IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	No. 3:13CR19 (JCH)
v.	
JESSE C. LITVAK	July 8, 2014

REPLY SENTENCING MEMORANDUM OF DEFENDANT JESSE C. LITVAK

Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

I. PRELIMINARY STATEMENT

The government's position is that a term of imprisonment for Jesse Litvak consistent with the low end of its Guidelines' sentencing range (108 months) is "sufficient but not greater than necessary" simply because it is a "Guidelines sentence," nothing more. Other than calling for rigid, unthinking adherence to the Guidelines, the government offers no meaningful support for the propriety of such a sentence, one which is truly irrational and lacking in any sense of fairness and proportionality. Rather than acknowledging how this case might be different from typical fraud cases, the government instead stridently urges the full measure of the Guidelines as if Mr. Litvak had cheated investors out of their principal and pocketed the money for himself. And in support of its draconian position that nine years is appropriate, the government has also seen fit to attack Mr. Litvak's character, repeatedly describing him as "arrogant." It is not clear what is motivating the government's harsh approach here. A clear-headed appraisal of the severity of the offense conduct should indicate that while the jury convicted him of fraud, and that appropriate punishment is warranted based upon these convictions, these crimes are simply less serious than typical securities frauds in which investors are bilked out of their savings. While the government refuses to consider that distinction, this Court should draw it in determining the appropriate sentence.

II. THE GOVERNMENT'S GUIDELINES LOSS CALCULATION IS DEEPLY FLAWED

In remarkable fashion, the government has reverted to arguing that Mr. Litvak's conduct caused victims to pay inflated prices for bonds. "The trial put this issue to the test," the government writes. (Gov't Sentencing Mem. at 11). As the Court will recall, the government expressly disavowed any need to prove loss at trial and strongly argued against any introduction of defense evidence that tended to rebut the Indictment's loss allegations. The government's

current position ignores the economic reality that each victim customer received a bond priced at fair market value in return for cash. The government readily conceded this fact in support of its effort to exclude defense evidence. The Court should thus reject the argument that victims overpaid as contrary to both the government's prior positions in this case as well as the ample trial evidence from victim witnesses agreeing that they did not overpay.

In the absence of evidence, the government resorts to speculation. It argues that "but for" Mr. Litvak's conduct, the "victims would have had the opportunity to accept prices that were not altered to provide a fraudulent profit for Jefferies." (Gov't Sentencing Mem. at 11). Yet there is no way to tell if this is true. And even if it were true, and Mr. Litvak had not engaged in the offense conduct, it does not prove that the prices would have been different. Mr. Litvak would have been free to negotiate for the very same price while remaining silent about Jefferies's cost. (*See* Litvak Trial Tr. at 538:19-539:2 (Canter) (acknowledging that the dealer's cost is generally not disclosed in bond transactions)).

The government seeks to avoid this problem by asserting that Mr. Litvak offered his customers "cost-plus" deals. While the government repeatedly asserted in pre-trial proceedings that Jefferies and its customers had cost-plus arrangements, it abandoned this theory at trial. In fact, the evidence at trial did not show the existence of "cost-plus" arrangements in which Mr. Litvak agreed to source a bond at its cost plus a commission. Fairly stated, the upshot of Mr. Litvak's conduct is that it masked Jefferies's true profits on each trade. We are not arguing that Mr. Litvak does not stand convicted of crimes involving deceit and fraud. Rather, our position is that under the Guidelines' conception of loss, evidence of pecuniary harm in this case is lacking.

III. A DOWNWARD DEPARTURE FOR LOSS OVERSTATING THE SERIOUSNESS OF THE OFFENSE IS APPROPRIATE

The downward departure consideration in Application Note 20(c) to U.S.S.G. §2B1.1 is an "encouraged" departure ground.[1] The government's argument that Mr. Litvak's conduct does not fit within the representative example included in Application Note 20(c) is not dispositive. The Second Circuit has recognized that this departure should be considered in conjunction with the introductory policy statement to the Guidelines, which plainly extends its scope beyond public-market securities frauds. *See* U.S.S.G. Ch.1, Pt. A, § 4(b) (2013). What should matter most here is that investors in this case did not suffer a loss of principal, which is the aggravating factor supporting the severity of the Guidelines approach to loss. Mr. Litvak's conduct is not like an investment fraud in which the security is rendered worthless or diminished in value. Even if the Court finds that Mr. Litvak's conduct affected the price, this "loss" is fundamentally different than in heartland securities fraud or other fraud cases. As the Court observed, "the concept of financial loss is ambiguous under the circumstances of this case." (Order Denying Motion for an Acquittal and Motion for a New Trial at 10 n.3, *United States v. Litvak*, No. 13-cr-00019 (D. Conn. July 2, 2014), ECF No. 265). Persuading someone to pay more within a range he is already willing to pay for the good he expects to receive is very different than stealing that person's money by providing an inferior good or no good at all. Since the price was acceptable and the desired goods received, the injury is not equivalent to having the same amount stolen from one's pocket. Thus, Mr. Litvak's offense conduct is far less serious than heartland securities fraud schemes. This is the very type of case for which the departure exists and it should be granted.

[1] The Office of Gen. Counsel U.S. Sentencing Comm'n, *Departure and Variance Primer* (June 2013) at 27-28, *available at* http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf (last visited July 7, 2014).

IV. THE GOVERNMENT'S PROPOSED SENTENCE CANNOT WITHSTAND SCRUTINY UNDER SECTION 3553(A)

A. The Loss Enhancement Defeats Efforts to Arrive at a Just Sentence

The government fails to explain how its loss figure is a reasonable proxy for Mr. Litvak's culpability. The government's comparison of this alleged loss to losses in frauds nationwide is not instructive because the significance of loss in a given case is not susceptible to this type of one-size-fits-all analysis. The amounts at issue here, a tiny percentage of the multibillion-dollar funds, are not comparable to $50,000 or $100,000 to the average investor in the average fraud from a harm and culpability standpoint. (*See* Gov't Sentencing Mem. at 12-13).

B. The Fraud Guidelines Are Not Entitled to the Weight the Government Seeks to Assign

In arguing for a draconian sentence, the government rests heavily on a guideline that courts, scholars, and the ABA recognize is deeply flawed and warrants less weight than other sentencing considerations. In all cases, courts do "not enjoy the benefit of a legal presumption that the Guidelines sentence should apply," *Rita v. United States*, 51 U.S. 338, 351 (2007), and their reasonableness is not to be presumed in a particular case. *Nelson v. United States,* 555 U.S. 350, 350 (2009). The government must show why its proposed Guidelines-sentence is sufficient yet not greater than necessary. The government's task is far harder when it tries to invoke the loss guidelines. Courts have recognized that the loss enhancement is plagued by the same deficiencies as the crack-cocaine Guidelines at issue in *Kimbrough* in that they too were not the product of empirical data. *United States v. Gupta*, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012) (recognizing that fraud Guidelines "appear to be more the product of speculation . . . than of any rigorous methodology"). Even a commentator upon whom the government relies notes that with the fraud Guidelines, the Commission "diverged" from "its historical approach" in raising

"sentencing levels for economic crimes over pre-Guidelines levels."[2] As a result, courts are admonished to give greater precedence to the other sentencing considerations of Section 3553(a) in performing an individual assessment of the defendant and the circumstances of his crime, while weighing the objectives of Federal sentencing. *See, e.g.*, *United States v. Corsey*, 723 F.3d 366, 379-80 (2d Cir. 2013) (J. Underhill, concurring) (loss guideline not developed using an empirical approach; district judges should exercise discretion when deciding whether to follow the sentencing advice that guideline provides); *United States v. Suarez-Reyes*, 2012 WL 6597814, at *8 (D. Neb. Dec. 18, 2012) (loss Guideline entitled to less deference because it was promulgated pursuant to Congressional directive rather than empirically, rendering it an unreliable proxy for culpability). The ABA proposal—rather than serving as a substitute for the actual fraud Guidelines—is instructive on how loss arbitrarily inflates a defendant's culpability and threatens sentences well-beyond what are necessary. The ABA offers important perspective on how to weigh the fraud Guidelines in the context of Section 3553(a) as a result.

C. The Government Fails Adequately to Consider the Nature and Circumstances of the Offense

The government's narrow approach to the "offense" for purposes of informing the Court's Section 3553(a) analysis ignores a host of key considerations. These factors confirm that the government's proposal is not based on an individual assessment of the nature and circumstances of the offense in this case. These factors include:

- There is no evidence Mr. Litvak personally profited from the offense conduct—any conceivable profit is not quantifiable;
- The victim counterparties were large investment funds, possessing a high degree of sophistication, and made trading decisions based on their own analytics and significant experience;

[2] *See* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reform: An Analysis and Legislative History*, 35 Ind. L. Rev. 5, 21 (2001).

- The victim counterparties acquired the agreed-upon securities at an accepted price that met their valuation, and made money as a result—they consistently testified that they would repeat the charged transactions at the same price if given the opportunity;

- The misrepresentations did not cause victims to pay more than fair market value and had no bearing whatsoever on the investment value of the securities;

- There is no evidence these RMBS bonds were available at a better price, or even available at all from a source other than Mr. Litvak;

- Mr. Litvak's conduct was consistent with others at Jefferies and explicitly condoned by management, including his long-time supervisors. Any greed and arrogance the government believes he exhibited was the product of that environment, and working with and for individuals who viewed the offense conduct as a proper way to do business; and

- Mr. Litvak has been selectively prosecuted; he has been singled out with criminal charges from within Jefferies and from within an industry where, as the government acknowledges, the offense conduct has been prevalent and encouraged. (Gov't Sentencing Mem. at 2).

The government largely concedes these points, which significantly weigh in Mr. Litvak's favor. They plainly remove Mr. Litvak's offense from the heartland of fraud cases the Commission sought to address, mitigate the seriousness of the offense for sentencing purposes, and defeat any efforts to establish the reasonableness of any sentence near-consistent with the government's Guidelines calculation.

D. Mr. Litvak's Personal History and Characteristics

In that same vein, the government altogether ignores Jesse Litvak separate and apart from his role in the offense. The Court must "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Gall v. United States*, 552 U.S. 38, 52 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). "*Gall* could not be clearer that the mechanistic force of the Guidelines are to be tempered, and perhaps even dissipated, by the discretion of federal judges who can choose to follow—or ignore—them so long as the decision is reasonably

well explained."[3] As the many dozens of submissions on Mr. Litvak's behalf attest, including from current and former employees of certain of his victims, the Court is dealing with a unique and special human being, blessed with a myriad of tremendous attributes, each of which should be weighed in determining what sentence is necessary.[4] The fact Mr. Litvak participated in the offense conduct is why he is before the Court today; that fact, however, does not erase the life he has otherwise lived, and will continue to live and build upon once his period of incarceration is completed. This all should be assessed by the Court under Section 3553(a), and applied in the determination of what sentence is necessary in this case.

The government's arguments on (and disturbing marginalization of) the plight of Mr. Litvak's six-year-old son with respect to any downward departure cannot begin to justify the utter disregard of Mr. Litvak's son and his needs for purposes of the requisite individual assessment of Mr. Litvak under Section 3553(a)(1). His son's special needs and requirements strongly support a sentence consistent with the defense's proposal.

E. Deterrence Cannot Justify the Proposed Sentence

The government's approach to general deterrence is instructive in that it confirms the scapegoating of Mr. Litvak for the ills of the financial industry and the professional trading markets in which the offense conduct occurred.[5] Rather than demonstrate why nine years (rather than a shorter term) of imprisonment is necessary for deterrence in a case where a custodial sentence of any length will come as a wake-up call to the scores of individuals engaged in the

[3] Peter Henning, *The Changing Atmospherics of Corporate Crime Sentencing in the Post-Sarbanes-Oxley Act Era*, 3 J. Bus. & Tech. L. 243, 254 (2008) (citing *Gall*, 518 U.S. at 49-51).

[4] One such submission came from Red Top, the victim in the transaction charged Count 7 of the Indictment, for which the government voluntarily sought and obtained dismissal because of its concern regarding Red Top's testimony. The other victim-letters came from former employees of EBF and WAMCO.

[5] While the government completely ignores specific deterrence considerations, it cannot dispute that the absence of any need for specific deterrence in this case must be weighed in Mr. Litvak's favor in assessing the appropriateness of any sentence, including the one the government itself proposes.

same conduct, it actually confirms that any deterrent interests can be satisfied with a sentence even below the defense's proposal.

The government's appeal to the social sciences backfires as it mischaracterizes the literature on which it relies to justify its draconian proposed sentence.[6] Rather than giving credence, the observations it cites demonstrate that its nine-year prison sentence is far greater than necessary to satisfy any deterrence considerations. They show that individuals similarly situated to Mr. Litvak can be sufficiently deterred by the certainty of any prison sentence. Even so, the government's principal "supporting" article concludes that "the necessity of imprisoning white-collar offenders [at all] to achieve deterrence … is questionable."[7] The only point that can be fairly gleaned is that the defense's proposed sentence would be a sufficiently strong deterrent to those similarly situated to Mr. Litvak, and that more than that is unnecessary.

F. The Government Cannot Identify Representative Sentences

The government posits that its proposed nine-year prison term avoids unwarranted sentencing disparities because it is within the Guidelines range and four individuals who engaged in "similar conduct" to Mr. Litvak—i.e., frauds "with similar amounts of loss and similar numbers of victims"—received "significant sentences" in this district.[8] But this premise is flawed—comparable amounts of loss and similar numbers of victims do not engender

[6] For example, the quotation the government highlights features three principal points: (1) jail terms have a self-evident deterrent impact upon corporate officials who belong to a social group that is exquisitely sensitive to status deprivation and censure; (2) it is generally perceived that executives exhibit distress at the thought of being sentenced to incarceration: it results in hypertension, it causes heart attacks, it is very serious; and (3) punishment should serve to discourage others from committing similar offenses, and jail or prison sentences are particularly effective as a general deterrent, as judges and scholars alike tend to believe. Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. Ill. U. L.J. 485, 492 (1999).

[7] Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. Ill. U. L.J. 485, 502 (1999).

[8] As the Court has recognized, a "significant" term of imprisonment is far less than the sentences of 7.25 to 8.5 years cited by the government, and the nine years sought for Mr. Litvak. Br. at 55 (Ex. P, *Rieger*, Sentencing Tr. at 40:15-16; 41:2-4) (24-month sentence is a "significant punishment" for a "very serious" crime).

equivalence across cases, as evidenced in even a cursory review of the offenses in the comparable cases the government cites, which we detail in the Attachment to this Reply. The government's selection of these cases as representative only demonstrates the irrationality and injustice of its proposed sentence and reinforces the appropriateness of the defense's proposal.

As should be apparent, none of these cases—which involve Ponzi schemes and other sophisticated, elaborate frauds including targeting life savings of the weak and vulnerable—suggest that sentencing Mr. Litvak within the government's Guidelines range "serves the interests of sentencing," let alone that doing so would result in a sentence "not greater than necessary" to promote Federal sentencing objectives. (*See* Attachment at 1-2). The unsuitability of these cases for the government's intended purpose is most apparent relative to Mr. Litvak's detailed discussion of other fraud cases in this district and elsewhere, where the government charged and the courts found more egregious conduct and graver outcomes relative to Mr. Litvak's offense—with many victims and large losses—resulting in non-Guidelines sentences well below the government's proposal. (*See, e.g.*, Attachment at 3).

V. THE GOVERNMENT'S PROPOSED FINE IS GROSSLY EXCESSIVE

With almost no effort at justification, and a focused effort at simply achieving a harsh result, the government requests a $5 million fine: the maximum available. The reasons offered in a brief paragraph do not justify this request. The main reason, that the offense was financially motivated, is surely blunted by the fact that Mr. Litvak did not receive the proceeds of the offense and that his financial motivation was attenuated at best. As to ability to pay, the government notes Mr. Litvak's substantial financial resources. After correcting for errors in the PSR, however, the actual amount of assets owned by Mr. Litvak is just over $3 million, nearly half of which consists of life insurance policies and Roth IRAs. Further, the reference to "real earning potential" is entirely misplaced. Mr. Litvak has not worked since December 2011, and

he faces a permanent bar from the securities industry as a result of his conviction. And while the government indicates that Jefferies has made certain restitution payments that may reduce Mr. Litvak's liability, it is not representing that it will not seek a restitution order.

All these factors support a fine that is a fraction of the government's proposal. (*See United States v. Ferguson*, 06-cr-00137 (CFD) (D. Conn. Dec. 16, 2008) Sentencing Tr. at 108:1-5; 108:25-109:1) (imposing fine of $200,000 with no restitution, along with two-years imprisonment where losses exceeded $500 million; maximum fine was $5 million)). A criminal fine that effectively takes all of Mr. Litvak's assets—none of which are traceable to the offense conduct—and leaves him with an uncertain ability to contribute to the support of his family is patently unreasonable. His financial situation will be exacerbated by any substantial custodial sentence the government proposes and anticipated monetary penalties in his SEC civil suit. Mr. Litvak's family will be significantly burdened forever, if not permanently in debt, with a fine anywhere near the government's proposal.

CONCLUSION

For the reasons set forth above and in Mr. Litvak's Sentencing Memorandum, the Court should sentence Mr. Litvak to a term of imprisonment of no more than 14 months, decline to order restitution because it is unauthorized in the absence of loss, order a fine that reflects the relative seriousness of the offense, and order a term of supervised release.

Respectfully submitted,

THE DEFENDANT,
JESSE C. LITVAK

By: /s/ Ross H. Garber

Ross H. Garber (ct17689)
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5901
Fax: 860-251-5219
Email: rgarber@goodwin.com

Patrick J. Smith (admitted *pro hac vice*)
John M. Hillebrecht (admitted *pro hac vice*)
Sarah B. Zimmer (admitted *pro hac vice*)
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, New York 10020
Tel.: (212) 335-4500
Fax: (212) 884-8509
Email: patrick.smith@dlapiper.com
john.hillebrecht@dlapiper.com
sarah.zimmer@dlapiper.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Ross H. Garber
Ross H. Garber

ATTACHMENT TO REPLY SENTENCING MEMORANDUM OF DEFENDANT JESSE C. LITVAK

I. Government's Sentencing Comparisons[1]

1. *United States v. Curtis* (10-cr-00035)

Susan Curtis was convicted of fraudulently representing to her employer Bank that shell corporations she had set up for purposes of her scheme were due millions of dollars in fees for dozens of real estate transactions.[2] According to the government, she repeatedly withdrew portions of the stolen funds immediately after they were wired into her shell companies, including for use "on items such as expensive cars, boats, and homes."[3] Her sentencing range—168-210 Months—was driven largely by the $7.8 million in losses attributable to the offense conduct and taking into account a three-point acceptance of responsibility deduction.[4] The Court departed downward based upon substantial overlap between certain offense level enhancements and calculated a Guidelines sentencing range of 135-168 months. (*Curtis*, Sentencing Tr. at 197:15-199:4). After departing downward, the Court imposed a below-Guidelines sentence of 102 months, about 40% below the low end of the PSR's range. (*Curtis*, Sentencing Tr. at 248:16-17).

2. *United States v. Brass* (11-cr-00224)

Robin Brass received a 96 month sentence in connection with an investment scheme she operated, which the Court found to be a Ponzi scheme.[5] After her sentencing, U.S. Attorney Fein remarked that, as part of her Ponzi scheme, Brass "preyed upon the elderly and other vulnerable people, deceiv[ing] them into believing their investments with her were safe."[6] One of the six victims who spoke at Brass's sentencing remarked that Brass approached her about investing the insurance proceeds from a near-fatal car accident, to which she agreed.[7] The victim, who was also battling cancer, testified that she had forgone physical therapy and other necessary medical procedures as a result of the losses from Brass's scheme. (*Brass*, Sentencing Tr. at 76:2-4; 80:16-20). The court—in sentencing Brass above the Guidelines range—characterized Brass's harm as "extraordinary" noting that many of her victims faced complete financial ruin. (*Brass*, Sentencing Tr. at 85:5-9; 91:19-92:1).

---

[1] Copies of the transcript excerpts are provided to the Court and opposing counsel as courtesy copies.

[2] FBI Press Release, *Woman Who Orchestrated $6 Million Embezzlement Scheme Sentenced to More Than Eight Years in Prison* (Mar. 29, 2012), *available at* http://www.fbi.gov/newhaven/press-releases/2012/woman-who-orchestrated-6-million-embezzlement-scheme-sentenced-to-more-than-eight-years-in-prison (last visited July 8, 2014).

[3] *United States v. Curtis*, 10-cr-00035 (JCH) (D. Conn. Mar. 16, 2012), Gov't Sentencing Mem. at 40 [Doc. #238]).

[4] *See United States v. Curtis*, 10-cr-00035 (JCH) (D. Conn. Mar. 29, 2012), Sentencing Tr. at 166:23-167:7.

[5] DOJ Press Release, *Washington Depot Woman Who Ran $2 Million Ponzi Scheme Sentenced to Eight Years in Federal Prison* (July 27, 2012), *available at* http://www.justice.gov/usao/ct/Press2012/20120727.html (last visited July 8, 2014).

[6] *Id.*

[7] *See United States v. Brass*, 11-cr-00224 (RNC) (D. Conn. July 27, 2012), Sentencing Tr. at 76:16-77:20.

3. *United States v. Clark* (10-cr-00235)

Maureen Clark was sentenced to 87 months in connection with a four-year investment fraud and money laundering scheme.[8] She was convicted of falsely representing to investors and potential investors that she and others owned and controlled hundreds of acres of land, a portion of which was purportedly zoned for casinos and residential properties.[9] The government introduced evidence that she falsely claimed to the investors that they would be building a resort community with two million square feet of casino gaming, hotels, condominiums, and a medical facility, and that partners of the company had invested several hundred million dollars of their own funds in buying land and options on land nearby.[10] Evidence offered by the government also showed that e-mails and attachments were sent to victim investors that falsely represented that major Wall Street investment firms had confirmed that they would partner in the project, and falsely indicating that she was getting financing from overseas sources.[11] The funds received were not invested as represented and instead were diverted in significant part for personal use.[12]

4. *United States v. Denniston* (13-cr-00036)

Garrett Denniston operated an investment fraud scheme wherein he made pitches to potential investors regarding exclusive "friends and family stock option" packages.[13] Rather than investing the victims' money as he had represented, he spent the money "on his own expenses, including using the money for airfare, hotels, restaurants, country club membership fees, mortgage and rent payments, cable and telephone bills, furniture, remodeling costs and other personal living expenses."[14] The fraud targeted his "closest friends and family" and "relied on his long-term relationships with [these] people" to execute the scheme. (*Denniston*, Plea Agreement at 8; Gov't Br. at 6). Victims submitted letters describing how their retirement planning was adversely effected by the scheme. (*Denniston*, Plea Agreement at 8-11 [Doc. #29]). Denniston received a sentence of 97 months imprisonment.

---

[8] *See United States v. Clark*, 10-cr-00235 (WWE) (D. Conn. Mar. 1, 2013), Sentencing Tr. at 89:6-13; DOJ Press Release, *Stonington Woman Sentenced to 87 Months in Federal Prison for Role in $1.7 Million Investor Fraud Scheme* (Mar. 1, 2013), *available at* http://www.justice.gov/usao/ct/Press2013/20130301-1.html (last visited July 8, 2014).

[9] DOJ Press Release, *Stonington Woman Sentenced to 87 Months in Federal Prison for Role in $1.7 Million Investor Fraud Scheme* (Mar. 1, 2013), *available at* http://www.justice.gov/usao/ct/Press2013/20130301-1.html (last visited July 8, 2014).

[10] *See id.*

[11] *See id.*

[12] *United States v. Clark*, 10-cr-00235 (WWE) (D. Conn. Feb. 25, 2013), Gov't Reply Sentencing Mem. at 1 [Doc. #312]); DOJ Press Release, *Stonington Woman Sentenced to 87 Months in Federal Prison for Role in $1.7 Million Investor Fraud Scheme* (Mar. 1, 2013), *available at* http://www.justice.gov/usao/ct/Press2013/20130301-1.html (last visited July 8, 2014).

[13] FBI Press Release, *Man Who Ran Multi-Million-Dollar Investment Fraud Scheme Sentenced to More Than Eight Years in Prison* (July 9, 2013), *available at* http://www.fbi.gov/newhaven/press-releases/2013/man-who-ran-multi-million-dollar-investment-fraud-scheme-sentenced-to-more-than-eight-years-in-prison (last visited July 8, 2014).

[14] *United States v. Denniston*, 13-cr-00036 (JBA) (D. Conn. June 27, 2013), Plea Agreement at 8 [Doc. #29]; Gov't Sentencing Br. at 5 [Doc. #39]).

II. Defendant's Additional Recent Sentencing Comparable

1. *United States v. Farha* (11-cr-00115)

Three health care company executives received below-Guidelines sentences of 36 (121-151), 24 (108-135), and 12 (78-97) months in prison, respectively, for their roles in defrauding the state Medicaid program.[15] For more than four years, they submitted fraudulently inflated expenditure figures to hide unused Medicaid balances that they would otherwise owe back to the government by law.[16] The court found that the government's loss figure exaggerated the actual harm to the agency because it did not give credit for the actual services performed by the company, which "exceed[ed] contractual expectations in providing outstanding care to real patients."[17] The court distinguished the case from a typical—or heartland—healthcare fraud, where fake clinics with "no business" and "no patients" are set up to substantiate fraudulent invoices mailed to the government for reimbursement. (*Farha*, Sentencing Tr. at 89:1-10). Although the numbers involved based on the various proposed loss calculations were "big" (ranging from $11million to almost $35 million), the court acknowledged that "if you put those numbers in the context of the amount of money paid to [the company] by [the state agency] for those years, it is not a significant number, and it's not a number that went directly into the pockets of these individuals." (*Farha*, Sentencing Tr. at 90:4-24). The court also noted the absence of any risk of recidivism and the reputational and long-term professional harm to the defendants. (*Farha*, Sentencing Tr. at 90:14-15). The defendants' employer entered into a deferred prosecution agreement and agreed to pay $40 million in restitution, forfeit another $40 million to the United States, and cooperate with the government's criminal investigation.

[15] *United States v. Farha*, 11-cr-00115 (JSM) (M.D. Fla. 2014), Sentencing Tr. at 91:22-92:7.

[16] DOJ Press Release, *Former Wellcare Chief Executive Sentenced for Health Care Fraud* (May 19, 2014), *available at* http://www.justice.gov/opa/pr/2014/May/14-crm-529.html (last visited July 8, 2014); DOJ Press Release, *Four Former Wellcare Executives Found Guilty in Florida* (June 10, 2013), *available at* http://www.justice.gov/opa/pr/2013/June/13-crm-659.html (last visited July 8, 2014).

[17] *See Farha*, Def. Sentencing Mem. [Doc. #876] at 18; *Farha*, Sentencing Tr. at 51:20-52:5; 63:7-9; 75:10-15.