Although the offense had some degree of sophistication, the less culpable motive, zero gain to the defendant, extenuating circumstances, and efforts to mitigate harm result in a "low culpability" score. The victim impact is also rated as "low" given that it involved a single institutional victim, but not minimal given the magnitude of the loss and the difficulty of the detection of the offense and the efforts needed to mitigate its harm. It is assumed the defendant would receive a leadership role in the offense adjustment under Chapter Three.

Case Scenario 3

The defendant was the owner of a durable medical equipment business that provided oxygen to Medicare patients. To qualify for reimbursement, equipment providers must ensure the oxygen is medically necessary by sending patients to an independent laboratory for testing. Instead of referring patients to independent labs for testing, the defendant caused his employees to conduct the testing themselves and then falsely represent to Medicare that the testing had been performed by an independent lab. Virtually all of the oxygen was medically necessary, although Medicare would not have paid the bills for it had the failure to qualify the patients by independent testing been disclosed. The fraud continued for more than a year, and involved in false representations regarding the testing of 159 patients. The amount billed to Medicare for their oxygen was $7.1 million. The patients were billed a small co-pay fee, and a small portion of the reimbursement for the oxygen received by these patients was also paid by 109 supplemental insurance companies.

Score under current guideline:

Base Offense level:	7
Intended loss:	+20
Sophisticated means:	+2
Production of unauthorized access device:	+2
More than 250 victims:	+6
Health care fraud offense	+3
Role in the offense	+4
	44

Score under ABA proposal:

Base offense level:	6-8
Actual loss:	+10
Moderate culpability:	0
Low victim impact:	+2
Health care fraud offense	+3
Role in the offense	+4
	25-27

This scenario presents a gatekeeping offense (although if the oxygen was either not provided or medically unnecessary this would be a predatory offense). Under current law in at least some circuits, the amount billed is treated as loss notwithstanding the medical necessity of the oxygen. *See*, *e.g.*, *United States v. Bane*, 720 F.3d 818 (11th Cir. 2013). Notwithstanding the less culpable motive, the defendant's culpability is considered "moderate" given his personal benefit as the owner of the company, the degree of sophistication involved, the duration of the offense, and the absence of any extenuating circumstances or efforts to mitigate harm. The victim impact is considered low in light of the medical necessity of the treatments provided but not minimal in light of the sensitive nature of the government benefits program at issue. It is assumed that an additional three-level upward adjustment would be required under the Congressional directive presently located at 2B1.1(b)(7), as well as a leadership enhancement under Chapter Three.

Case Scenario 4

The defendant accepted $1,000 to act as a "straw purchaser" in a fraudulent real estate transaction that resulted in a $250,000 loss to a financial institution.

Score under current guideline:

Base offense level:	7
Loss:	+12
Role in the offense	-2
	17

Score under ABA proposal:

Base offense level:	6-8
Loss:	+6
Low culpability:	-3-5
Minimal victim impact:	0
Role in the offense	-2
	5-9[1]

This scenario presents a risk shifting offense in which the defendant's gain is minimal in relation to the loss and the offense involved limited sophistication and duration. On the other hand, the defendant knowingly played an essential role in a serious offense causing a significant risk of loss and did derive a direct personal benefit from the offense. For these reasons, the defendant's culpability would be "low" but not "lowest." The victim impact is considered minimal in that the victim is institutional, the amount of the loss did not threaten the security of the institution, and the severity of the offense conduct is adequately captured by the loss amount alone. A mitigating role in the offense adjustment under Chapter Three is assumed, but would not in all cases be applied.

[1]If the Base Offense Level is set at 8, Low Culpability is set at -3, and the defendant did not receive a mitigating role adjustment, this would result in an offense level 11, but in this scenario the offense level cap for non-serious offenses would cap the offense level at 10 if the defendant is a first offender.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -v.- LILIAN JAKACKI, a/k/a Lilian Wieckowski, MARCIN JACKAKI, a/k/a Martin, MW&W GLOBAL ENTERPRISES INC. d/b/a CHOPIN CHEMISTS, and EUROPEAN APOTHECARY INC. d/b/a CHOPIN CHEMISTS, and ROBERT CYBULSKI Defendants.	15 CR 727 (JSR)

SENTENCING MEMORANDUM ON BEHALF OF DEFENDANT LILIAN WIECKOWSKI

Jodi L. Avergun (NY Bar No. 2166668)
Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W.
Washington, D.C. 20001
(202) 862-2456

Attorney for Defendant Lilian Wieckwoski

TABLE OF CONTENTS

INTRODUCTION

This sentencing memorandum is submitted on behalf of defendant Lilian Jakacki, a/k/a Lilian Wieckowski, and her solely-owned corporate entities,[1] to provide this Court with the information necessary to impose a sentence "sufficient, but not greater than necessary" to achieve the statutory purposes of punishment. 18 U.S.C. § 3553(a); Gall v. United States, 552 U.S. 38, 50 n.6 (2007). As will be demonstrated in detail below, the factors enumerated in Section 3553(a) weigh heavily in favor of a sentence that falls below the Sentencing Guidelines range. The Guidelines range in this case is 135 to 168 months. The Probation Department, acknowledging that the Guidelines range is excessive, recommended 72 months incarceration. However, it is respectfully submitted that a sentence of three years more accurately reflects the offense conduct and the unique personal circumstances of the defendant, and is sufficient, but not greater than necessary, to achieve the statutory purposes of sentencing.

FACTUAL OBJECTIONS TO THE PSR

Ms. Wieckowski provided the Probation Department with her objections to the Presentence Investigation Report ("PSR") on October 7, 2016, and the Probation Department responded on October 17, 2016. There are no outstanding objections, and Ms. Wieckowski agrees that the Guidelines range is correctly calculated in the PSR.

---

[1] As part of her plea agreement with the government, Ms. Wieckowski entered guilty pleas on behalf of both of the corporate defendants. Both are closely held corporations of which Ms. Wieckowski is the sole shareholder and officer. One corporation, MW&W Global Enterprises, ceased operations in April 2014. The other, European Apothecary Inc., ceased operations in October 2016. Ms. Wieckowski provided financial information for both companies to the Probation Department, showing that MW&W had no revenue or assets, and that European Apothecary Inc. had minimal revenue and no assets. The PSR concluded that Ms. Wieckowski does not have an ability to pay a fine. Although the PSR did not address the corporate defendants, we ask that the court similarly find that neither company has an ability to pay a fine separate and apart from Ms. Wieckowksi.

THE CHARGED OFFENSES

Lilian Wieckowski has been a licensed pharmacist for her entire professional career. She successfully ran MW&W Global Enterprises, Inc. (d/b/a Chopin Chemists) in Greenpoint, Brooklyn, New York, between 1995 and 2014. In 2010, she incorporated European Apothecary, Inc. (d/b/a Chopin Chemists) in Queens, New York. Ms. Wieckowski operated her stores legitimately, and never had a problem with any regulator or government authority until this case.

For most of her years in business, Ms. Wieckowski employed a staff of Polish nationals who had been in the medical profession in Poland, but had not been able to obtain similar jobs in the U.S. In late 2009, Ms. Wieckowski placed a Craigslist ad for a pharmacist and Don Aoki, a retired pharmacist with over 30 years of experience, answered. Ms. Wieckowski hired him and he became a full-time employee at Chopin Chemists in Greenpoint in early 2010. By then, the Greenpoint neighborhood had significantly changed. Ms. Wieckowski could not financially support her large and loyal professional staff and was forced to let most of them go. She hired new, less educated, and less expensive workers to work with Mr. Aoki. That is where the troubles began.

Within a year of Aoki's hiring, Ms. Wieckowski's stores were prolific purchasers of oxycodone, and customer traffic from walk-ins increased. Some of these walk-in customers had fraudulent or questionable prescriptions for oxycodone, and Ms. Wieckowski personally filled many of the prescriptions. She has acknowledged to the Probation Department that, as a trained professional, she could see that a number of these customers suffered from addiction to opioids. Once word got out that Chopin Chemists filled oxycodone prescriptions without careful scrutiny, the volume of that type of business increased.

In late 2012, Ms. Wieckowski became suspicious of Don Aoki and some of her other employees. She soon learned that they had been using the pharmacy's electronic Controlled

Substances Ordering System to order large quantities of oxycodone without her knowledge. Upon this discovery, Ms. Wieckowski immediately terminated Don Aoki and instituted more careful recordkeeping and controls. The volume of oxycodone purchased by the stores dropped significantly. Indeed, the Brooklyn pharmacy went from ordering 343,700 tablets of oxycodone in 2012 to 38,800 tablets in 2013.[2] *See* Exhibit 18. However, Ms. Wieckowski occasionally continued to fill false prescriptions for certain of her customers. Between 2010 and 2015, Ms. Wieckowski distributed approximately 100,000 tablets of oxycodone on the basis of fraudulent prescriptions, including providing 720 tablets to an undercover law enforcement officer.[3] In addition to the fraudulent prescriptions, between November 2011 and June 2015, Ms. Wieckowski also filed $520,000 in false Medicare claims seeking reimbursement for medications she purportedly sold to her customers, but actually did not. In December 2012, Ms. Wieckowski used proceeds from the health care fraud and improper prescriptions to help finance a home in Greenwich, Connecticut.[4] As is detailed below, much of this criminal activity can be attributed to emotional difficulties Ms. Wieckowski was suffering, which left her both depressed and inattentive to her businesses. She acknowledges her difficulties only serve to explain her misconduct, but not to excuse it.

---

[2] Nevertheless, the pharmacy's ordering pattern had attracted the DEA's attention, which inspected the Brooklyn store in January 2013.

[3] Over 80 percent of Ms. Wieckowski's illegal distribution occurred in 2011 and 2012.

[4] The home cost $2 million, and was purchased with a down payment of $1,030,000, which included legitimate savings and proceeds of the sale of her prior home, in addition to proceeds from the illegal activity. Additionally, Ms. Wieckowski obtained a mortgage loan in the amount of $970,000.

THE STATUTORY CONSIDERATIONS DEMONSTRATE THAT INCARCERATION FOR A TERM NOT GREATER THAN 36 MONTHS WOULD BE A JUST AND APPROPRIATE SENTENCE

In order to fashion a just and proper sentence, it is necessary for a court to take into account much more than the mathematical calculations that form the basis of the Sentencing Guidelines. As this Court has more than once observed, the Sentencing Guidelines give virtually no weight to the "history and characteristics of the defendant," which Congress instructs the sentencing court to consider *equally* with "the nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). As the Supreme Court observed in Rita v. United States:

> The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civil, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.

127 S. Ct. 2456, 2473 (2007) (citations omitted). *See also* United States v. Dorvee, 616 F.3d 174, 183 (2d Cir. 2012) ("In applying § 3553(a) and its parsimony clause, the court must look to the nature and circumstances of the offense and the history and characteristics of the defendant... In conducting this review, a district court needs be mindful of the fact that it is emphatically clear that the Guidelines are guidelines—that is, they are truly advisory." (internal quotations omitted)). Applying Dorvee, a review of the factors listed in § 3553(a) highlights why a variance from the Guidelines range is appropriate in this case.

A. Ms. Wieckowski's Unique Characteristics and the Specific Nature and Circumstances of Her Offense Support a Variance from the Guidelines

1. Family Life

Ms. Wieckowski was born in 1966 and lived with her parents, who were Polish émigrés, and three siblings in a private house in Williamsburg, Brooklyn. PSR ¶¶ 84-85, 87. She lived a

sheltered life under modest circumstances and worked odd jobs from an early age because she was expected to earn her own money. Her parents were strict with Ms. Wieckowski and her siblings, and demanded that their children pay attention to their studies, their church and little else. PSR ¶¶ 88-89. Ms. Wieckowski did not have a happy home life and reported to the Probation Department that she felt unloved by her parents. PSR ¶ 104. She also reported fighting constantly with her sisters, especially her older sister, Elizabeth. One such altercation required the involvement of the family's parish priest and family counseling. PSR ¶¶ 104-105. Ms. Wieckowski's desire for emotional connection led her to marry at the early age of 19. PSR ¶ 91. Ms. Wieckowski knew her father would disapprove of her marriage, so she tried to keep it secret for some time. However, her father ultimately learned of the marriage and cut off communication with her. *Id*. Ms. Wieckowski's father relented five years later, but Ms. Wieckowski and her first husband divorced after three years of marriage. *Id*.

Ms. Wieckowski soon met another man, Marcin Mieloszyk, and married him in 1990. Unfortunately, after twelve years, that marriage too ended in divorce because of her husband's infidelity. PSR ¶ 92. Ms. Wieckowski then found love with Geoffrey Laturner, an attorney who is currently employed as a court clerk in the Kansas court system. In 2008, she became pregnant with his child. Unfortunately, she suffered a miscarriage and their relationship faltered. Nevertheless, on hearing of Ms. Wieckowski's situation, Mr. Laturner wrote a moving letter to the court in strong support of Ms. Wieckowski. *See* Exhibit 1.

Ms. Wieckowski met her present spouse, Marcin Jakacki, in 2009, and they married in 2011. PSR ¶ 93. Mr. Jakacki, who worked in construction, also occasionally assisted her at the Brooklyn store. He is a co-defendant in this case. *Id*.

Ms. Wieckowski is close with her elder sister, Stella Wieckowcki, and Stella's children, all of whom have written to the court about their relationship with Ms. Wieckowski, the selflessness and generosity she has shown them, and their hopes for her future. *See* Exhibits 2-5.

2. The Pharmacy Business

Although Ms. Wieckowski was not fortunate in her personal relationships, she was a successful businesswoman. She graduated from St. John's University in 1988 and was licensed to work as a pharmacist in New York in 1989. PSR ¶¶ 112, 114. In 1995, at age 29, she opened her own business, MW&W Global Enterprises, Inc., which did business as Chopin Chemists. PSR ¶ 117. Her father, her then-husband, and her sister were her partners in the store, which was a successful, legitimate pharmacy. *Id.* Ms. Wieckowski bought out her sister in 1996 and her ex-husband in 2002, and remained the sole owner of the store until she sold the business to CVS in April 2014. *Id*.

In 2002, Ms. Wieckowski opened another pharmacy on Grand Street in Williamsburg, Brooklyn. PSR ¶ 120. In 2007, the stores were generating sufficient revenue to enable her to open a third pharmacy, Atlas Park Chopin Chemists. Unfortunately, the financial crisis impacted the landlords of Atlas Park, whom went bankrupt before Ms. Wieckowski opened the pharmacy there. *Id.* The financial crisis also forced Ms. Wieckowski to close her store on Grand Street. *Id*.

In 2010, Ms. Wieckowski founded and opened another business, European Apothecary Inc., which operated as another branch of Chopin Chemists, in Queens, New York. PSR ¶ 119. Lilian worked mostly in the Brooklyn store, and had other employees manage the Queens store. At various times, Ms. Wieckowski employed approximately 15 full and part-time employees. Her stores were open 9 a.m. – 9 p.m. Monday - Saturday, 10 a.m. – 6 p.m. on Sundays, and on holidays as well.

Motivated by the devastating death of her father in 1996 from metastatic cancer, and the inability of traditional pharmaceuticals to help him, Ms. Wieckowski started studying natural medicine. She developed and marketed a private label line of herbs and tinctures used to rebalance the body and its ailments from "*Acne to zzzz*," which she has sold in her stores for the past 10 years. She also educated the staff at Chopin Chemists about the use of these products. Many customers seek her advice about these natural remedies.

What Ms. Wieckowski lacked in emotional attachment and family affection in her personal life, she made up for in her professional life. She was extremely caring towards her employees and customers and had genuine concern for their well-being. She was also generous and charitable. Several of Ms. Wieckowski's long-time customers and two of her former employees wrote to the Court expressing their strong support of her. *See* Exhibits 6-10, 13.

In the words of one customer: "I could see by our first meeting, that [Lilian] was genuinely concerned about the work I was involved in. . . . I felt the relationship was more personal than business, she showed us so much care and concern." *See* Exhibit 6, Letter from Joseph Campo, Director of St. Francis House, a group home in Brooklyn designed to shelter and support young men who are looking for a new start in life.[5] Mr. Campo also noted that Ms. Wieckowski's business, unlike all other pharmacies in the area, offered the residents of St. Francis "a huge discount" on monthly medications.

Ms. Wieckwoski's compassion and empathy was particularly important to one of her long-time customers with a significant and potentially devastating health issue who tells the Court in her letter: "When I explained that I was newly diagnosed, and that I couldn't reach out to my family, in fear that. . . they'd disown me, Lilian immediately began to calm my fears, and

---

[5] http://www.stfrancishousebrooklyn.com/about-us/

right then is when I knew, that I had just met my personal angel, sent to me from God." This customer credits Ms. Wieckowski with keeping her "sane, stable and always reminding me that . . . I still have my whole life to live." *See* Exhibit 7, Letter from Blanca R.[6]

Yet another long-term customer notes that: "If [the Brooklyn store] were to close we would lose a very valuable place/resource to help the community maintain its health and well-being. . . . It distresses me to think that Sedona[7] might shutter its doors as a result of this case. I know that Lilian and Marcin, despite the mistakes they might have made, are good people and that they are a vital help and necessity for the Greenpoint community." *See* Exhibit 8, Letter from Raphaele Shirley.

Ms. Wieckowski working at Chopin Chemists

---

[6] Last name omitted to protect the author's privacy.

[7] Sedona Nutrition is Ms. Wieckowski's current business. Sedona specializes in providing customers with natural vitamins, nutritional supplements, and beauty products.

As an example of Ms. Wieckowski's charity, one of her former employees relates that Ms. Wieckowski told her employees that, instead of buying Christmas gifts for her, the money they would have spent on her was to be "collected and (matching funds from Lilian) sen[t] to a family in Kenya, and it was the greatest gift we could give her." *See* Exhibit 10, Letter from Tamara Urbas.

Similarly, Ms. Wieckowski's charity and compassion is evidenced by the medical and nutritional advice she offered to the current girlfriend of Geoffrey Laturner, an attorney and court employee in Kansas with whom Ms. Wieckowski once had a romantic relationship. Mr. Laturner's girlfriend has breast cancer and, as he notes: "Even with Lilian's legal problems, she offered to help us with her knowledge of fighting cancer. She is kind, generous, and has always tried to help people with health issues." *See* Exhibit 1, Letter from Geoffrey Laturner.

Ms. Wieckowski's positive impact on those around her is further demonstrated in additional letters submitted in her support. *See* Exhibits 9, 11-12.

3. Lilian and Marcin Unsuccessfully Try to Have a Family

Ms. Wieckowski has long yearned for a child, and during the period of the offense, she devoted hours, days, and weeks, as well as untold energy and attention, to trying to conceive a child with her husband. Ms. Wieckowski's preoccupation with her infertility, and the resulting depression from her inability to conceive, factor strongly in explaining how she became involved in criminal conduct and failed to understand the full impact of her actions.

Ms. Wieckowski has had long-standing fertility issues. She previously miscarried on two occasions: in 1984 after eight weeks, and in June 2008. To address these issues, she started fertility treatment in March 2009 with a specialist, Dr. Andrew Loucopoulos. Ms. Wieckowski saw Dr. Loucopoulos twenty-five times between March and December 2009. During this period,

she underwent numerous tests, procedures and other efforts to become pregnant. The efforts were unsuccessful. *See* Exhibit 14 (filed under seal).

Starting in November 2010, Ms. Wieckowski began seeing an endocrinologist, Dr. Alkmini Anastasiadou. She had hoped that addressing underlying problems with her endocrine system would pave the way to conception. Dr. Anastasiadou diagnosed Ms. Wieckowski with, *inter alia*, hypothyroidism, hyperlipidemia, Vitamin B12 and D deficiencies, and hypoglycemia. She remained under his care until January 2011, trying to address these issues with, among other items, vitamin supplements and testing. *See* Exhibit 15 (filed under seal). Despite these efforts, Ms. Wieckowski still could not become pregnant. She reports beginning to suffer depression as a result.

In January 2012, Ms. Wieckowski decided to return to Dr. Loucopoulos for another attempt at fertility treatments. Although Dr. Loucopoulos discussed with her the "very low chance of pregnancy," she wanted to try again. As a result, Ms. Wieckowski underwent another twenty-two fertility treatments, sometimes seeing Dr. Loucopoulos four times a month. Once again, the efforts proved unsuccessful. The treatments ended in the middle of October 2012, with Dr. Loucopoulos recommending that Ms. Wieckowski seek an egg donor.

These unsuccessful efforts at having a child devastated Ms. Wieckowski. In addition to not going to work on the days that she had to see her doctors, she also would skip work on other days to lessen her stress or complications while she was undergoing fertility treatments. Additionally, when she learned each month that her treatments had not worked, she often would remain at home, depressed, incapable of getting out of bed, and completely unable to attend to her businesses and pharmacy duties. At the height of the illegal oxycodone orders from her stores, Ms. Wieckowski was distracted and dismayed by her unsuccessful efforts to conceive. These outside distractions made her careless with her business responsibilities and clouded her

judgment. She was not closely monitoring the actions and paperwork of her employees—thus leaving the pharmacies vulnerable to greater misuse than she herself was personally involved in.

4. Aberrant Behavior

Ms. Wieckowski is a first-time, non-violent offender. PSR ¶¶ 78-79. Until this offense, she was a law-abiding pharmacist.

Ms. Wieckowski does not dispute that between 2010 and 2012, her Brooklyn store ordered significantly more oxycodone than other pharmacies in the same zip code, and that she dispensed much of this medication illegally. However, prior to that time, Ms. Wieckowski ordered and dispensed quantities within a normal range. We have reviewed the Brooklyn store's controlled substances dispensing records, which show that between 2004 and 2009, oxycodone accounted for less than one percent of the store's prescriptions.[8] *See* Exhibit 16. And as discussed above, in 2013, the store's oxycodone orders dropped dramatically. *See* Exhibit 18.

Without diminishing the seriousness of the offense, this evidence shows the aberrant nature of the illegal prescribing over the course of Ms. Wieckowski's nearly thirty-year career as a pharmacist. Indeed, as demonstrated from letters sent to the Court by Ms. Wiecowksi's long-term customers, she operated a well-respected, community-based pharmacy that operated legally for the vast majority of the time it was in business.

5. Ms. Wieckowski's Loss of Spouse, Reputation, and Livelihood

Also noteworthy is the devastating impact this case has had on Ms. Wieckowski's family life and future. Ms. Wieckowski is fifty years old. She faces the prospect of over ten years in prison, virtually ensuring that she will never bear a child. Ms. Wieckowski's husband, Marcin,

---

[8] These figures are derived from reports from the Brooklyn store's pharmacy management software, as described in the attached affidavit from Alex Tirrell. Exhibit 17. Due to the volume of the pharmacy's dispensing records, we have provided a summary of them rather than the complete set of reports.

likely will be deported as a result of his related conviction. Their marriage, although it has strengthened in the months since their arrests, may not survive the stress of the forced separation that awaits.

Ms. Wieckowski has been a pharmacist for her entire adult working life – pharmacy is all that she studied. For the vast majority of that time, her only concern was the health of her customers, whose respect and trust she earned. Loss of reputation is something that most individuals convicted of a crime suffer. However, as someone who has spent most of her adult life compassionately helping people with illness, the loss of her reputation for integrity and honest counsel is particularly hard to bear. Ms. Wieckowski realizes that she disappointed her legitimate customers, and worries that because of her conduct they will not receive the kind of sympathetic guidance and advice about natural remedies for their illnesses that she has been providing of late. Ms. Wieckowski has agreed never to reapply for a DEA registration, has notified New York State of her intent to relinquish her state pharmacy license, and will never be able to work as a pharmacist again. She likely will never be able to work in a pharmacy again, even as an assistant or cashier. An entire career in health care – the only career she knows – will be over as a result of her conviction. In addition to being ineligible to work in the only profession she has ever had, her drug distribution conviction will likely render Ms. Wieckowski ineligible for many public benefits. *See* 21 U.S.C. § 862a(a). Given that the combined forfeiture and restitution amounts she will pay, plus the judgment in the civil case, will likely render her nearly penniless, the debarment from certain benefits could be particularly devastating.

These consequences amount to the kind of "civil death" about which Judge Block wrote in United States v. Nesbeth, 2016 WL 3022073 (E.D.N.Y. May 24, 2016), and justify the imposition of a below-Guidelines sentence. In Nesbeth, Judge Block concluded that collateral consequences, principally the defendant's likely inability to pursue a teaching career or achieve

her goal of becoming a principal, amounted to sufficient punishment and "that jail is not necessary to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing." *Id.* at *14. As in Nesbeth, Ms. Wieckowski's conviction itself already imposes substantial punishment on her, and the Court should take these severe collateral consequences into account in determining what period of incarceration is necessary.

B. A Term Not Greater than 36 Months Incarceration Would Reflect the Seriousness of the Offense, Promote Respect for the Law and Provide Just Punishment

1. Comparisons with Sentences in Similar Cases Demonstrate That Application of the Guidelines Range Would Produce an Unwarranted Sentencing Disparity

Courts shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" in determining the sentence to be imposed. 18 U.S.C. § 3553(a)(6). *See* United States v. Wills, 476 F.3d 103, 110 (2d Cir. 2007) ("Even in fulfilling their primary duty of rendering just sentences with an eye toward the particular circumstances before them, judges must be mindful of the general goal, however elusive, of national consistency."); United States v. Calcano, 2014 WL 148637, *9 (S.D.N.Y. Jan. 15, 2014) (granting a motion for resentencing, and finding that the "weight to be given such disparities, like the weight to be given any § 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge and is beyond [appellate] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented."(internal citation omitted)). *See also* United States v. Lente, 647 F.3d 1021, 1039 (10th Cir. 2011) ("The need to avoid unwarranted disparities is a critical sentencing factor. Equal justice is a core goal of our constitutional system."). We identified thirteen recent cases involving the illegal sale of oxycodone by pharmacists who pleaded guilty to violating the Controlled Substances Act and had no prior criminal history. As the chart below reflects,

comparable cases resulted in much lower sentences for pharmacists and pharmacy owners than what the Guidelines provide for in this case.[9] A sentence of 135 months would create an unwarranted disparity within this district and across the country for similarly situated defendants. Indeed, only three of the pharmacist defendants described in the chart received a sentence over 135 months.

Name	District Court / Docket Number	Alleged Conduct	Count(s) of Conviction	Age	Guideline Range	Sentence
Chai, Christina	SDNY - 1:13-CR-00290	Over 1,000 fraudulent oxycodone prescriptions	21 U.S.C §§ 846, 841(a)(1), (b)(1)(C)	30	235-293 Months	5 Years Probation
Fletcher, Harold Eugene	SD Ohio - 2:10-CR-00249	More than 5,500 illegal oxycodone prescriptions	21 U.S.C §§ 846, 841(a)(1), (b)(1)(C)	43		24 Months
Tanana, Hossam	EDMI-2:08-CR-20369	991 illegal oxycodone prescriptions; additional amounts of other controlled substances	21 U.S.C §§ 846, 841(a)(1)	42	57-71 Months	36 Months
Fortunato, Thomas	EDPA - 2:10-CR-00247	14,700 tablets of oxycodone and other prescription painkillers	21 U.S.C §§ 846, 841(a)(1), (b)(1)(C)	48	108-135 Months	46 Months
Wagner, Leroy Dewayne	NDGA - 1:13-CR-00129		21 U.S.C §§ 841(a)(1), (b)(1)(C)		87-108 Months	63 Months
Vanterpool, Beavis	EDPA - 2:12-CR-00115	More than 4,471 illegal oxycodone prescriptions; at least 447 grams of oxycodone	21 U.S.C §§ 846	35		63 Months
Carmona, Emerson	SDFL - 1:11-CR-20698	430 grams of oxycodone	21 U.S.C §§ 846, 842(b)(1)(C)	40	70-87 Months	70 Months

[9] The chart does not include cases in which the government filed a motion for a downward departure under § 5K1.1 of the Sentencing Guidelines.

Name	District Court / Docket Number	Alleged Conduct	Count(s) of Conviction	Age	Guideline Range	Sentence
Esparza, John Christopher	EDTX - 4:15-CR-00168	A "large amount of oxycodone with a street value of approx. $2.9 million"	21 U.S.C §§ 846	29		72 Months
Maaf, Ihsanullah	EDPA - 2:11-CR-00434	Over 200,000 pills of oxycodone	21 U.S.C §§ 846		210-262 Months	72 Months
Aryan, Aiman	SDFL - 1:11-CR-20698	575,445 pills of oxycodone and 254,365 pills of oxycontin	21 U.S.C §§ 846, 842(b)(1)(C)	40		108 Months
Otano, Jorge	MDFL - 2:13-CR-00089		21 U.S.C §§ 841(a)(1), (b)(1)(C)	51		144 Months
Krecht, Mahmoud	SDFL - 9:07-CR-80141	Over 400,000 tablets of oxycodone	21 U.S.C §§ 846	34	210-262 Months	210 Months
Hsia, Vincent	DNJ - 2:11-CR-00080	Hundreds of thousands of doses of oxycodone	21 U.S.C §§ 846	52		240 Months

According to our review, most sentences in cases involving similarly situated defendants with comparable conduct and quantity of controlled substances ranged between twenty-four and seventy-two months. Almost all of these sentences are below the applicable Guidelines range. There is nothing about Ms. Wieckowski's conduct that justifies a higher than average sentence, and her mature age and low likelihood of recidivism compared to the defendants in the chart, justify an even lower sentence. Two of the cases most similar to Ms. Wieckowski's are described directly below.

In United States v. Tanana (E.D. Mich. 2008), pharmacist Hossam Tanana was accused of filling almost 1,000 fraudulent prescriptions for oxycodone, many of which were for 80 mg pills, a quantity of oxycodone significantly higher than the 30 mg pills Ms. Wieckowski

distributed. Additionally, in some instances, Tanana sold controlled substances with no prescription at all. Tanana pleaded guilty to the distribution charges and received a sentence of thirty-six months even though the Guidelines range was 57-71 months.

Similarly, in United States v. Chai (S.D.N.Y. 2013), Christina Chai pleaded guilty to illegally filling over 1,000 prescriptions. She was the pharmacist in charge at Stanley Pharmacy, where she filled clearly fraudulent prescriptions for regular customers, some of whom had prescriptions filled multiple times in the same day. The pharmacy charged up to $1,000 to fill a prescription and required payment in cash. Even though the Guidelines range was 235-293 months and the government sought a sentence of 120 months, the Court sentenced Ms. Chai to a term of probation.

Pharmacists who received longer sentences closer to or within their Guidelines range engaged in more egregious conduct than Ms. Wieckowski.[10] For example, in United States v. Krecht (S.D. Fla. 2007), the defendant received $50,000 a week from a street drug dealer to regularly provide large quantities of oxycodone and other controlled substances. In just two of their many transactions, Krecht provided the drug dealer with 9,000 and 18,000 tablets of oxycodone. Over several months of such dealings, the drug dealer paid Krecht between $500,000 and $1,000,000 dollars. Moreover, Krecht distributed over 400,000 pills on the basis of prescriptions that were supposedly written by a single doctor. Krecht was sentenced to 210 months imprisonment.

---

[10] The sentence imposed in United States v. Hsia (D.N.J. 2011), appears to be out of line with sentences in similar cases. The defendant in that case owned a pharmacy from which he illegally distributed oxycodone to at least five street level drug dealers on the basis of fraudulent prescriptions. Hsia advised the drug dealers on how to disguise the fraudulent nature of the prescriptions and would frequently fill multiple prescriptions for 180 pills from the same doctor on the same day, but with different patient names. For this conduct, Hsia received the statutory maximum sentence of 240 months, along with additional sentences totaling 60 months for tax evasion. Because this case is not representative of sentencing in pharmacist cases involving oxycodone, we submit that it is not a fair comparison for the purpose of avoiding unwarranted sentencing disparities.

In another case where the defendant received a sentence close to the minimum Guidelines range, United States v. Otano (M.D. FL 2015), the defendant was responsible for dispensing over 800,000 oxycodone pills based on invalid prescriptions. Otano refused to accept responsibility for his crimes—continuing to claim even at sentencing that he didn't know the prescriptions he filled were fraudulent. He also charged as much as $12 per individual oxycodone pill and counseled customers how to make their fraudulent prescriptions appear more legitimate. Otano had a base offense level of 40 and was sentenced to 144 months.

Defendants who ran pharmacies and illegally distributed similar types of narcotic pain medications, some of whom did not accept responsibility for their crimes, also received sentences lower than the Guidelines range for Ms. Wieckowski in this case. In United States v. Sodipo, 1:06-cr-00444 (D. MD 2008), the defendants owned and operated a pharmacy that filled orders for rogue Internet pharmacy websites. They received payment from the website operators for each prescription that they filled, and the prescriptions were mailed all over the country. The defendants each made millions of dollars from their nationwide illegal sales and spent the money on luxury items including expensive cars. The defendants' online pharmacy had little legitimate business and hydrocodone comprised 88% of all prescriptions filled. After being convicted at trial, the defendants each received sentences of 60 months for selling nearly 10 million hydrocodone pills over the Internet during a two-year period.

In United States v. Birbragher, 07-cr-01023 (N.D. Iowa 2007), defendant Orlando Birbragher ran a business, Pharmacom, that operated eighteen different websites through which customers purchased prescription painkillers and other controlled substances. The websites routed the drug requests to a network of doctors who wrote prescriptions without reviewing medical records. The prescriptions were then filled by pharmacies who had contracted with Pharmacom. The customers' identities were not verified by Pharmacom, the doctors, or the

pharmacies. Over 12.5 million doses of Schedule III controlled substances, approximately 80% of which were hydrocodone, were filled by doctors and pharmacists that had contracted with Pharmacom. Birbragher received a sentence of 35 months after pleading guilty to illegally distributing controlled substances and money laundering.

The nature and scope of the criminal conduct in Sodipo and Birbragher contrasts with the present case. Unlike Ms. Wieckowski's local customer base, the overwhelming majority of these prescriptions were sold to out-of-state customers, who could not have been legitimate patients. The online pharmacies were also part of much larger criminal networks of doctors and pharmacies that spanned across the country.

In sum, Ms. Wieckowski is guilty, but she should receive a sentence that appropriately reflects her level of guilt relative to other defendants whose crimes are similar.

2. Ms. Wieckowski Poses a Very Low Risk of Being a Recidivist

The Guidelines range calculated by the Probation Department exceeds what is necessary to protect the public and to deter Ms. Wieckowski from committing additional offenses. The Sentencing Commission has conducted a study that found that defendants over the age of forty exhibit markedly lower rates of recidivism in comparison to younger defendants, and that "recidivism rates decline relatively consistently as age increases." Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, at 12, 28 (2004) http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf ("*Measuring Recidivism*"). In particular, the study found that defendants over the age of 50 recidivate at a rate of 9.5% compared to a 35.5% rate of recidivism for defendants under the age of 21. *Id.* Courts in this district and in the Eastern District of New York have imposed sentences that vary from the Guidelines range because the Guidelines do not adequately account for the lower risk of repeat

crimes that older defendants pose. *See, e.g.*, United States v. Carmona-Rodriguez, 2005 WL 840464, *4 (S.D.N.Y. April 11, 2005) (where a 55-year-old woman pled guilty to drug distribution, a sentence below the Guidelines range was appropriate due to the low probability defendant would recidivate); United States v Hodges, 2009 WL 366231, *8 (E.D.N.Y., Feb. 12, 2009) (court relies, in part, on lower risk of recidivism for older defendants like the 43-year-old in this case in justifying a sentence below the Guidelines range). The *Measuring Recidivism* study also found that women recidivate at a far lower rate (13.7%) than men (24.3%). *Measuring Recidivism* at 11. As a fifty-year-old female first-time offender, the risk that Ms. Wieckowski will commit another crime is quite low, and the Guidelines range, driven as it is by the weight of the drugs distributed, fails to account for that fact.

Ms. Wieckowski's inability to work as a pharmacist in the future provides additional assurance that there is little risk of recidivism. Ms. Wieckowski depended on her professional status to commit her criminal conduct. She has voluntarily surrendered her DEA license and is barred permanently from resuming work for any DEA registrant by 21 C.F.R. § 1301.71(f). Ms. Wieckowski has also informed the New York State Office of Professional Discipline that she intends to surrender her New York pharmacy license. There is no chance that Ms. Wieckowski will ever work as a licensed pharmacist or even in a pharmacy again.

3. The Sentencing Guidelines Overstate the Seriousness of the Offense and Ms. Wieckowski's Culpability

Ms. Wieckowski pleaded guilty to one count of illegal distribution of prescription medication, one count of health care fraud, and one count of money laundering. Due to grouping rules, the Guidelines for the drug distribution offense drives the offense calculation for all three counts of conviction.

The Sentencing Guidelines for drug offenses often result in sentences that are disparately harsh and patently unfair. Much of the severity of the drug guidelines emanated from the Anti-Drug Abuse Act of 1986 ("ADAA"), which essentially uses the weight of the drugs involved as the single determinant of the seriousness of the offense. Pub.L. No. 99-570, §1002, 100 Stat. 3207, 3207-2 to 3207-4. In the case of prescription medications, the excessively harsh nature of the drug guidelines is magnified when the medications are converted into a marijuana equivalency. This conversion bears no rational relationship to the actual quantities of drugs distributed, and serves to exacerbate the already overly-harsh Guidelines range for narcotics distribution. The Sentencing Commission's marijuana equivalency calculations are intended to equate the potency of dissimilar drugs with each other, which often can lead to arbitrary results. The Supreme Court criticized this weight-based approach in Kimbrough v. United States, 552 U.S. 85, 96 (2007), noting the Sentencing Commission did not employ this empirical approach for drug trafficking offenses—relying instead on "the weight-driven scheme" of the ADAA.

Studies have demonstrated that the marijuana equivalency tables for opioids, in general, and oxycodone, in particular, bear no relation to potency and, in fact, are arbitrary. Michael J. Liston, Quantity Dependent Sentencing Ranges, The Drug Equivalency Table, and "Oxycodone (Actual)" (October 22, 2014).[11] Moreover, when the Sentencing Commission adopted an amendment making marijuana the only drug to which other drugs are converted for sentencing purposes, the Commission noted that the change was solely designed for ease of computation. *See* U.S. Sentencing Commission, Guidelines Manual, App. C, Vol. I, at 276 (2003); *see also* United States v. Diaz, 2013 WL 322243, *6 (S.D.N.Y. Jan. 28, 2013) ("the ADAA's weight-driven regime has resulted in a significantly more punitive sentencing grid than Congress

[11] *Available at* https://www.fd.org/docs/select-topics/sentencing-resources/quantity-dependent-sentencing-ranges-the-drug-equivalency-table-and-oxycodone-(actual).pdf?sfvrsn=4.

intended in passing the ADAA."); United States v. Hayes, 948 F. Supp. 2d 1009, 1027 (N.D. Iowa 2013) (same).

Ms. Wieckowski has admitted to illegally distributing approximately 3,000 grams of oxycodone tablets, which amounts to 100,000 30 mg tablets. Under the drug equivalency tables of Section 2D1.1, these 100,000 tablets equate to 20,100 kilograms of marijuana (PSR ¶ 58), meaning that a single 30 mg oxycodone tablet is viewed as equivalent to 1/5 kilogram of marijuana. Without diminishing the negative impact of even a single pill of non-medically necessary oxycodone, in the absence of a valid reason relating to comparable potency or danger, equating one single 30 mg pill of oxycodone to 1/5 kilogram of marijuana yields an offense level that is, at best, greater than necessary to achieve a just sentence.

C. Ms. Wieckowski's Remorse and Acceptance of Responsibility

Ms. Wieckowski is greatly ashamed of what she has done. She is determined to make amends to her family, her community and society. She has fully accepted responsibility for her conduct, as evidenced by resolution of all the legal matters pending against her. Ms. Wieckowski promptly notified the government of her intention to plead guilty and to resolve the civil case against her. She has agreed to forfeit all the money that she gained from her illegal activity, even though it means that she will be rendered homeless and nearly destitute in so doing. She also voluntarily surrendered her DEA license, thereby terminating the administrative proceedings against her. As mentioned above, Ms. Wieckowski has also informed the New York State Office of Professional Discipline that she intends to surrender her New York pharmacy license. Finally, she has made a reasonable offer to settle the civil case against her, which the government is considering. The settlement offer includes Ms. Wieckowski's agreement to never reapply for a DEA license.

CONCLUSION

Lilian Wieckowski, a lifelong health care worker and community-based pharmacist, ran legitimate pharmacies for most of her life. Ms. Wieckowski wanted to be a pharmacist to help those around her. Between 1988 and 2009, she met that goal in an admirable way. But, in a departure from her normal practices, and despondent over her continued failure to conceive, her judgment was clouded, and she stopped paying attention to many aspects of her business. Her inattention and lack of judgment compounded the crimes she acknowledges committing. Despite her crimes, incarcerating Ms. Wieckowski for the period of time the Guidelines suggest, or even the time recommended by the Probation Department, serves none of the purposes enumerated in Section 3553(a). In the words of Mr. Campo, the Director of St. Francis House, whose profession is giving people who have run out of alternatives a renewed chance: "In my experience, I have found that if you give a good person a second chance, they become a better human being." *See* Exhibit 4. It is Ms. Wieckowski's plan that to seize that second chance after a reasonable period of incarceration. She is confident that she will re-establish herself as a helpful, positive, and productive member of society, if given the chance.

Accordingly, it is respectfully submitted that, under the totality of the circumstances, Ms. Wieckowski should be sentenced to a term of not more than 36 months imprisonment.

Dated: November 21, 2016

/s/ Jodi L. Avergun

Jodi L. Avergun (NY Bar No. 2166668)
Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W.
Washington, D.C. 20001
(202) 862-2456

Attorney for Defendant Lilian Wieckwoski

White Collar Sentencing

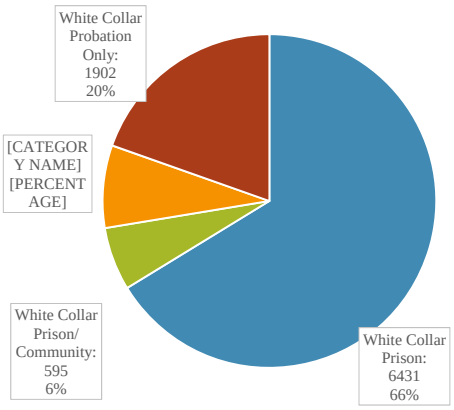
Lisa A. Peebles
Federal Public Defender

White Collar Crimes

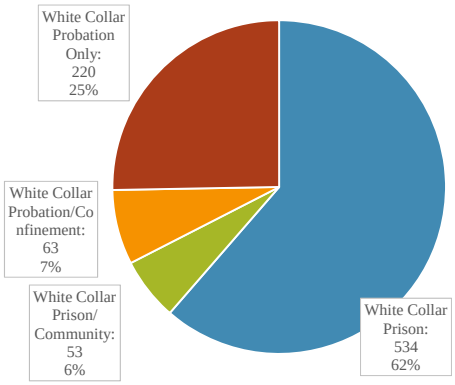
- Larceny
- Fraud
- Embezzlement
- Forgery/Counterfeiting
- Bribery
- Tax
- Money Laundering
- Antitrust

National & Second Circuit

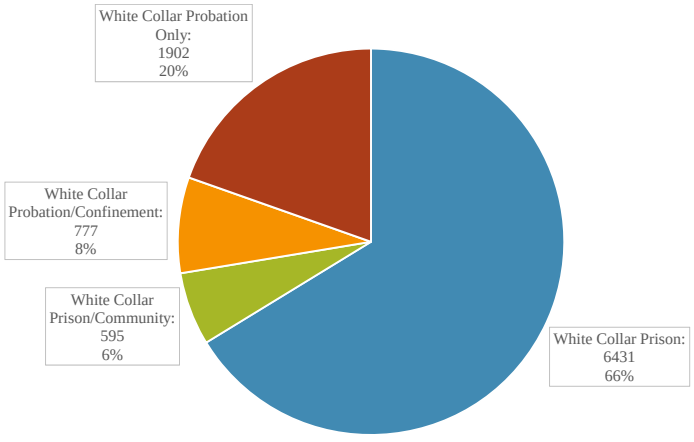
National



Second Circuit

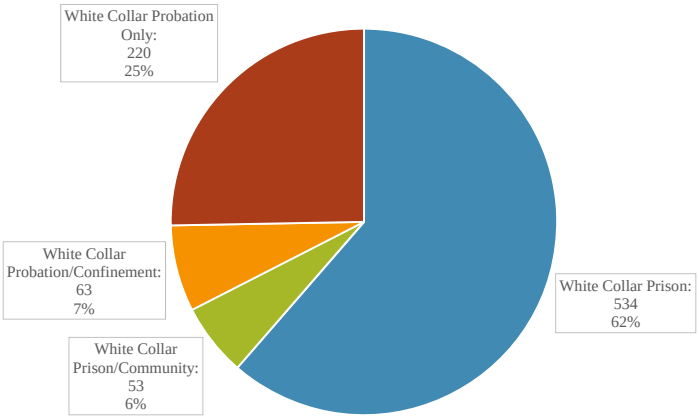


National



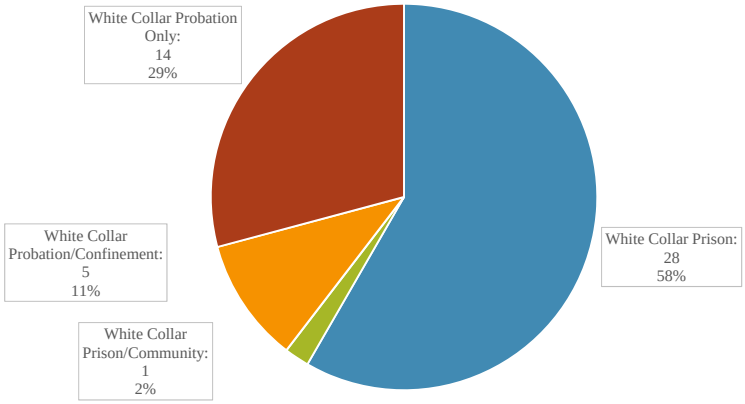
Source: *United States Sentencing Commission, Statistical Information (2016)*

Second Circuit



Source: *United States Sentencing Commission, Statistical Information (2016)*

Northern District of New York



Source: *United States Sentencing Commission, Statistical Information (2016)*

Average Sentences Per Offense (in Months)

Primary Offense	National Average	Second Circuit Average	NDNY Average
Larceny	20	28	-
Fraud	34	30	35
Embezzlement	19	32	-
Forgery/Counterfeiting	19	13	-
Bribery	29	30	-
Tax	20	13	-
Money Laundering	40	33	-
Antitrust	8	-	-

National Sentences Relative to the Guideline Range (2016)

		WITHIN GUIDELINE RANGE		UPWARD DEPARTURE		UPWARD DEPARTURE W/*BOOKER*		ABOVE RANGE W/*BOOKER*		REMAINING ABOVE RANGE	
PRIMARY OFFENSE	TOTAL	N	%	N	%	N	%	N	%	N	%
TOTAL	**66,961**	**32,519**	**48.6**	**317**	**0.5**	**102**	**0.2**	**1,131**	**1.7**	**67**	**0.1**
Robbery	701	365	52.1	5	0.7	1	0.1	28	4.0	3	0.4
Drugs - Trafficking	19,222	6,921	36.0	66	0.3	12	0.1	137	0.7	14	0.1
Drugs - Simple Possession	1,624	1,466	90.3	8	0.5	0	0.0	135	8.3	2	0.1
Firearms	7,293	3,836	52.6	53	0.7	26	0.4	257	3.5	9	0.1
Larceny	978	571	58.4	6	0.6	0	0.0	13	1.3	1	0.1
Fraud	6,389	2,730	42.7	30	0.5	15	0.2	88	1.4	4	0.1
Embezzlement	310	175	56.5	0	0.0	1	0.3	5	1.6	0	0.0
Forgery/Counterfeiting	449	256	57.0	1	0.2	2	0.4	11	2.4	0	0.0
Immigration	19,969	11,616	58.2	59	0.3	20	0.1	230	1.2	13	0.1
Other Miscellaneous Offenses	10,026	4,583	45.7	89	0.9	25	0.2	227	2.3	21	0.2

SOURCE: United States Sentencing Commission, *Second Circuit Statistical Information Packet for Fiscal Year 2016*

Second Circuit Sentences Relative to the Guideline Range (2016)

PRIMARY OFFENSE	TOTAL	WITHIN GUIDELINE RANGE N	WITHIN GUIDELINE RANGE %	UPWARD DEPARTURE N	UPWARD DEPARTURE %	UPWARD DEPARTURE W/*BOOKER* N	UPWARD DEPARTURE W/*BOOKER* %	ABOVE RANGE W/*BOOKER* N	ABOVE RANGE W/*BOOKER* %	REMAINING ABOVE RANGE N	REMAINING ABOVE RANGE %
TOTAL	**3,407**	**946**	**27.8**	**12**	**0.4**	**2**	**0.1**	**30**	**0.9**	**0**	**0.0**
Robbery	**29**	16	55.2	0	0.0	0	0.0	0	0.0	0	0.0
Drugs - Trafficking	**1,285**	249	19.4	4	0.3	1	0.1	2	0.2	0	0.0
Drugs - Simple Possession	**15**	12	80.0	0	0.0	0	0.0	0	0.0	0	0.0
Firearms	**399**	137	34.3	5	1.3	0	0.0	13	3.3	0	0.0
Larceny	**88**	34	38.6	0	0.0	0	0.0	1	1.1	0	0.0
Fraud	**560**	147	26.3	1	0.2	0	0.0	2	0.4	0	0.0
Embezzlement	**23**	8	34.8	0	0.0	0	0.0	0	0.0	0	0.0
Forgery/Counterfeiting	**26**	17	65.4	0	0.0	0	0.0	0	0.0	0	0.0
Immigration	**258**	129	50.0	0	0.0	0	0.0	5	1.9	0	0.0
Other Miscellaneous Offenses	**724**	197	27.2	2	0.3	1	0.1	7	1.0	0	0.0

SOURCE: United States Sentencing Commission, *Second Circuit Statistical Information Packet for Fiscal Year 2016*

NDNY Sentences Relative to the Guideline Range (2016)

PRIMARY OFFENSE	TOTAL	WITHIN GUIDELINE RANGE N	WITHIN GUIDELINE RANGE %	UPWARD DEPARTURE N	UPWARD DEPARTURE %	UPWARD DEPARTURE W/*BOOKER* N	UPWARD DEPARTURE W/*BOOKER* %	ABOVE RANGE W/*BOOKER* N	ABOVE RANGE W/*BOOKER* %	REMAINING ABOVE RANGE N	REMAINING ABOVE RANGE %
TOTAL	**306**	**155**	**50.7**	**0**	**0.0**	**0**	**0.0**	**1**	**0.3**	**0**	**0.0**
Robbery	**2**	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0
Drugs - Trafficking	**109**	49	45.0	0	0.0	0	0.0	0	0.0	0	0.0
Drugs - Simple Possession	**2**	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Firearms	**24**	12	50.0	0	0.0	0	0.0	0	0.0	0	0.0
Larceny	**8**	5	62.5	0	0.0	0	0.0	0	0.0	0	0.0
Fraud	**31**	14	45.2	0	0.0	0	0.0	0	0.0	0	0.0
Embezzlement	**1**	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Forgery/Counterfeiting	**0**	0	--	0	--	0	--	0	--	0	--
Immigration	**64**	42	65.6	0	0.0	0	0.0	1	1.6	0	0.0
Other Miscellaneous Offenses	**65**	29	44.6	0	0.0	0	0.0	0	0.0	0	0.0

SOURCE: United States Sentencing Commission, *Northern District of New York Statistical Information Packet for Fiscal Year 2016*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CASE NO. [redacted]

[redacted],

Defendant.

SENTENCING MEMORANDUM

DATED: February 20, 2018

LISA A. PEEBLES
Federal Public Defender
Bar Roll No. 507014
Clinton Exchange, 3rd Floor
4 Clinton Street
Syracuse, New York 13202
(315) 701-0080

INTRODUCTION

[redacted] submits this memorandum in support of a sentence of probation and an order of restitution. This sentence is "sufficient, but not greater than necessary," to achieve the statutory purposes of 18 U.S.C. § 3553(a)(2) for several reasons.

First, this is not a typical fraud case. [redacted] was convicted of (and has never denied) failing to retain a client's money in a joint account and then failing to disclose its location. Atypically, [redacted] did not divert the money for personal enrichment. Instead, [redacted] transferred the funds to satisfy mounting business obligations. In doing so, he fully believed the money would be replaced and the clients would suffer no harm. Therefore, [redacted] conduct falls at the lower end of the culpability spectrum.

Second, [redacted] is not a typical defendant. He has no prior arrests or convictions. Far from it, he has led a productive and exemplary life in service of others. Accordingly, there is simply no need to incapacitate [redacted] to prevent him from committing further crimes, given his extraordinarily low (if any) risk of recidivism. Any lingering concerns about [redacted] risk of recidivism could be addressed through the imposition of special conditions of probation. Moreover, imprisoning [redacted] would provide no deterrent effect and would only minimize (if not eliminate) any chance that he could ever satisfy his obligations to repay [redacted].

Finally, the Sentencing Guidelines' recommendation for a sentence above probation is flawed. As an initial matter, the guideline calculation set forth in the PSR is incorrect because (1) the abuse of position of trust enhancement scored by the Probation Office does not apply because, quite simply, [redacted] did not hold a position of trust, and (2) [redacted] should be granted a two-level reduction for acceptance of responsibility. More importantly, the guideline range of 57 to 61 months is based entirely on the application of a 16-level loss amount

enhancement that has no basis in empirical evidence; fails to take any account of [redacted] culpability, low risk or recidivism, and need to make restitution; results in unwarranted disparity, and produces an imprisonment range that is far greater than necessary to promote the goals of sentencing in this case.

PROCEDURAL STATEMENT

On October 18, 2017, [redacted] was found guilty after a jury trial of conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343, 1349.

A Presentence Report ("PSR") prepared by the United States Probation Department was submitted on January 16, 2018 in anticipation of his sentencing. According to the PSR, [redacted] total offense level is 25 and his Criminal History Category is I, resulting in an advisory guideline imprisonment range of 57 to 71 months. The defense has objections to the factual contents of the PSR and the advisory guidelines computation set forth in the PSR. Those objections are set forth fully below.

ARGUMENT

I. OBJECTIONS TO THE GUIDELINE COMPUTATION AND FACTUAL CONTENTS OF THE PSR

A. Objections to Guideline Computation

The defense objects to paragraph 76 under the Offense Level Computation section, which applied a 2-level enhancement for abuse of position of trust pursuant to U.S.S.G. § 3B1.3. The basis for the objection is twofold. First, [redacted] did not hold a position in which [redacted] placed their trust. Application note 1 to § 3B1.3 clarifies that the term "public or private trust" is "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." For the enhancement to apply, "the position of public or private trust must have contributed in some significant way to facilitating the

commission or concealment of the offense (*e.g.*, by making the detection of the offense, or the defendant's responsibility for the offense more difficult)." The evidence makes it abundantly clear that [redacted] did not trust the [redacted] representatives with exclusive control of their funds, which is the very reason [redacted] required a dual signatory on the escrow account. This was an arms-length transaction in which [redacted] was not a banker, nor did he ever hold himself out as someone with special banking knowledge. In fact, the [redacted] representatives were highly sophisticated, educated and had significantly more experience in the world of commercial banking. In fact, the original Memorandum of Understanding stated either [redacted] or [redacted] would open the account. There was no reason [redacted] could not have opened the joint account. Therefore, because [redacted] did not hold a position of trust in the first instance, he could not be said to have abused such a position.

The mere fact that [redacted] representatives trusted [redacted] to open the account does not create a "position of trust." If that were the case, every business transaction in which one party breached an agreement could be said to have violated a "position of trust" and certainly that would not be true. Indeed, Application Note 1 makes clear that the "adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk." U.S.S.G. § 3B1.3, comment. (n.1). In this case, [redacted] status as to [redacted] did not even rise to the level of a bank teller.

Additionally, the allegations relied upon in paragraph 76 to support the enhancement are incorrect. The trial evidence demonstrated [redacted] was not present in Chicago on November 16, 2010 when the meeting with [redacted] was held and the joint account was opened. The credible proof showed that the day the funds were scheduled to be transferred to the joint account, [redacted] believed [redacted] was a joint signatory on the account and he

instructed the bank representative, [redacted], to communicate with [redacted] regarding the transfer of funds. *Defense Exhibit 41*. In an email dated December 1, 2010 to [redacted], [redacted] wrote, "a gentleman by the name of [redacted]-who is a signature on the account-will be calling you to confirm the wired funds have arrived successfully in the account. When he calls, please let him know that status of the funds in the account." *Id.* Finally, the PSR states on page 45 that the defendants failed to abide by the very requirements which caused LAC to entrust them with its money, including failing to disclose bank statements when requested for two years. This allegation is baseless and it did not facilitate the concealment of the offense. LAC would have no reason to go through [redacted] to acquire the statements if they believed they were joint signatories on the account. This was proved through the actions of LAC, who called Wells Fargo to receive copies of the bank statements. Once LAC received the bank statements from Wells Fargo in March of 2011, they learned they were not a dual signatory on the account. The evidence proves that LAC's access to the Wells Fargo bank statements was not dependent upon the actions of [redacted]. Based on the foregoing, the defense objects to paragraph 76 and maintains a two-level enhancement is not applicable under the facts of this case.

[redacted] objects to paragraph 80 of the Offense Level Computation section because he should receive a 2-level reduction to his advisory guideline base offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. "Conviction by trial […] does not automatically preclude a defendant from consideration for such a reduction." U.S.S.G. § 3H1.1, comment. (n.2). "[A] defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant *goes to trial to assert and preserve issues that do not relate to factual guilt*

[…].” *Id*. (emphasis added). [redacted] admitted transferring the [redacted] money out of the escrow account and using it to pay other [redacted] expenses and obligations. [redacted] acknowledged his responsibility to pay back [redacted]. He admitted he should not have transferred the money out of the account, particularly after he realized no one from [redacted] was a signatory on the account. He did not personally profit from the transfer of the funds, he acknowledged wrong-doing and signed a personal guarantee for the $2.5 million.

[redacted] raised a statute of limitations defense prior to trial, arguing the indictment should be dismissed because the charge was time-barred. Additionally, [redacted] argued the indictment failed to allege an essential element of the substantive offense, namely an agreement between [redacted] and [redacted] to commit an unlawful act. The Court denied [redacted] pre-trial motions and ruled the issues raised were matters for the jury to decide. [redacted] had no choice but to proceed to trial to raise and preserve these important legal questions. The defense stipulated to the vast majority of the government’s proof and exhibits. A signed acceptance of responsibility letter by [redacted] was sent to probation, yet the PSR states “defendant was convicted at trial and has not admitted guilt.” PSR ¶¶ 70, 80.

Additionally, the jury instructions were such that the government need only prove [redacted] and [redacted] deprived [redacted] of access to its funds, even if only temporarily. The jury could have found [redacted] guilty based upon this fact alone. From the government’s perspective, that is all it needed to prove. [redacted] admitted he used [redacted] funds without permission but anticipated the immediate replacement of the funds, which never happened. Also, on page 43 of the PSR in the addendum, it states the defendants used LAC’s money to pay ERAS group a portion of the money it was contractually owed, and the defendant disputes ERAS was victimized and asserts ERAS should repay the money it received to LAC. The PSR relies on

this statement to deny [redacted] acceptance of responsibility. However, this is a true statement because ERAS was provided a windfall by receiving LAC funds. ERAS never performed on any portion of their contractual obligation to manufacture wind turbines. ERAS walked away with a net of more than $1.3 million. The reliance on this fact to deny [redacted] acceptance of responsibility is misplaced and fundamentally unfair.

Simply put, [redacted] should not be punished for exercising his constitutional right to a jury trial and his total offense level should reflect a two-level reduction, resulting in an advisory imprisonment range absent the abuse of trust enhancement of 37 to 46 months.

B. Factual Objections to the PSR

The defense objects to paragraph 110 under the Financial Condition: Ability to Pay in its entirety. Paragraph 110 references a letter sent to the Court by [redacted]. In his letter, [redacted] complains [redacted] defaulted on a loan agreement with a member of [redacted] family. [redacted] goes on to claim he "knows of five others who have had the same experience." The claims by [redacted] have no place in [redacted] PSR. [redacted] testified at trial and admitted his personal animosity toward [redacted] because [redacted] was instrumental in generating community opposition to a proposed apartment complex expansion by [redacted]. [redacted] was on the [redacted] and [redacted] proposal was voted down. [redacted] does not owe [redacted] any money and his claims involving others are hearsay and not supported by any evidence. [redacted] is simply seeking to retaliate against [redacted] because his apartment complex proposal failed and he blames [redacted]. Contrary to [redacted] description, dozens of people who have worked and volunteered with [redacted] have an entirely different view of him and question [redacted] integrity. For example, [redacted] Regional Community Manager for the [redacted], writes, "he has been able to balance major issues involving

the LGBT community, economic justice, aging community infrastructure, and religious bias. The two men who have maligned his name, and I know them personally, are individuals with checkered pasts and questionable integrity." (*See attached letter Gina Crezee*).

The PSR in paragraphs 86 through 88 includes other criminal conduct allegations and information about a pending investigation in [redacted]. The information in those paragraphs details personal loans obtained by [redacted] through friends. There is nothing criminal about what he did. He asked to borrow money from people he knew and he promised to pay them back. [redacted] did not borrow money under false pretenses, he explained exactly what he needed the money for and he has made efforts to pay back the individuals he owes. He provided a detailed itemization of what he owed to probation when he was asked to complete his financial disclosure form. He has never tried to file bankruptcy to discharge any of his outstanding financial obligations. This information only serves to highlight [redacted] efforts to keep his business afloat and make good on his promises.

II. ARGUMENT FOR NON-GUIDELINE SENTENCE

The defense disagrees with paragraph 131 of the PSR which failed to identify factors that would warrant a sentence below the advisory guideline range. Not only is the offense conduct in this case unquestionably unique, it occurred more than seven years ago. More specifically, the fraud allegations in this case did not involve any personal financial gain on the part of [redacted]. He did not transfer the $2.5 million for his personal use. He used the vast majority of it to pay [redacted], ironically, *an identified victim,* [redacted] (two [redacted] board members) and [redacted], CEO of ERAS. The government acknowledges $1.75 million was used to fund a different renewable energy project and the remainder was principally used to pay [redacted] expenses. [redacted] was wrong to use the funds in the manner in which he

did. However, his conduct clearly establishes his motive was far from sinister. This was also evident to the [redacted] representatives because they chose to sit back and wait to see whether [redacted] would ultimately be able to fund their project. According to [redacted], he was not concerned about recovering the $2.5 million when he learned the account had been drained but rather, he wanted [redacted] to come through with the funding. In addition to the uniqueness of the offense conduct, [redacted] character and background should be considered in mitigation of the offense for which he was convicted.

In *United States v. Booker,* 543 U.S. 220, 226 (2005), the Supreme Court held that the mandatory application of the United States Sentencing Guidelines is a violation of the Sixth Amendment. The sentencing court is required to consider the advisory sentencing guideline range along with the statutory factors set forth in 18 U.S.C. § 3553(a). Specifically, (1) the offense and offender characteristics; (2) the need for the sentence to reflect the basic aims of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. 18 U.S.C. § 3553(a); *see also Rita v. United States,* 551 U.S. 338, 347-48 (2007). Here, each of these factors militate toward a sentence of probation.

A. Background and History of [redacted]

One of the first factors the Court must weigh in crafting a sentence is the history and characteristics of the offender. [redacted] has led an exemplary life and has proven to members of his community, church, friends and family, to be a giving, reliable, hardworking family man. (*See attached support letters*). For years he has been a leader in his church and been a respected politician and community activist. [redacted] is a pillar of the [redacted] community. To

understand [redacted] character, one need only look at his nuclear family and community good works. His family is the most important thing in the world to him. [redacted] is a 58-year-old father of three young children, with no criminal history. Before he met his current wife, [redacted] was married to a woman named [redacted] She unfortunately passed away at a young age from cancer and rheumatoid arthritis complications. He remained by his wife's bedside throughout her illness, hoping for a cure, but, sadly, none was found. [redacted] best friend, [redacted] describes [redacted] during that difficult time, "he was thoughtful, patient, loving and willing to sacrifice his own interests and hopes during this time. In all actuality, [redacted] comfort and happiness was what he cared about most-all other interests and past ambitions paled compared to his commitment and love for her." (*See attached letter from* [redacted]). Following [redacted] death, [redacted] was heartbroken and alone for two years, but he carried on his church leadership and civic responsibilities with dignity. [redacted] states, "during the time when [redacted] was alone, we had tender times where we cried together as we reminisced about [redacted]. But he would always try to see the positive, give more than he received and he kept going." *Id.*

[redacted] eventually met his second wife, [redacted]. He now resides in [redacted] with [redacted] and their three children, [redacted], ages twelve, ten and eight, respectively. [redacted] describes him as "the most amazing husband; I truly believe I am the luckiest girl in the world to have him by my side. I rely on him constantly, especially when I am unable to move around because of my back injuries. . . he is a wonderful father because of the way he interacts with our children and encourages them to grow and expand their minds." (*See letter from* [redacted]). [redacted] is a doting husband and father. He not only provides for their essential needs and financial support, he spends quality time taking his family to cultural events,

exploring state parks near his home, coaching his son's baseball team, and even traveling to Wyoming in August 2017 to watch the Solar Eclipse. (*See attached photographs).*

[redacted] has lived in [redacted] since he was 10 years old. He was raised there by both parents as a fourth generation Mormon. [redacted] describes his upbringing as "great." His mother stayed home and raised him along with his five siblings, while his father worked as a criminal defense attorney. As a child, [redacted] was very involved in school and community activities. He was a committed boy scout and athlete, participating in track, cross-country, rugby, and baseball. As a member of the boy scouts, [redacted] rose to the level of an Eagle Scout when he was only 14 years old. He earned three Eagle Palms by acquiring 15 additional merit badges beyond those required for his Eagle Scout rank. Both [redacted] father and grandfather were Eagle Scouts. *(See attached [redacted] photograph with his grandfather, [redacted])* Throughout his entire life, Jergensen completed countless hours of volunteer work, demonstrated strong leadership skills and commitment to community. These traits were the requirements for him to attain the rank of an Eagle Scout at age 14. [redacted], his friend of 40 years, recalls working together with [redacted] as gardeners at Temple Square in downtown [redacted] [redacted] writes, "these gardens are renowned throughout the world, boast 250 individual flower beds and provide the backdrop of the most visited site in [redacted]. We were both teenagers in high school at the time but it was not an easy task to be hired for such a job. The work was hard and the quality standards were high. With few exceptions, the employer only hired Eagle Scouts who were of impeccable character. [redacted] was a leader among the best and the brightest."

From a young age, [redacted] prided himself in helping others and serving his community. In high school, [redacted] continued to impress his peers with his leadership skills and they elected him senior class president. Today, numerous people from [redacted]

recognize the profound impact he has had on their community. In a letter to the Court, [redacted], the state director for a U.S. Senator writes, [redacted] has helped me to get involved on the school community council where I witnessed time and again his effort to involve any parent interested in helping our community. For him, it was clear that his motivation for betterment of those around him and success of our students always superseded any personal ambition or motivation."

[redacted], CEO of the YWCA, has known [redacted] for more than a decade and she writes, "I feel confident that I can speak for the YWCA when I say that we are enduringly grateful to [redacted] for his friendship and support during a several years-long process in the mid-2000s to secure adjacent downtown property to build a new crisis shelter and residence for women and children who are victims and survivors of domestic violence. . . . He generously used his connections and influence, championed the YWCA's work, offered invaluable advice, and remained unfailingly optimistic throughout the entire long process. All of this was done on a volunteer basis . . . We will never forget what he did for us." [redacted] has known [redacted] for fifteen years and writes, "I have seen him roll up his sleeves and get his hands dirty alongside community members in the annual clean-up of [redacted] adjacent to the downtown area of [redacted]. . . He has been the chair of the [redacted] . . . In that capacity, he went beyond the typical committee duties and mobilized an effort to get volunteers in the school to help the many disadvantaged children with reading and other school work."

Attorney [redacted] has known [redacted] for more than 20 years and writes, "My first acquaintance with [redacted] came as he was serving as the Stake President of the [redacted] Stake of the Church of Jesus Christ of Latter-Day Saints . . . There have been occasions when I have

asked [redacted] to take on one more volunteer responsibility that was Church related and never left disappointed at his willingness to step forward without complaint or hesitation and help in ways in which he was uniquely qualified." [redacted] has known [redacted] for over 25 years and states, "he has been a great support for public television in our area volunteering many hours in fundraising efforts, and has also been a reliable support for the [redacted] competition and concerts. His own piano skills have allowed him to share his talents in various programs where he generously contributes his gifts to the community. Yet he is not above serving in less visible places such as his children's elementary school directing traffic, helping with science fairs or other classroom needs." [redacted] President/CEO of three non-profit organizations describes [redacted], "[redacted] is the consummate volunteer and an angel to many organizations due to his willingness to get involved and volunteer on numerous levels." [redacted], Principal for [redacted], can't say enough about the impact [redacted] has had on their school community. [redacted] writes, "[redacted] has really made a difference for the students and families at our school. For example, he has been instrumental in increasing science enrichment activities for our students. With his daughter, [redacted] he pushed the organization of a science club just for girls. [redacted] work with the School Community Council and with faculty has institutionalized our school's annual science fair and science night."

[redacted] strength lies with volunteering his time and desire to help others, not necessarily managing his own finances. While he has always been a hard worker, [redacted] had unsuccessfully fought hard to sustain his own manufacturing company. Twenty years ago, he began working for a struggling company, [redacted] [redacted] was fighting to save the business and its employees. [redacted], a [redacted] employee, writes, "In 2001, our main customer went bankrupt with over $300,000 owed to us. It left us with over two hundred

thousand dollars in debt that [redacted] owed as a result of work done for this customer. [redacted] could have easily filed bankruptcy. [redacted] met with the employees, he met with our suppliers and, even through some very difficult times, we continued business and were able to pay off all those who were owed money as a result. . . [redacted] helped many of the employees with advances, loans and extra bonuses at Christmas time. He paid tuition for many of the employees so they could attend college. He helped me and my family through a particularly difficult time by paying for the funeral arrangements for both my parents."

As an educated civil engineer, [redacted] has been interested and involved with creating businesses and job opportunities in the area of renewable energy sources. He cares deeply about the environment, community and well-being of others. His career path and business ventures reflect his passions. [redacted] is not an opportunist who simply seeks to fuel his self-interest, but, rather, he is quite the opposite. He is someone who is always thinking about others and how to make the world a better place.

B. Offense Conduct

Having sat through the jury trial, this Court is intimately familiar with the facts and circumstances of [redacted] case. However, it cannot be overlooked that [redacted] entered into contracts with a company called "[redacted]" in which the director of [redacted], agreed to fund several of the [redacted] renewable energy projects, including [redacted]. [redacted] reliance on the representations made by [redacted], however misguided, was the sole reason [redacted] was required to send $2.5 million to [redacted] in the first instance. This scenario was not cooked up by [redacted] to swindle [redacted] out of their funds. There were many things [redacted] should have done differently, but he only had a desire to provide funding to [redacted] so the maintenance repair facility for large jets could be built. There can be no

question [redacted] and [redacted] took gross advantage of [redacted]. "[redacted] is a crook." That was a text message [redacted] sent to [redacted] when [redacted] finally realized the funding promised by [redacted] would never materialize. Paragraph 31 of the PSR suggests the investment by LAC was a "form of earnest money," as it is customary for investors to require the promoters of a project to have some form of financial stake. In this case, [redacted] required money up front pursuant to the contract [redacted] entered into with [redacted]. The contract between [redacted] and [redacted] was attached to the email sent to [redacted] members following the November 2010 meeting in Chicago. (*See attached defense trial exhibit 17*) LAC turned to [redacted] because they ran out of financing options. The contract between [redacted] and LAC was entered into during a period of time when conventional means of financing was not available and LAC knew [redacted] was a small start-up with no capital.

The PSR references grand jury testimony of "other [redacted] members" suggesting [redacted] never successfully raised funds for any of its projects. It should be noted, [redacted], ERAS and [redacted] were the first projects [redacted] was involved with trying to fund as a member of [redacted]. Moreover, the negotiations with [redacted] and ERAS were already underway when [redacted] became a member of [redacted]. It's not surprising [redacted] was unable to successfully fund additional projects when [redacted] was relying on the representations of [redacted] and [redacted]. [redacted] took a gamble and he failed.

C. This Court Should Reject the Guideline Range because it is Not Based on Empirical Evidence or National Experience, and Fails to Promote any Purpose of Sentencing.

When Congress enacted the Sentencing Reform Act of 1984, it directed the Commission to promulgate guidelines that "assure the meeting of the purposes of sentencing," 28 U.S.C. §

991(b)(1)(A), and to use average sentences imposed and prison time actually served in the preguidelines period as a "starting point." 28 U.S.C. § 994(m). The Commission was then to continually review and revise the guidelines in light of sentencing data, criminological research, and consultation with frontline actors in the criminal justice system. *See* 28 U.S.C. § 991(b)(1)(C), § 991(b)(2), § 994(o), § 995(13), (15), (16). The original Commissioners abandoned the effort to design the guidelines based on the purposes of sentencing because they could not agree on which purposes should predominate, and instead purportedly based the guidelines on an empirical study of time served for various offenses before the guidelines. *See* USSG, Ch. 1 Pt. A (3); Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988).

In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court gave two reasons that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that "might achieve § 3553(a)'s objectives." First, the original Commission used an "empirical approach" which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." Second, the Commission can review and revise the guidelines based on judicial feedback through sentencing decisions, and consultation with other frontline actors, civil liberties groups, and experts. *Id*. at 348-50.

The Supreme Court recognized, however, that not all guidelines were developed in this manner. *See Gall v. United States*, 552 U.S. 38, 46 & n.2 (2007); *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). When a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role," because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields

a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Id.* at 109-10.

The fraud guideline is not based on empirical data of past practice or on national experience since then. Because the Commission failed to rely on empirical data or national experience in promulgating or amending § 2B1.1, and thus failed to fulfill its institutional role, this Court is free to disagree, on reasoned policy grounds, with its recommendation. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009); *Kimbrough*, 552 U.S. 101-02, 109-10; *Rita*, 551 U.S. at 351, 357.

As reported in the PSR, [redacted] guideline range is 57 to 71 months. Before the guidelines, first offenders convicted of sophisticated fraud involving the highest loss amounts who were sentenced to prison served, on average, a prison sentence of 18-24 months, and 18% of such defendants received probation. *See* U.S. Sent'g Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 33 (1987), http://www.src-project.org/wpcontent/pdfs/reports/USSC_Supplementary%20Report.pdf.

When the Commission adopted the original guidelines in 1987, it "decided to abandon the touchstone of prior past practice" with respect to white collar offenses. Breyer, *supra*, 17 Hofstra L. Rev. at 22-23. The Commission required some form of confinement for all but the least serious cases, and adopted a fraud guideline requiring no less than 0-6 months and no more than 30-37 months for defendants in Criminal History Category I. *See* USSG § 2F1.1 (1987). The Commission explained that "the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm." USSG, Ch. 1, intro., pt. 4(d) (1987); *see also* U.S.

Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004) [hereinafter *Fifteen Year Report*] (Commission sought to ensure that white collar offenders faced "short but definite period[s] of confinement").

The Commission's deterrence rationale was not based on empirical evidence. The empirical research regarding white collar offenders shows no difference between the deterrent effect of probation and that of imprisonment. *See* David Weisburd *et al., Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995). "[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders." Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007).

Moreover, while the amount of "loss" is the primary determinant of the offense level for fraud offenders, loss is a highly imperfect measure of the seriousness of the offense. *See United States v. Gupta*, __ F. Supp. 2d __ (SDNY Oct. 24, 2012) ("By making a Guidelines sentence turn on this single factor [loss or gain], the Sentencing Commission ignored [3553(a)] and . . . effectively guaranteed that many such sentences would be irrational on their face."); *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing "the inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss" without any explanation of "why it is appropriate to accord such huge weight to [this] factor[ ]"). The amount of loss is often "a kind of accident" and thus "a relatively weak indicator of [ ] moral seriousness . . . or the need for deterrence." *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004). Defendants rarely set out to

defraud others of a specific amount of money; rather, the amount of loss is dependent on the security procedures in place and the point in time when the fraud happens to be detected. *Id.* "Had [the defendant] been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more." *Id.*

The Second Circuit recently recognized the problems inherent in the fraud guidelines. In *United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016), the Court noted that the Sentencing Commission "valued fraud . . . at level six, which translates in criminal history category I to a sentence as low as probation, and then let the amount of loss, finely calibrated into sixteen categories, become the principal determinant of the adjusted offense level and hence the corresponding sentencing range." The Circuit held that where, as here, "the Commission has assigned a rather low base offense level to a crime and then increased it significantly by a loss enhancement, that combination of circumstances entitles a sentencing judge to consider a non-Guideline sentence." *Id.*

In fiscal year 2016, sentences below the guideline range were imposed in about 55% of all fraud cases. *See* U.S. Sent'g Comm'n, *2016 Sourcebook of Federal Sentencing Statistics*, tb. 27. "[I]t is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance," *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008); *see also United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010) (The "Guidelines were of no help."). "[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to

comply with its objectives." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008).

A variance is necessary to do justice in this case, and will also contribute to the evolution of responsible guidelines. As the Supreme Court emphasized, when judges articulate reasons for sentences outside the guideline range, they provide "relevant information to both the court of appeals and ultimately the Sentencing Commission," which "should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw." *Rita*, 551 U.S. at 357-58.

D. Need for punishment

[redacted] now has a felony conviction on his record and will now suffer certain civil disabilities which are very important to him, such as holding public office and voting. Since he misappropriated the [redacted] money more than seven years ago, he resumed his otherwise exemplary law-abiding life. No purposes under § 3553(a) would be satisfied by sentencing him to a term of imprisonment.

E. Objection to Special Condition

[redacted] objects to special condition number 4 on page 47 which states:

"The Court finds there is a reasonably foreseeable risk that you may engage in criminal conduct similar or related to the present offense or your past criminal conduct. Therefore, the Court directs you to notify any employer of risks that may be occasioned by your criminal record or personal history or characteristics, and directs the probation officer to confirm your compliance with this notification requirement."

This proposed condition is not only vague, confusing and inappropriate, it is preposterous. Mr. [redacted] does not have a criminal past nor is there anything in the record to suggest he is likely to recidivate. At most, Mr. [redacted] should be required to notify his potential employer of

his federal felony conviction and the fact he is under supervision, anything more would be unconstitutionally vague and violate his due process rights.

CONCLUSION

For the reasons discussed above, the defense requests that the Court impose a sentence of probation and a restitution order in the amount of $2.5 million, minus $25,000, which he has already paid back to [redacted].

DATED: February 20, 2018

/s/

LISA A. PEEBLES
Federal Public Defender
Office of the Federal Public Defender
Bar Roll No. 507041
Clinton Exchange, 3rd Floor
4 Clinton Street
Syracuse, New York 13202
(315) 701-0080