IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	No. 3:13CR19 (JCH)
v.	
JESSE C. LITVAK	June 27, 2014

SENTENCING MEMORANDUM OF DEFENDANT JESSE C. LITVAK

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I. PRELIMINARY STATEMENT

We submit this memorandum on behalf of Jesse Litvak to aid the Court in crafting a fair and reasonable sentence in this case. Because the trial was focused on the evidence of Mr. Litvak's false statements in the sale of RMBS bonds, the Court learned virtually nothing else about the man who faces sentencing on July 23, 2014. This memorandum therefore seeks to explain to the Court the manner in which Mr. Litvak has led his life, the strength of his character, the impact he has had on the lives of others and the vital role he plays in his family. As the Court saw firsthand, Mr. Litvak enjoyed tremendous support from family and friends at trial, including daily attendance from his parents, his wife and his wife's parents. That support is also shown by the many letters from family, friends, former colleagues and former customers who attest to Mr. Litvak's worth as a human being.

Like all of us, Mr. Litvak is not perfect and has struggled at times in his life. But as we hope this submission makes clear, he is a genuine, humble, and selfless man who has an extraordinary way of making everyone in his life feel cherished and loved. As Your Honor will learn after reading the personal anecdotes contained in the more than 100 letters received on his behalf, Mr. Litvak has been this way since he was a young boy growing up in Colorado. From Mr. Litvak's extended family and friends who have known him his entire life to his wife's sisters and parents, who met him as an adult vying for the affections of their beloved sister and daughter, everyone who has crossed paths with Mr. Litvak is in awe of his sincerity and giving spirit. Mr. Litvak is a devoted and loving husband to his wife of almost 12 years, Dr. Renee Litvak, who describes him as a supportive, compassionate, and loyal partner. He is a gentle, hands-on father to two young children, eight-year-old [redacted] and six-year-old [redacted], who depend on him for physical and emotional support. Six-year-old [redacted], who has [redacted], especially needs his father's love and support at this fragile time in his young life.

Together with Mr. Litvak's personal attributes, the Court must of course consider the crimes for which Mr. Litvak stands convicted and the nature of the offense conduct that is associated with those convictions. As the Court well knows, Mr. Litvak's defense never denied that he made misrepresentations to customers in the course of negotiating bond trades. Instead, Mr. Litvak's defense sought to place his conduct in the context of practices oft-utilized across Wall Street and at Jefferies, as well as to explain that his conduct had no actual impact on the investment decisions of his customers and on their investment returns. At the heart of Mr. Litvak's defense was that while he may have made misrepresentations to customers, he did not believe he was committing criminal fraud—to point out that it was an unusual federal fraud case in which the victim not only suffers no economic harm but also profits from the investments that are the subject of the prosecution. And to show that despite the misrepresentations, every investor who dealt with Jesse Litvak got a fair deal on the bonds they bought. While the jury's verdict rejected some of these defenses, they remain powerful mitigating factors as the Court now considers an appropriate sentence.

Mr. Litvak's conviction has sent a shock wave up and down Wall Street's trading desks. Conduct long accepted as part of the hurly burly of bond trading has been found by a federal jury to be criminal conduct. The question most asked in the wake of the indictment and conviction in this case is: where is the line? Will misrepresentations in price negotiations on bond trades land you in the "box" or will it land you in federal prison? The conduct that Mr. Litvak engaged in was not unique: indeed, the trial showed that victim witnesses as well as former colleagues and supervisors at Jefferies made misrepresentations during negotiations. What is unique and what makes Mr. Litvak's case stand out as the first of its kind is that no one else has ever been prosecuted criminally for the types of misrepresentations at issue in this case. In contrast,

numerous more serious cases of fraud relating to markups and transaction costs have resulted in administrative penalties that are trivial in comparison to the lengthy term of imprisonment reflected in the PSR's sentencing range that the government is apparently seeking here.

The challenge for the Court then is to gauge the severity of Mr. Litvak's conduct. The Sentencing Guidelines, intended to aid the Court, are a tool ill-suited to this task. The main Guidelines application issue here is whether there was any loss and, if so, what to make of it. The government is urging a view of loss that equates the seriousness of the offense conduct with Ponzi schemes and boiler room operations where investments sold by fraudulent means are worthless and the investor-victim suffers a complete loss of principal. Accepting this view of Guidelines loss here would suggest sentencing Mr. Litvak to a term of imprisonment approaching those of the worst white collar offenders in recent history. In the absence of both true out-of-pocket loss and direct personal gain to Mr. Litvak, we submit that the PSR's advisory sentencing range is unreasonable.

To be sure, the jury's verdict stated that the misrepresentations mattered in the context of bond trading negotiations and that the deceitful tactics rose to the level of criminal fraud. What the verdict does not show is that the victims experienced an actual loss or harm: that is something the government never sought to prove and cannot show now. This is the main differentiator from frauds designed to steal an investor's principal. The only theory of loss that the government is advancing is that if the misrepresentations had not taken place, Mr. Litvak's customers may have fared better in the negotiations. This possible different outcome is speculative and does not equate to the categorical approach to loss that the government seeks to have imposed: loss as measured by the difference between the actual markup charged and the markup represented. Nor does it support a finding of loss within the meaning of U.S.S.G. §

2B1.1. Absent the conduct for which Mr. Litvak stands convicted, Jefferies and Mr. Litvak could just have easily remained silent about what they were actually paying for bonds and would have been free to charge any markup embedded in a price to which their customer agreed. Indeed, such trades are typical on Wall Street and continue today. Only the trader who unnecessarily misrepresents a fact that he did not have to disclose in the first place buys himself a problem.

The government's insistence that the full measure of the hypothetical loss figure should be used as the benchmark for sentencing shows a remarkable lack of perspective on the offense conduct in this case and a cynical indifference to the true economics of the actual trades at issue. On the spectrum of offense severity between total principal loss (coupled with severe victim impact) and an actionable misrepresentation that did not otherwise harm the victim, Mr. Litvak's conduct is at the latter end of the spectrum. The government is well aware that the victim funds at issue in this case did not suffer actual economic harm and, with one exception, enjoyed gains on these investments that dwarfed the hypothetical loss figures. Alliance Bernstein's PPIP fund, for example, enjoyed profits on the purchase of the Harborview (Count 1) and Lehman (Count 2) bonds that outpaced the performance of the overall fund. In sentencing Mr. Litvak, the Court can and should consider the outstanding returns enjoyed by investors on the securities that Mr. Litvak sold to them.

In addition to the unusual circumstance of no actual loss to victims, this case features a financial crime in which the defendant did not receive any of the proceeds of the crime. All of the "secret gains" at issue went to Jefferies. At trial, the government was unable to tie any of the extra profits back to Mr. Litvak's compensation. As a result, the Court appropriately excluded evidence of Mr. Litvak's earnings. The record has not improved on this issue and the

government is simply left to argue motive. Even accepting the government's view of relevant conduct in its entirety, Mr. Litvak's trading book was only marginally more profitable in view of the very large profits that he generated in 2009 and 2010 from conduct that is entirely free from any taint. The lack of personal gain is a powerful mitigating factor here.

Our hope is that the Court will see that a Guidelines sentence in this case, as calculated in the PSR, fits neither the offense nor the offender. Recent sentences in securities fraud and other similar white collar cases in this and neighboring districts strongly suggest that such a sentence would be extreme in its severity, given the nature of this offense. Mr. Litvak's otherwise blemish-free life, and the collateral consequences for his family, and in particular his young son, weigh heavily against a lengthy period of incarceration. As we argue more fully below, we respectfully request that the Court, after considering all of the Section 3553(a) factors, sentence Mr. Litvak to a term of imprisonment of no more than 14 months.

II. JESSE LITVAK'S PERSONAL HISTORY AND CIRCUMSTANCES

A. Mr. Litvak's Upbringing

Jesse Litvak was born in the mountains of Colorado on October 12, 1974. His parents, Steven and Nancy Litvak, met while teaching at an inner city high school in Buffalo, New York, and later settled in Colorado before Mr. Litvak—their only child—was born. Mr. Litvak and his parents lived on an Indian Reservation called Tiny Town for several years before moving closer to Denver. In raising their son, Mr. Litvak's parents stressed personal responsibility, hard work, respect for others, and most importantly, empathy and compassion for *all* people, regardless of walk of life. Although Mr. Litvak is an only child, numerous family members and close friends look up to Mr. Litvak as a big brother and someone who they can always turn to in times of need. That Mr. Litvak can give so much of himself to so many people yet never appear to be spread too thin is simply remarkable. As many have noticed, this attribute manifests in Mr. Litvak's

powerful ability to connect with people. (*See, e.g.*, Ex. A at 1-3, Letter from S. and N. Litvak; Ex. A at 4-5, Letter from M. Kunen; Ex. A at 6, Letter from D. Kunen).[1] From the janitorial staff at his apartment building to his beloved 96-year-old grandfather, Mr. Litvak has a special way of making everyone he interacts with feel cherished and loved. "He so often is the bridge to different social groups. He brings people together, but not with showmanship. Rather, he has always had a quiet, sincere care and love for those around him." (Ex. A at 8, Letter from R. Short). Perhaps Mr. Litvak's parents said it best: "He is, quite simply, gifted at being human." (Ex. A at 1, Letter from S. and N. Litvak).

B. Mr. Litvak's Education

After he attended a private grammar school, Mr. Litvak's parents transferred him into the public education system. He attended an inner city school in Denver where he was often confronted with violence in and out of the hallways. On one occasion, sixteen-year-old Jesse Litvak was forced to dodge bullets from a drive-by shooting during his lunch break. Despite this new and challenging environment, Mr. Litvak excelled. He poured himself into tennis and was often found training and jumping rope, not stopping until attaining 100 consecutive revolutions. (*See* Ex. A at 9, Letter from Dr. R. Litvak). Mr. Litvak maintained a high academic average despite a rigorous schedule travelling and competing in state-wide and national tennis competitions. Mr. Litvak served as captain of the high school tennis team and also found time to give back to his community by serving as a children's tennis instructor. (*See* Ex. A at 12, Letter from P. Armstrong). By the time he graduated from high school, Mr. Litvak was the number two ranked tennis player in all of Colorado. Mr. Litvak's dedication and determination was

[1] The letters submitted in support of Mr. Litvak are attached to this memorandum as Exhibit A and Bates stamped consecutively.

recognized by Emory University in Atlanta, where he attended college from 1993-1997, earning a Bachelor's Degree from the business school.

Mr. Litvak was a star member of Emory's tennis team. (*See* Ex. A at 15, Letter from C. Saacke). One of his teammates stated, "Jesse was a tremendous asset to have on the team, not only for his play on the tennis court, but for his unique ability to bring out the best in the rest of the guys on the team." (*Id.*). Mr. Saacke described when Mr. Litvak petitioned the head tennis coach and organized a team trip to Texas to visit a teammate who had incurred a serious head injury. (*Id.* at 16). That trip—planned by a young freshman Jesse Litvak—meant the world to the injured teammate and his family. (*Id.*).

Naturally, Mr. Litvak was an active member of the university community and made countless friends. He volunteered for Habitat for Humanity and was a member of many campus social and academic groups. One college friend said that Mr. Litvak "was always there to help out his friends with advice, a pat on the back, or just an extra slice of pizza if our food card was running low." (*See* Ex. A at 17, Letter from L. Kutz). Mr. Litvak's magnetic personality even caused several of his friends to follow him to Emory because they trusted his judgment and wanted to be near him. (*See, e.g.*, Ex. A at 8, Letter from R. Short) ("I decided to attend a school in Atlanta that I have never seen, simply because my friend Jesse, whom I trusted completely, told me it was going to be great."); Ex. A at 19, Letter from R. Simon ("I've followed [Jesse] through life, literally—I followed him to college at Emory University, in awe of who he is. When I arrived at Emory as a scared freshman, Jesse invited me into his very impressive world with open arms."); Ex. A at 21, Letter from A. Rosdal ("It was [Mr. Litvak's] illustration of drive that pushed me to play two high school sports like he did, graduate towards the top of my High School class, and also attend Emory as a student athlete.")).

C. Marriage and Family

Simply put, family is everything to Mr. Litvak. As expressed in almost every letter received on his behalf, Mr. Litvak is the kind of spouse and parent that everyone aspires to be. (*See, e.g.*, Ex. A at 21-22, Letter from A. Rosdal). Mr. Litvak met Renee, his wife of almost twelve years, when she, a young dental student at Columbia University, and he, an eager young analyst working more than 90 hours a week, crossed paths during a night out with friends in New York City. Dr. Litvak quickly fell in love with this energetic and compassionate young man who would, without hesitation, step away from the trading desk in the middle of a hectic work day to listen to any problem she may be having and "respond with a tranquility that was contagious." (*See* Ex. A at 10, Letter from Dr. R. Litvak). Mr. Litvak has been a supportive, compassionate, and loyal partner to his wife since they first met. Aaron Rosdal, Mr. Litvak's lifelong friend, "remember[s] the support Mr. Litvak provided for his wife as she started her practice. He was so vested in her success and he encouraged her career aspirations and dreams." (*See* Ex. A at 22, Letter from A. Rosdal).

Today, Dr. Litvak maintains a full-time private endodontic practice and holds several Board positions at Columbia University—none of which would be possible without Mr. Litvak's unwavering support and hands-on parenting to their two young children, [redacted], eight, and [redacted], six. Mr. Litvak is the model "super dad." He takes his children to and from school, helps them with their homework, and guides them with gentle fatherly wisdom. While the past two and a half years have been "an unthinkable nightmare" for the Litvaks, "[t]he one bright spot is that Jesse has used his time to strengthen his bond with both of [his] children." (*See* Ex. A at 11, Letter from Dr. R. Litvak). While his wife is at work, Mr. Litvak is [redacted] and [redacted] caretaker and has, with great pride and devotion, embraced this role. (*Id.*). According to Dr. Litvak:

> Jesse has never been defined by his employment on Wall Street, or its subsequent severe ramifications. He has always been recognized as a Family Man. He is the dad who drives his children to school every morning and never misses a class play. The husband who sends flowers to his wife just because he is thinking about her. The man who sits on the floor with his children, after working for twelve hours straight, to play a board game and listen to the stories of their day.

(*Id.* at 9). [redacted] and [redacted] look for their dad every morning when they wake up and need to feel the security of his embrace every night before they go to sleep. (*Id.* at 9). Close friends of the Litvaks described Mr. Litvak's interactions with his beloved children:

> On a typical day with the Litvaks, Jesse can be found playing on the playground with his children, teaching them to swim and play sports, comforting them when they get a scrape, kissing their "boo boos," bathing them, and reading to them before bed. His gentle and kind nature with his children, as well as with everyone he interacts with, is heartwarming."

(*See* Ex. A at 23, Letter from Drs. M. and B. Lieberman).

Mr. Litvak's eight-year-old daughter, [redacted], is "outgoing yet shy, brave yet timid, self-assured yet scared of the dark, and whenever she is about to 'fall', she looks for 'daddy' to catch her, and he always does—always." (*See* Ex. A at 5, Letter from M. Kunen). Mr. Litvak and his daughter share an extraordinary bond—one that is especially revered by Mr. Litvak's father-in-law, Marc Kunen, who has raised three daughters himself. Mr. Kunen stated that the difference Mr. Litvak has made in [redacted] life and maturation is nothing short of praiseworthy. "As an infant into early childhood she feared everything from spiders to her grandparents. Her life required stability and equilibrium. Her parents brought her that quality, but she always ran to her daddy for security, safety and assurance that it was 'OK.'" (*Id.*).

Mr. Litvak's six-year-old son, [redacted], is a rambunctious, curious, and loving little boy who is best friends with his big sister, [redacted]. [redacted]. (See Ex. B, Psychological Evaluation of [redacted] (Nov.

2012). [redacted] (*See* Ex. C, Preschool Report and Evaluation of [redacted] Litvak (Jan. 2013). [redacted] currently attends a [redacted] (*See* Ex. D, [redacted] Mid-Year Speech and Language Remediation Report for [redacted] Litvak (2013-2014). Despite [redacted] young age, it has become clear that his [redacted] Thus far, [redacted] has taken great strides with the help of his father, who has been an integral part of his development. Since his wife is employed full time, Mr. Litvak reviews [redacted]. These tasks, which are only truly fit for a parent, must be diligently completed on a daily basis. (*See* Ex. A at 10, Letter from Dr. R. Litvak). Mr. Litvak's absence from the home will greatly impede his son's progress and will inhibit him from continuing to do so both at school and in the home. Donna Logue, the Director of Early Childhood at [redacted] school who referred to Mr. Litvak as the "beloved parent of one of [her] students," wrote:

> Despite being under the cloud of indictment, and now a felony conviction, Jesse is a constant presence at [redacted]. He regularly attends school events, including parent-teacher conferences. He frequently picks [redacted] up from school and [redacted] lights up whenever he sees his father waiting for him in the lobby. . . . Most impressively, throughout the ordeal of the trial Jesse and Renee worked hard to maintain a sense of normalcy for [redacted]. . . . Jesse went so far as to attend the Early Childhood Movie Night in February even though it meant rushing back to Manhattan from his own trial. That evening, I witnessed him put aside the burdens of the trial and greet his children joyfully. I saw both of his children revel in the power of his very tangible love for them.

(Ex. A at 25, Letter from D. Logue).

D. Mr. Litvak's Career

Fresh out of Emory, Mr. Litvak accepted a job as an analyst at Greenwich Capital in Connecticut and remained there for 11 years—a duration practically unheard of on Wall Street. Mr. Litvak's supervisor observed that "Jesse was not a typical Wall Street trader who came from a privileged background." (Ex. A at 28, Letter from R. Weibye). In Mr. Litvak, he sees a "self-made man who literally picked himself up by his bootstraps, rising from the bottom of the organization to eventually become a gifted and respected trader." (*Id.*). John Anderson, who hired Mr. Litvak in 1997 and proudly calls him a friend today, said "[w]hile it may be current fashion to paint everyone employed on Wall Street with the brush of greed and selfishness, Jesse has never fit that stereotype. . . . Jesse is at his core a humble and caring man, a trusted and unselfish friend." (*See* Ex. A at 30, Letter from J. Anderson). Mr. Litvak worked tirelessly—through many sleepless nights and weekends—for everything he achieved professionally. Throughout, Mr. Litvak's upbeat outlook on life and the enthusiasm with which he approached his career has been nothing short of exceptional.

As an analyst, Mr. Litvak worked close to 90 hours a week, sometimes spending the night in the office. Mr. Litvak's wife recalled that early in his career:

> Jesse prided himself on getting to work before his supervisor, Mr. Ronald Weibye, and refused to leave until Mr. Weibye departed for the day. Jesse's work ethic and sense of responsibility were two qualities I fell in love with. I learned quickly that Jesse has a deep need to please those whom he respects. Praise motivates him and positive reinforcement drives him. These attributes are what make him so lovable to his colleagues and his customers.

(Ex. A at 10, Letter from Dr. R. Litvak). Mr. Litvak was a star in the banking group and quickly was trusted to work with the firm's top customers. Trading, however, was his true passion, and after a stint as an assistant on the mortgage desk, he proved himself to his superiors and was eventually promoted to trader and later, senior trader. Before his thirtieth birthday, Mr. Litvak

earned the position of Managing Director. Mr. Weibye noted that Mr. Litvak worked twice as hard and put in twice the hours as anyone else—not only because he enjoyed it, but because it was important for him to demonstrate to his superiors his gratitude for the opportunity. (*See* Ex. A at 28, Letter from R. Weibye). The head of Greenwich Capital's Mortgage and Asset Backed Securitization group called Mr. Litvak one of the most respected young traders at the firm and watched in awe as this remarkable young man evolved and succeeded within their organization. (*See* Ex. A at 31, Letter from R. McGinnis).

In April 2008, Mr. Litvak and a large group of Greenwich Capital employees left the firm to pursue a new opportunity at Jefferies, where Mr. Litvak became a senior trader and Managing Director. He was directly supervised by two of his former supervisors at Greenwich Capital, Johan Eveland and Bill Jennings, who became the co-heads of the greater Fixed Income Division at Jefferies. Mr. Litvak remained at Jefferies until December 2011.

Numerous former colleagues, business associates, and even one of the alleged victims in this case—Red Top Investors—wrote letters to the Court concerning their professional dealings with Mr. Litvak and their beliefs about the kind of man he is—fair, honest, and humble. Red Top Investors stated that in all of their years working with Mr. Litvak, they considered him to be an honest, hard-working and passionate professional. (Ex. A at 33, Letter from Red Top Investors). Glenn Tso, a former Greenwich Capital customer, stated that in the 15 years he conducted business with Mr. Litvak, he "always found [Mr. Litvak] to be trustworthy, protective and (most important) transparent with respect to disclosure." (Ex. A at 35, Letter from G. Tso). Mr. Tso recounted two specific examples in which Mr. Litvak acted with honesty and a sense of fair play by putting his (the customer's) interests above his own. (*Id.*). Jeff Katz, a former employee of the victim-entity Western Asset Management Company, did a great deal of business

with Mr. Litvak and said that he always found Mr. Litvak to be considerate and thoughtful of customer needs and concerns. (Ex. A at 36, Letter from J. Katz). Mr. Katz further expressed that even after the disclosure of his dealings, one of which Mr. Katz was involved with, he believes that Mr. Litvak is a kind individual who was performing in the capacity that he learned. (*See id.*). Chris Rice, a former employee of the victim-entity EBF & Associates, stated:

> I do not recall a single instance in the hundreds of trades I did with Jesse where I felt I was treated unfairly and certainly do not think I was overcharged. What I do recall are a lot of instances where I felt Jesse did an exceptional job where I tried to pay more money than he would accept. I certainly do not consider myself a victim, but rather someone who benefited from my interactions with Jesse.

(*See* Ex. A at 39, Letter from C. Rice). John Halsey's Wall Street career spanned 20 years, the last five of which were spent working with Mr. Litvak at Greenwich Capital. Regarding Mr. Litvak's professionalism and integrity, he said:

> I trusted Jesse. My clients trusted Jesse. The trust was earned because my clients, some of the brightest money managers in the world, knew the business, knew the "game" if you will, knew that while Jesse was motivated by profit, he was always fair. He earned their trust by being fair. I have reached out to some of my old clients who are now just friends. I have found none that will disparage Jesse or his actions.

(*See* Ex. A at 41, Letter from J. Halsey). Another Greenwich Capital co-worker with whom Mr. Litvak worked for 10 years said, "Jesse is one of the few people that I found to be loyal and that I knew could be trusted in all facets of his responsibilities." (*See* Ex. A at 42, Letter from J. Dieck). Not only is Mr. Litvak known for being loyal and putting his customers' interests ahead of his own, but his former colleagues have remarked that he puts his co-workers' needs ahead of his own as well. (*See* Ex. A at 44, Letter from R. Shugrue). This theme is repeated in dozens of stories from former co-workers, customers, friends, and family members alike.

E. Mr. Litvak's Character

Mr. Litvak's genuine goodness shines through the more than 100 letters submitted on his behalf. His absence stands to directly impact the lives of each of his supporters (and undoubtedly many more) in meaningful ways. Mr. Litvak's importance to these friends and loved ones is of course dwarfed by the significance of his imprisonment to his two young children. Mr. Litvak has lived an admirable life and has never wavered from contributing wholesomely to his community. As the anecdotes articulated in these letters attest, Mr. Litvak's:

> good deeds were not performed to gain status or enhance his image. Most of them were unknown to all but a few people until the time of his sentencing. But, surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, the history and characteristics of the defendant.

United States v. Adelson, 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006) (internal quotations omitted). Along with the foregoing, friends and family members scattered around the country wrote to share with the Court many more anecdotes about the man with a heart of gold that so many love and admire. These supporters love and admire Mr. Litvak not only because he is their son, nephew, or cousin, or because he is fun to be around—they love him because he has personally impacted each one of their lives in a remarkable way. In these letters, three overlapping themes appear time and time again: (i) Mr. Litvak's selflessness; (ii) Mr. Litvak's compassion; and (iii) Mr. Litvak's steadfast devotion to his family and friends, in good times and bad.

The abundance of Mr. Litvak's generosity, which can only be touched on in this memorandum, demonstrates his true character. Mr. Litvak is a man whose character was shaped and nurtured from his earliest days by two people who could not ask for a better son—two

people who are also described as having hearts of gold—Steven and Nancy Litvak. Even during the extremely stressful time leading up to and during his trial, Mr. Litvak consistently demonstrated the same care and kindheartedness for others that has always defined his personality. One of the most poignant examples of Mr. Litvak's character comes from his lifelong friend, Rae Sandler Simon, who recounted how, on February 27, 2014, the second day of his defense case, Mr. Litvak took the time to send *her* a message. Ms. Simon wrote:

> [The message] included a picture he'd taken of the treasured photos framed in his home in New York City. I'm assuming he took the time to capture the photo the weekend before he sent it, as he was staying in Connecticut during the week. It read "Irky in our [home] every day … He's with us always. Love u so much!!! Jesse," and included a framed photo of my dad. This same day—February 27, 2014—was the eighth year anniversary of my dad's death after losing his battle with MDS, a rare form of cancer.

(Ex. A at 18, Letter from R. Simon). When Ms. Simon's father was diagnosed with cancer in 2005, Mr. Litvak was one of the first people to find out if he could be a potentially life-saving bone marrow donor match—a quite painful and time-consuming process. (*See id.* at 19; *see also* Ex. A at 47, Letter from A. Sandler). Ian Karp, another close friend, recalled a similar memory, noting that Mr. Litvak was one of the first people to call him following his mother's passing—the day before Mr. Litvak's trial began—expressing his condolences, lending his love and support, and sharing some of his own memories of Mr. Karp's mother. (*See* Ex. A at 48, Letter from I. Karp). Mr. Karp's brother, Harrison, also shared this story and one of his own, noting how when he was diagnosed with a rare and dangerous kidney disease requiring intense chemo therapy, Mr. Litvak was one of the few people who would consistently check in on him both in person and on the phone to see how he was feeling and offering to do anything he could to help. (*See* Ex. A at 49, Letter from H. Karp) ("Jesse had a wife, a family, a demanding job and his own problems but that never stopped him from making the time for me. He genuinely shared in my pain."). Lisa Keston, a long-time friend of Dr. Litvak wrote:

> I knew from the start that there was something really unique about Jesse. He was quite simply the nicest man I had ever met. . . . Over the nearly decade and a half that I have known Jesse, I have searched and searched for serious flaws in his character because in my opinion, no one can be that nice all the time. It amazes me that after all this time, I still haven't seen a side of him that is anything other than kind, good-natured and caring. There are little things that Jesse does that distinguish him from other friends' husbands. He is the only one of my friends' husbands that writes me every year on the anniversary of my brother's death to tell me he's thinking about me and that he loves me. He's the only one of my friends' husbands that writes me to congratulate me on a pregnancy or other major life events.

(Ex. A at 51, Letter from L. Keston).

Upon meeting Mr. Litvak, Dr. Litvak's mother was immediately struck with Mr. Litvak's compassion for others and his charitable spirit. She recalled that when their close family friends' two sons were diagnosed with autism, Mr. Litvak was the first to lend a hand. He made donations to the children's new school and supported and attended all subsequent fundraisers. (*See* Ex. A at 6, Letter from D. Kunen). Mr. Litvak's support of charitable causes in his community spans many organizations over many years. With both his time and financial support, Mr. Litvak has given to the Samuel Waxman Cancer Research Fund, the UJA-Federation, the Reed Academy for Children with Autism Spectrum Disorders, Go The Distance for Autism, The Phoenix House, Harlem RBI, New York Cares, and the 92nd Street Y. Mr. Litvak has also contributed countless hours volunteering in soup kitchens in New York City. The Litvaks had recently planned to found a dental clinic for children with autism in New York City. Unfortunately, these plans have been put on hold. (*See* Ex. A at 23, Letter from Drs. M. and B. Lieberman).

Devoted to education, Mr. Litvak has generously supported many schools including the 92nd Street Y Nursery School, Horace Mann, Columbia Grammar, University of Pennsylvania, Columbia University, and Emory University. He has worked with the alumni associations of these schools, lending his expertise to managing their curriculum. (*See* Ex. A at 89, Letter from

Dr. S. Hofstetter). Ellen Birnbaum, Director of the 92nd Street Y Nursery School, noted that Mr. Litvak attended all school events with "great enthusiasm." (*See* Ex. A at 52, Letter from E. Birnbaum) At the Y's annual book fair, Mr. Litvak always volunteered his time to work with the children. (*Id.*). Even while working a demanding full-time job, Mr. Litvak made time to attend all classroom-related events and parent-teacher conferences. Ms. Birnbaum stated, "I can attest from first hand experience how respectful and responsive Mr. Litvak was to teacher comments and suggestions. This became even more abundantly clear as we were dealing with issues related to his son [redacted]." (*Id.*).

Whether it be his involvement with charitable causes or simply opening his home to friends and family in times of need, Mr. Litvak's kindness warms everyone in his life. His extended family members, some of whom travelled from Buffalo to attend his trial, wrote letters to describe their beloved cousin who, despite growing up in Denver, always made sure they knew he was thinking about them. (*See, e.g.*, Ex. A at 54, Letter from R. Noonan, Jr.) ("Jesse grew up on the other side of the country, but he always made time for his little cousin. Whether it be a simple phone call to make me laugh when I was having a bad day or sending me a care package of his own clothes and toys to let me know I was in his thoughts."). Mr. Litvak's extended family has spent time each summer for more than 50 years in Hampton Beach, New Hampshire, with approximately 70 family members in attendance. This annual trip is cherished by many who wrote to share what Mr. Litvak's presence there means to them, including Mr. Litvak's uncle, Robert Noonan, who offered that "no one is more loved and respected and treasured in our family than Jesse." (*See* Ex. A at 56, Letter from R. Noonan). Each of Mr. Litvak's cousins described him as a role model and more of a brother than a cousin. Mr. Litvak inspires his cousins to be better spouses, parents, and friends. (*See, e.g.*, Ex. A at 54, Letter from

R. Noonan, Jr.) ("Jesse has always been my rock and having him in my life has made me a better man. I know someday it will make me a better husband and father and for that I am forever grateful."). Through these letters, his extended family shared fond memories of those summer vacations spent with Mr. Litvak at Hampton Beach. Describing Mr. Litvak as a humble member of their family, many did not even know of his professional success until this case came to light. (*See, e.g.*, Ex. A at 57, Letter from K. Noonan).

Mr. Litvak's cousin, Anne Noonan, is a single mother who tries her best to do the types of activities with her young daughter that typically would be done by a father. (Ex. A at 59, Letter from A. Noonan). Last year, at Hampton Beach, Ms. Noonan made it her mission to fly a kite with her daughter. Unfortunately, she simply could not get the kite to fly, and after running up and down the beach for 20 minutes, she gave up, thoroughly embarrassed, and moved on to something else. She recounted:

> It wasn't even five minutes later that I noticed Jesse working to get that kite in the air, with my daughter at his heels. It didn't take him long to get the kite in the air. My daughter [], and his children [] were so excited. They crowded around Jesse as he helped them each take turns holding the string. It was a really touching thing for me to watch.

(*Id.*). Mr. Litvak's cousin, Father Mark J. Noonan, has known Mr. Litvak his entire life as they are only one year apart in age. Fr. Noonan stated that throughout his life, he has often seen Mr. Litvak "come to the assistance of others in a remarkable way." (Ex. A at 60, Letter from Fr. M. Noonan). There is, however, one instance that Fr. Noonan shared in his letter that he believes truly shows the type of person that is Mr. Litvak. In the summer of 2009, Fr. Noonan's sister married a man who, in the following months, became physically, verbally, and emotionally abusive. In the first days that the family became aware of the tragic violence his sister was going through, it also became known that she was pregnant. Fr. Noonan learned that on the same evening Mr. Litvak found out about his much younger cousin's situation, he immediately called

her—even though, due to age disparity, they had never been particularly close—to remind her that "[Mr. Litvak] and his wife loved her, how much she is worth, how they would do anything they could to be of help to her, and how they felt she (and her baby) deserved the best possible life—and whatever it took to do that—they stood ready to be of service to her." (*Id.*). Fr. Noonan was so taken by Mr. Litvak's gesture because as his extensive experience in cases of domestic violence has shown, "family members most always shy away from a direct discussion about the problem," believing that it is no one's place to intervene. (*Id.* at 61). Mr. Litvak was the *only* extended family member that reached out to Fr. Noonan's sister during that difficult time. Fr. Noonan knows this story through his sister only and has never spoken to the Litvaks about it. (*See id.*).

An honorable and giving man, Mr. Litvak is not flawless. As indicated in the PSR, he has struggled with alcohol abuse over the course of his career. Even with his flaws, his true character remains unwavering and the stories and memories shared by his loved ones illustrate the kind of man Jesse Litvak is—the kind of man who supports those around him without thinking twice and with no expectation of anything in return. Mr. Litvak's kind acts are not done for recognition or out of obligation. Instead, he does them with a selfless and kind heart. The Court can be certain that Mr. Litvak will continue to do good for his family, friends, and others if permitted to remain in the community—a community he undoubtedly will continue to improve with his tremendous spirit and good will.

III. A SENTENCE OF NO MORE THAN 14 MONTHS' IMPRISONMENT IS SUFFICIENT BUT NOT GREATER THAN NECESSARY IN THIS CASE

A. Federal Sentencing Framework

The sentence imposed on Mr. Litvak should be driven by the "overarching" command of 18 U.S.C. § 3553(a), which "instruct[s] district courts to 'impose a sentence sufficient, but not

greater than necessary' to accomplish the goals of sentencing." *United States v. Collado*, 2008 WL 2329275, at *3 (S.D.N.Y. June 5, 2008) (quoting *Kimbrough v. United States*, 552 U.S. 85, 89 (2007) (internal quotation marks omitted)). The Guidelines are advisory and in no sense does a Guidelines calculation engender a presumption that the attendant sentence is appropriate, let alone required. *See, e.g, United States. v. Davis*, No. 07 Cr. 727, 2008 WL 2329290, at *4 (S.D.N.Y. June 5, 2008) (citing *Gall v. United States,* 552 U.S. 38, 45 (2007)). In fact, courts "may not presume that the Guidelines range is reasonable" at all or that only "extraordinary circumstances … justify a sentence outside the Guidelines range." *United States v. Cavera*, 550 F.3d 180, 189, 199 (2d Cir. 2008) (quoting *Gall,* 552 U.S. at 47); *see Nelson v. U.S.*, 555 U.S. 350, 350 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."); *Rita v. United States,* 51 U.S. 338, 351 (2007) ("sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

While the Court is instructed to use the Guidelines as an initial benchmark, they are only "one factor among several" that the Court should consider, and can and should play no role in the sentencing decision when doing so would undermine Federal sentencing objectives. *Kimbrough*, 552 U.S. at 90. As the Second Circuit has explained:

> the district court must form its own view of the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The sentencing judge is directed, moreover, to consider: a) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for that offense; b) the need to afford adequate deterrence to criminal conduct; c) the need to protect the public from further crimes by the defendant; and d) the need for rehabilitation. *Id.* § 3553(a)(2). Additionally, district courts must take into account: the kinds of sentences available, *id.* § 3553(a)(3); any pertinent Sentencing Commission policy statement, *id.* § 3553(a)(5); the need to avoid unwarranted sentence disparities among similarly situated defendants, *id.* § 3553(a)(6); and, where applicable, the need to provide restitution to any victims of the offense, *id.* § 3553(a)(7).

Cavera, 550 F.3d at 188-89. It follows that courts may consider whether a Guideline does not reflect the considerations outlined in § 3553(a), reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is otherwise appropriate. *Rita*, 51 U.S. at 350-51. Judges also "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 552 U.S. at 101.

In sum, to fulfill its duty, the Court must conduct its own "independent review of the sentencing factors, aided by the arguments of the prosecution and the defense" and exercise discretion in fitting the sentence in this case to Mr. Litvak's individual circumstances, giving "consideration [to its] own sense of what is a fair and just sentence under all the circumstances." *See Cavera*, 550 F.3d at 189; *United States v. Jones,* 460 F.3d 191, 195 (2d Cir. 2006). To be sure, "the amount by which a sentence deviates from the applicable Guidelines range is not the measure of how 'reasonable a sentence is.'" *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (citing *Gall,* 552 U.S. at 46-47). Rather, "[r]easonableness is determined instead by the district court's individualized application of the statutory sentencing factors." *Id.* Application of these factors in this case strongly support a sentence of no more than 14 months' imprisonment.

B. The PSR's Advisory Guidelines Approach is Unsupported

1. PSR's Guidelines Calculation

The government's loss calculation, adopted by the PSR, is approximately $6.3 million. This figure is the sum of $1,397,282.13 in alleged loss arising from the charged transactions, $833,199.09 in alleged losses from nine uncharged trades about which the government introduced evidence at trial, and further alleged losses from additional trades the government identified for the Probation Officer as relevant conduct. Applying this loss figure to the Guidelines, the government (and PSR) calculated Mr. Litvak's offense level as follows:

2B1.1(a) - Base Offense Level:	7
2B1.1(b)(1) - Amount of Loss over $2.5 million:	18
2B1.1(b)(19)(a)(ii) - Conviction for violation of securities law and association with a broker or dealer	4
2B1.1(b)(1)(A) - More than 10 victims	2
TOTAL OFFENSE LEVEL =	31

Because Mr. Litvak has no criminal convictions, his criminal history score was calculated as zero, which places him in criminal history category I. The PSR also states that restitution shall be ordered in this case.

2. The Offense Conduct Does Not Support a Finding of Loss

We submit that there is no loss because no actual or intended pecuniary harm has been demonstrated within the meaning of U.S.S.G. § 2B1.1 (2013). At trial, the government elected not to prove actual or intended loss in connection with any relevant transaction.[2] It instead contended that Mr. Litvak's tactics operated as a fraud because investors did not have truthful information about Jefferies's profits on each trade, and that, as a result, Jefferies made more in "secret profits" on each trade. The government tried the case on this secret gain theory and loss was not an issue at trial. The government's theory at sentencing is that "but for" the offense conduct, the trades would have been more profitable for the victim investors—a theory that depends upon a finding that absent Mr. Litvak's misrepresentations, the transactions would have taken place at a lower price with the "savings" passed along to victim investors. While such a result is theoretically possible, it is unrealistic to conclude categorically that the negotiations would have turned out that way. (*See* Ex. E, *United States v. Ghavami*, 10-cr-01217 (KMW) (S.D.N.Y July 23, 2013), Sentencing Tr. at 10:8-14) ("defendants' fraudulent manipulation of the

[2] In fact, at the pretrial conference, the government itself stated that the only portion of the Indictment alleging loss, paragraph 29, should be redacted from the Indictment and not read to the jury. *See* Pretrial Tr. at 42:22-43:3 (Feb. 7, 2014).

market may have caused municipal issuers to receive less than they otherwise would have received and [] the Treasury may have been deprived of the use of some money. The fact that there may have been losses, however, is insufficient to meet the government's burden to show that the victims did sustain a loss.").

As the government has acknowledged many times, there was no duty to speak in this case, but once Mr. Litvak elected to make a statement he was required to speak accurately. If the misrepresentations are taken out of the mix, the far more likely outcome is that Mr. Litvak would have made no statements about Jefferies's costs or markups rather than disclose Jefferies's costs. It is the difference between stating "he will sell to me at 76, will you pay me 4 ticks on top?" and "you can have these bonds at 76, will you pay me 4 ticks on top?" In a scenario where Jefferies actually pays 75-16 rather than 76, the first statement is false and is the basis for the "fraud" for which Mr. Litvak has been convicted. The second statement is silent as to cost and is not actionable. The economics of the trades, however, are identical: the investor pays the same price, the profit potential to the investor is the same, and Jefferies makes the same 20 tick profit: 16 ticks of which is undisclosed, and 4 ticks "on top." There is no economic harm, actual, intended or otherwise, to the investor from the false statement because the investor is in the exact same position either way.

In the absence of any proof as to how the negotiations may have turned out differently, the PSR's conclusion that there was a loss is speculative, and should not be accepted in light of the lack of any actual negative financial impact as of trade date on investors. *United States v. Cuti*, 2011 WL 3585988, at * 4 (S.D.N.Y. July 29, 2011) (courts "may not engage … in 'pure speculation'" in calculating "loss attributable to the offenses of conviction.") (quoting *United States v. Deutsch*, 987 F.2d 878, 886 (2d Cir. 1993)). Given the government's trial arguments,

the evidence offered in support, and the Court's instructions, the verdict cannot fairly be viewed as a determination that any investor suffered loss through an over-charge. There is in fact no basis to conclude that any investor suffered a loss.

The PSR also bases its loss finding at least in part on its view that Mr. Litvak inflated bond prices above "fair market value." (*See* Second Addendum to the PSR at 1 [Doc. #253]). Mr. Litvak objects to this finding. It is completely at odds with the government's position, which ultimately was that there was no dispute that the trades took place at fair market value, and that whether they did or not was irrelevant. (*See* Opp. Mem. to Gov. Mot. to Preclude Defendant's Experts at 19 [Doc. #164] (citing Transcript of Jan. 10, 2014 Hearing at 101:9-10)). On that basis, the Court excluded proffered expert testimony intended to rebut any claim that prices were inflated. To the extent the Court intends to rely on this finding in the PSR, Mr. Litvak requests a *Fatico* hearing for the purpose of rebutting this erroneous conclusion.

It should also be noted that 21 of the additional 56 relevant conduct transactions introduced—totaling more than $1.9 million in alleged loss—are based on evidence that is either speculative, incomplete, or imprecise. (*See* Ex. F (Ex. A to Letter containing Mr. Litvak's objections to the PSR from Patrick Smith to Ray Lopez dated June 10, 2014, at 4)). For sentencing, the evidence proffered in support of inclusion as part of relevant conduct is insufficient and these transactions should be disregarded.

3. Gain to Jefferies is Not a Proxy for Loss

It is not disputed that Jefferies made more money than Mr. Litvak represented it would on the relevant trades. The Court, however, cannot increase the offense level by substituting for victim loss the difference between Jefferies's represented and actual gains on these trades: before gain may be used as "loss" for purposes of the loss enhancement, there must be a finding that a victim sustained pecuniary harm, which is missing here. U.S.S.G. § 2B1.1, App. Note

3(B) (2013) ("The Court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."); *see United States v. Miller*, 588 F.3d 560, 567 (8th Cir. 2009) (holding that no loss enhancement was appropriate where there was no actual or intended loss even though defendant's gain could be calculated); *United States v. Haddock*, 12 F.3d 950, 960-61 (10th Cir. 1993) ("[T]he enhancement is only for loss to victims, not for gain to defendants. The defendant's gain may be used only as an 'alternative estimate' of that loss; it may not support an enhancement on its own if there is no actual or intended loss to the victims.").

4. Mr. Litvak is Eligible For a Two-Level Reduction For Acceptance of Responsibility

Contrary to the position taken in the PSR, Mr. Litvak is also eligible for a two-level reduction for acceptance of responsibility. At trial, the defense acknowledged all of the conduct that the government contended was wrongful, including the untruthfulness of statements Mr. Litvak made to counterparties. Mr. Litvak's submission to the probation department also acknowledged and accepted responsibility for making misrepresentations. Mr. Litvak thus fits into the class of defendants who have asserted legal defenses at trial yet remain eligible to receive the acceptance of responsibility adjustment. The assertion of trial defenses to the characterization of Mr. Litvak's conduct including the materiality of the statements and whether they could constitute criminal fraud under the circumstances is no bar to this adjustment. *See*, *e.g.*, *United States v. Garcia*, 182 F.3d 1165, 1173-74, 1177 (10th Cir. 1999) (upholding district court's granting of acceptance of responsibility reduction, despite the fact that defendant was convicted by a jury, where defendant admitted his involvement in the offense but argued that the crime was not his fault by using the entrapment defense); *United States v. Gauvin*, 173 F.3d 798, 805-806 (10th Cir. 1999) (upholding acceptance of responsibility reduction, despite the fact that

defendant was convicted by a jury, where defendant admitted all of the conduct with which he was charged and simply disputed whether his acknowledged factual state of mind met the legal criteria).

5. Appropriate Advisory Guidelines Calculation

The base level offense under Section 2B1.1(a) of the Guidelines is 7 because Mr. Litvak was convicted of securities fraud, which carries a maximum sentence of 20 years. Mr. Litvak is eligible for a two-level reduction for acceptance of responsibility. He does not contest the four-level increase for a person associated with a broker-dealer and the two-level increase because the offense conduct involved more than 10 victims. Since the counter-parties did not suffer any pecuniary harm, no enhancement under U.S.S.G. § 2B1.1(b)(1)(J) is warranted.[3] The offense level is thus 11. Because Mr. Litvak has no prior convictions, he is in Criminal History Category I. Accordingly, the applicable Guidelines range is 8-14 months (Zone B).

6. The Guidelines Do Not Authorize a Restitution Order

As "the purpose of restitution is essentially compensatory," *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006), the Mandatory Victim Restitution Act limits restitution to "the full amount of each victim's loss," 18 U.S.C. § 3664(f)(1)(A), and requires that any restitution order be tied to the "victim's actual, provable, loss." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012); *United States v. Marino*, 654 F.3d 310, 319-20 (2d Cir. 2011) ("[R]estitution is authorized only for losses that [were] … directly caused by the conduct composing the offense of conviction and only for the victim's actual loss."); U.S.S.G. § 5 E1.1. (2013) (restitution shall be ordered "for the full amount of the victim's loss"). It follows that in the absence of actual loss,

[3] Erroneously included in the government's summary chart on page 7 of its submission to the Probation Officer is the Third Point side of the trade charged in Count 6. On February 13, 2014, after a duplicitous objection was raised by the defense, the government vowed not to seek to prove at trial that the fraud charged in Count 6 was committed in the purchase of the INDX bond from Third Point LLC. *See* Letter from Jonathan Francis to Patrick Smith, dated Feb. 13, 2014.

an order of restitution is unwarranted. Here, the government failed to prove actual loss and cannot rely on any victim's theoretical "disappointed expectations" of obtaining a better price in seeking restitution. *Boccagna*, 450 F.3d at 119; *see United States v. Germosen*, 139 F.3d 120, 130 (2d Cir. 1998).

C. A Downward Departure Is Appropriate

1. The PSR's Approach to Loss Overstates the Seriousness of the Offense

If the Court accepts the PSR's loss calculation, the Court should then grant a downward departure from the resulting offense level under the Guidelines because an 18-level upward adjustment based on loss overstates the seriousness of the offense. *See* U.S.S.G. § 2B1.1, App. Note 20(C) (2013). Moreover, a downward departure should also be granted because the offense conduct falls outside of the "heartland" of fraud cases. This is not the typical "fraud" case for which the Guidelines were designed. *See* U.S.S.G. Ch. 1, Pt. A, § 4(b) (2013) (The Commission intended that "w[h]en a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.").

(a) Lack of Economic Harm

This case is a textbook example of why "one-size fits all" is not an approach that works in fraud cases. Ordinarily, criminal investment fraud cases involve hard out-of-pocket loss of principal, or some reduction in the investment value of a security as a result of the offense conduct. *See, e.g.*, U.S.S.G. § 2B1.1., App. Note 3(C)(v) (2013) (stating that the estimate of loss in economic fraud offenses is determined, in part, by the "reduction that resulted in the value of equity securities or other corporate assets"); U.S.S.G. § 2B1.1, App. Note 3(F)(ix) (2013) (stating that actual loss in cases of fraudulently inflated securities is determined, in part, by assessing the difference in price of the security "during the period that the fraud occurred" and

"during the 90-day period after the fraud was disclosed to the market"). The "loss" here is notional at best. Investors paid a single price for RMBS with no "extra" charges for markups, fees or commissions. Transaction costs were not separately booked—they were embedded in the price paid for bonds. Since the bonds traded at fair market value prices—a point the government does not contest—as of the trade date investors received a fairly valued asset in return for cash. To the extent the Court believes there was an overcharge on fees or commissions embedded in the price, that extra "cost" was immediately recouped in the value of the security purchased. Investors therefore suffered no loss of principal—a circumstance that makes this case fundamentally different from investment fraud cases in which the security received is fraudulently overvalued or, as a result of misrepresentations, becomes worthless.

Mr. Litvak never set out to cause economic harm to investors—a fact that takes his conduct outside the heartland of fraud defendants. *See United States v. Broderson*, 67 F.3d 452, 455 (2d Cir. 1995) (affirming downward departure on ground that loss enhancement "significantly overstated the seriousness of [defendants'] conduct, and that there were mitigating circumstances of a kind or degree not adequately taken into consideration in the Guidelines, where, *inter alia*, defendant "had sought only to benefit his employer[ ] and had received no personal benefit from the fraud … [and] under existing market conditions, the contract was favorable to the government [victim]"); *United States v. Monaco*, 23 F. 3d 793, 799 (3d Cir. 1994) (approving of downward departure when loss overstated seriousness of offense, in part because defendant's intent "was not to steal money outright from the United States," but only to expedite payments that would have been due and thus "obtain a de facto interest-free loan").

(b) Lack of Personal Gain to Mr. Litvak

The "loss" figure also overstates the seriousness of the offense because, as highlighted above, the government's contention that Mr. Litvak stood to and did gain personally from the

offense conduct is without evidentiary support. *See Broderson*, 67 F.3d 452 at 457-59; *United States v. Walters*, 87 F.3d 663, 671-72, n.8 (5th Cir. 1996) (affirming downward departure where loss calculation "overstates the seriousness of the particular defendant's conduct" as defendant "fail[ed] to receive a personal benefit" from the scheme); *United States v. Oakford Corp.*, 79 F. Supp. 2d 357, 368 (S.D.N.Y. 1999) (finding that Guidelines overstated seriousness of offense where "each of the defendants personally realized only a small portion of the overall gain or profits" from scheme); *United States v. Stuart*, 22 F.3d 76, 82-83 (3d Cir. 1994) (finding that a nine-level loss enhancement may overstate defendant's criminality because he only personally received a maximum of 1.6% of the government's loss figure). The only evidence relevant to this issue is unhelpful to the government, namely that at Jefferies the bonus of a trader, such as Mr. Litvak, cannot be linked to any particular trade, and that Mr. Litvak's bonus was entirely discretionary, as memorialized in his 2008 employment agreement. (*See* Tr. at 1951:6-1952:1 (Eveland)). As the evidence showed, all of the extra profit earned as a result of the offense conduct was retained by Jefferies. The RMBS bonds Mr. Litvak sold belonged to Jefferies and the proceeds generated belonged to Jefferies. The government was unable to prove at trial, and cannot prove in connection with sentencing, that Mr. Litvak's compensation was ever upwardly adjusted as a result of the offense conduct. The absence of proof on this issue in fact resulted in the exclusion of evidence of Mr. Litvak's compensation. And, even if one accepts that Mr. Litvak's compensation was enhanced to some extent due to the offense conduct, the amount of any enhancement is indeterminable, and would certainly have been marginal at best given the success of his trading book overall in 2009 and 2010. Thus, this case is well-outside the heartland, which "in effect, resides in a case where loss and gain are roughly coincident." *See United States v. Costello*, 16 F. Supp. 2d 36, 40-41 (D. Mass. 1998) (downward departure from

level 24 to 15 was "appropriate" where, among other things, the loss enhancement generated offense level seriously overstated the offense as defendants' personal gain was not nearly commensurate with loss); *United States v. Redemann*, 295 F. Supp. 2d 887, 899-900 (E.D. Wis. 2003) (granting downward departure where "defendant may have improperly gained nothing from his crime; at most he received $500,000, yet the loss amount attributed to him was five times that").

(c) Investors Enjoyed Outsized Returns

If the Court accepts the PSR's loss calculation, it should then consider the overall very positive economic impact on Mr. Litvak's counterparties. Unlike the typical or "heartland" investment fraud that leaves investors holding a substantially devalued security, this case featured an exchange at fair market value plus extraordinary returns on investment. *See United States v. Gordon*, 291 F.3d 181, 201 (2d Cir. 2002) (reasoning that "selling worthless stock" exemplifies "the heartland of fraud offenses"). At trial, the defense had sought, through expert testimony and through witnesses from the various counterparties, to demonstrate that the RMBS purchases at issue were highly profitable investments. The defense sought to introduce this evidence to rebut the Indictment's actual loss allegations, which while not proven at trial, are now the predicate for the loss enhancement the government advances.

While the Court excluded this evidence, it is certainly relevant to sentencing because it indeed shows that no pecuniary harm was experienced. From an investor's perspective, what matters most is return. Here, the returns that the PPIP investment funds enjoyed on the bonds purchased through Mr. Litvak actually enhanced fund returns because these bonds generated more return than each fund's annualized return. For example, the Harborview and Lehman bonds Jefferies sold to AllianceBernstein ("AB"), charged in Counts 1, 2, and 3 of the Indictment, generated rates of return for AB of 14.95%, 15.64%, and 15.63%, respectively. The

SARM and WFMBS bonds charged in Counts 4 and 5 earned 12.13% and 13.04%, respectively, for the victims on those trades. This chart shows these figures and the total profits expressed in dollars.

Bond	Ind. Count	Total Amount Spent	Total Amount Received	Net Profit	Rate of Return
HVMLT 2006-10 2A1A	1	($6,977,028)	$9,098,518	$2,121,490	14.95%
LXS 07-15N 2A1	2	($20,118,278)	$26,133,267	$6,014,989	15.64%
HVMLT 07-7 2A1A	3	($6,196,696)	$7,149,469	$952,772	15.63%
SARM 05-21 7A1	4	($23,376,670)	$27,244,182	$3,867,512	12.13%
WFMBS 06-AR12 1A1	5	($1,178,107)	$1,512,342	$334,235	13.04%

To truly appreciate the extent of the profits reported by Treasury, one must understand that the PPIP funds were 200% leveraged—for every dollar of equity invested from TARP and privates sources, TARP loaned each PPIF a dollar in debt financing, increasing the total purchasing power.[4] Returns calculated for each PPIF are returns to equity. Thus, the RMBS bonds purchased from Jefferies through Mr. Litvak were "better than average" for these funds and enhanced their returns. If the government disputes any of these calculations, Mr. Litvak reserves the right to prove these facts at a *Fatico* hearing.

Other alleged victims, like MFA Financial, still hold the bonds they purchased from Jefferies, and these bonds, like those referenced above, have performed extremely well. For example, MFA purchased the INDX bond, charged in Count 6, from Jefferies for $42.25 in May 2009. (*See* Ex. G (MFA DOC 027); Ex. H (GX 60B)). According to documents received from

[4] *See* Selecting Fund Managers for the Legacy Securities Public-Private Investment Program, Special Inspector General for the Troubled Asset Relief Program ("SIGTARP's Selecting Fund Managers Report") (Oct. 7, 2010), at 5, 31, *available at* http://www.sigtarp.gov/Audit%20Reports/Selecting%20Fund%20Managers%20for%20the%20Legacy%20Securities%20Public-Private%20 Investment%20Program%2009_07_10.pdf (last visited June 27, 2014).

MFA, as of November 2013, it valued the bond at 72, which, including principal and interest received, indicates a total return of more than 92%. (*See* Ex. I (MFA DOC 080-MFA DOC 081)).

Unsurprisingly, Mr. Litvak's victims consistently testified that they did not overpay for the RMBS bonds and that they would do the trades again at the same transaction prices. Mr. Canter, the government's star witness, testified in substance that:

> on each of the deals, [he] got the bond, at the price … [he] determined was in the best interest of the funds and regardless of anything that Jesse … or Beth Starr or anyone else at Jefferies did … [he] never bid on a bond at a level that … [he] thought was too high to pay for that bond on that day … [In his view he] never overpaid for a bond, in terms [of] an appropriate price.

(Tr. at 495:16-496:22 (Canter)). This is because—as also testified to consistently—a marginally greater embedded markup does not alter any of the economics of the trades.[5] These sophisticated money managers received or sold the bonds in question at a price they wanted, knew, and accepted. The lack of economic impact is reinforced in that Mr. Litvak's customers would execute the same trades at the same prices again regardless of Jefferies's actual profit on the trades.[6]

(d) Mr. Litvak's Family Circumstances Warrant a Downward Departure

Mr. Litvak is entitled to a downward departure for Family Ties and Responsibilities pursuant to U.S.S.G. § 5H1.6. Mr. Litvak has two young children, one of whom has [redacted]

[5] *See, e.g.*, Tr. at 498:19-22 (Canter) ("The profit potential of the bond on trade date, once . . . [parties] agreed to the price, was not altered by any information . . . learned after the fact" about broker's profit). The relative importance of these markups is reinforced by the fact that generally, investment managers are not even aware of their amount, and certainly do not track them for any purpose. *See, e.g.*, Tr. at 893:13-22 (Norris); Tr. at 1036:12-1037:2 (Wollman) ("records tracking transaction cost or fees paid to broker/dealer" not kept); Tr. at 1128:22-1129:10 (Lemin) ("The trade tickets of this format do not reflect any commissions")).

[6] *See, e.g.*, Tr. at 628:21-629:3 (Canter) ("perfectly happy with the trade" at the "price" paid; Tr. at 644:4-11); Tr. at 822:9-12; 823:3-14 (Vlajinac) ("I would say that I achieved best execution with the parameters that were set to me internally, whether or not I thought there was a value to it at 76, I don't know. Would I do it again at 76, just based on price, probably.")).

[redacted]. Since Dr. Litvak is employed full time, Mr. Litvak has been the principal caregiver for his children and has played a significant role in his six-year-old son [redacted]. Mr. Litvak reviews [redacted] with him, and [redacted]. These tasks, which are best fit for a parent, must be diligently completed daily. Prolonging Mr. Litvak's absence from the home will greatly impede his son's progress and will prevent him from continuing to advance both at school and in the home, with lifelong ramifications. (*See* Ex. J, *United States v. Whittier*, 07-cr-00087 (JSR) (S.D.N.Y. Oct. 15, 2007), Sentencing Tr. at 17:10-22) (granting four offense level downward departure because defendant was "a very significant component in the development of his autistic child.").[7]

Numerous close family members, teachers and professionals involved in [redacted] education and care expressed these sentiments in letters to the Court. Ms. Logue stated that [redacted] is a "very vulnerable little boy . . . at great risk for [redacted]. . . . As school gets more and more challenging, [redacted] will need even greater support from his loving father." (*See* Ex. A at 25, Letter from D. Logue). Ellen Birnbaum, Director of the 92nd Street Y Nursery School, who has known the Litvaks since 2008, said that Mr. Litvak's "insightful responses to [redacted] needs and development have been crucial to his child's progress." (*See* Ex. A at 52, Letter from E. Birnbaum). Estelle Hofstetter, a developmental specialist, has witnessed [redacted] first-hand and expressed her expert opinion on the ramifications of Mr. Litvak's absence from his family. She wrote that the "separation of Jesse from his son would be

[7] John Whittier, a former hedge fund manager, pled guilty to securities fraud for perpetrating a scheme to defraud hedge fund investors of $88 million, while fraudulently gaining $5.5 million from stock sales and managing accounts. Although Whittier was the primary person responsible for perpetrating the fraud and the guideline range was 188-235 months, Whittier was sentenced to 36 months. The court reasoned that the victims were sophisticated investors and "not widows and orphans." *See* Ex. J, *Whittier*, Sentencing Tr. at 32:4. The court also took into account the good deeds Mr. Whittier performed in his life and the fact that some of the victims requested a non-custodial sentence.

extremely detrimental for [redacted]." (*See* Ex. A at 62, Letter from E. Hofstetter).

> The manner in which Jesse responds to [redacted] is incredible to watch as he takes an [redacted] child and calms him with his soft comforting words and gentle hugs. Since Jesse has been out of work, and spends a great deal of time with [redacted] after school and on the weekends, the progress has been immeasurable.

(*Id.*). Mr. Litvak's mother-in-law wrote "Jesse spends countless hours with [redacted] every day, reinforcing what his teachers and therapists are working to accomplish. . . . If Jesse is removed from [redacted], I know the effect will be permanently devastating to this fragile child." (*See* Ex. A at 6, Letter from D. Kunen). Similar sentiments were also expressed by Mr. Litvak's parents. (*See* Ex. A at 3, Letter from S. and N. Litvak) ("If Jesse were to be out of his son's life at this critical time, we fear [redacted] will never recover.").

In fact, Mr. Litvak's family has already witnessed the effect of Mr. Litvak's absence on [redacted]. Dr. Litvak watched her sweet, affectionate, and loving child act out physically and with increased impulsivity during her husband's trial. (*See* Ex. A at 11, Dr. R. Litvak). Mr. Litvak's father-in-law recounted "during the several weeks that Jesse was away from [redacted] during the trial period, [redacted] teachers . . . noticed a regression in his behavior. Once the trial was over, and Jesse resumed the daily care and attention to [redacted], there was an immediate rebound in the child's attitude." (*See* Ex. A at 5, Letter from M. Kunen).

[redacted], too, will be "totally shattered" without her father's love and support. (Ex. A at 3, Letter from S. and N. Litvak). Given the extra attention [redacted] requires, the effect of Mr. Litvak's absence on [redacted] will be multiplied. As Mr. Litvak's parents noted, [redacted] has "outgrown many of her childhood fears and shyness, in great measure because of the steady, calm and tender presence of her father." (*Id.*). Like [redacted], [redacted] teachers and loved ones noticed a difference in her behavior as a result of Mr. Litvak's absence during trial. [redacted] second-grade teachers

noted that [redacted] found it challenging to function during this time. She was unable to focus and became extremely needy, felt physically ill, and asked to visit the school nurse multiple times a day. (*See* Ex. A at 63, Letter from A. Savvas and H. Lau). Mr. Litvak's constant love and support is vital to his children's emotional development and the negative impact on their lives—if he is taken from them—will be devastating and irreversible.

D. A Significant Downward Variance From the PSR's Guidelines Calculation is Warranted Under Title 18, United States Code, Section 3553(A)

1. Mr. Litvak's Personal History and Characteristics

Like other recent white collar defendants, Mr. Litvak is "supported by a large community of family and friends, and a wife and child[ren], who have attested to his good character in written submissions to the court." *United States v. Butler*, 2011 WL 4073672, at *4 (E.D.N.Y. Sept. 13, 2011). As shown in these letters and as further detailed above, Mr. Litvak is a loving husband to his wife, Dr. Litvak, and a devoted, hands-on father to his two young children, [redacted] and [redacted]. Any prison time will create a severe hardship for Mr. Litvak's family, but a long sentence will be truly devastating to his wife and children who so desperately rely on his physical and emotional support. Most tragic will be the effect on Mr. Litvak's [redacted] son, [redacted], who has made substantial progress as a result of Mr. Litvak's unwavering dedication to [redacted]. If Mr. Litvak is removed from his life, the effect on [redacted] will be incredibly destructive and likely irreversible. (*See* Ex. A at 26, Letter from D. Logue; Ex. A at 62, Letter from E. Hofstetter). A long sentence will also be burdensome for Mr. Litvak's aging parents and the extended family members who have come to rely on Mr. Litvak's goodwill and assistance. Many other people, including community members who benefit from Mr. Litvak's tremendous philanthropic spirit, also will be negatively impacted by Mr. Litvak's absence, if an

unduly long term of incarceration is ordered. Mr. Litvak's community (and society at-large) will be far better off if Mr. Litvak is permitted to return soon as an active, contributing member.

2. The Nature and Circumstances of the Offense

There are numerous ways in which Mr. Litvak's offense characteristics support a substantial variance. There is no evidence that Mr. Litvak personally profited from the offense conduct. His customers possessed a high degree of sophistication and made trading decisions based on their own analytics and significant professional experience. They acquired the agreed-upon securities at an accepted price that met their valuation, and made money as a result. The misrepresentations here 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. The amount of alleged "loss"—Jefferies's secret profits—could not have impacted the funds or their investors in any meaningful way. All of these circumstances situate this case well-beyond the heartland of criminal securities frauds. The government has in fact acknowledged that Mr. Litvak has been singled out from within Jefferies and from within an industry where the offense conduct has been prevalent. Finally, while the loss enhancement should not apply here, and need not be accorded weight in any event, certainly, under these circumstances, when it drives Mr. Litvak's sentencing range beyond the realms of reasonableness it should be disregarded altogether.

(a) The Offense Conduct Did Not Result in Personal Gain to Mr. Litvak

First, Mr. Litvak did not benefit financially from the offense conduct. Any attempt to correlate Jefferies's "secret gain" and Mr. Litvak's compensation is an empty exercise, and nothing in the record suggests otherwise. Mr. Litvak conducted approximately 4,750 RMBS

trades while employed at Jefferies.[8] The 11 transactions charged in the Indictment combined with the nine uncharged transactions amount to a fraction of one percent of Mr. Litvak's overall trading activity. The additional trades recently identified, including those for which there is insufficient evidence, brings that figure to about 1.5 percent. During the Indictment period (2009 to 2011), Mr. Litvak generated approximately $58 million in net profit for Jefferies, the overwhelming portion of which was earned through trades not alleged to be tainted by unlawful conduct. This figure dwarfs the now $6.3 million of Jefferies's profits the government maintains were unlawful.

(b) The Sophisticated Counterparties Suffered No Economic Harm

Mr. Litvak's customers possessed a high degree of sophistication and made trading decisions based on their own analytics and significant professional experience. They were not vulnerable victims, and were not targeted or pursued by Mr. Litvak in the way often found in fraud schemes. More importantly, as detailed above, Mr. Litvak's statements about Jefferies's costs did not cause his counterparties to pay too much for RMBS. The RMBS Mr. Litvak sold his counterparties at prices consistent with these counterparties' valuations enabled them to reap significant profits on virtually each trade charged. There is no evidence these counterparties could have bought these RMBS elsewhere, and even if they were available, there is no evidence that a better price was attainable. In addition, each customer testified that he was in full control of the decision to purchase or sell the security at all times. (*See, e.g.*, Tr. at 496:11-22 (Canter)). Mr. Litvak did not make that decision for them.

The actual amount of the alleged loss was a rounding error for these counterparties, and would and did have zero impact on the funds. Perceiving the alleged loss as a percentage of the

[8] See Mem. of Law in Supp. of Def.'s Mots. *in Limine* at 2, Dec. 3, 2013 [Doc. #104-1].

total value of the fund's bond holdings at month end for the relevant trade date informs Mr. Litvak's culpability and any conception of victim impact. In the charged transactions for which the government obtained convictions, these percentages range from 0.028% on the high end to 0.0000133% on the low end. While in the aggregate these figures enter the million plus dollar range, that is a product of the funds' trading power and the size of the positions in which they transacted. These "loss" figures are just not informative qualitatively on Mr. Litvak's offense conduct. For point of reference, for an investor with $1,000,000, a loss of 0.028% is $280. For that same investor, a loss of 0.0000133% is 13 cents.

(c) The Offense Conduct is Not Regularly Charged Criminally

Mr. Litvak's conduct is rarely the subject of criminal charges. Criminal securities fraud cases are not brought where misrepresentations relating to price do not cause victims to pay more than fair market value and have no bearing whatsoever on the investment value of the securities. That is certainly so when the alleged victims acquired the agreed-upon securities at an agreed-upon price that met their valuation of the security, the transactions in question generated significant profits for the alleged victims, and some of the alleged victims even testified that they would repeat the transaction at the same price. This is not a fraud case where companies suffered, pensions lost, employees laid off, or lives in any way impacted.

Mr. Litvak's case is truly unique and he should be sentenced accordingly. In that regard, individuals operating in the financial markets who are more culpable in that their conduct caused actual loss and real harm—are regularly not charged criminally with securities (or other species of) fraud. For example, the SEC charged LatAm Investments employees, Fabrizio Neves and Jose Luna, for fraudulently overcharging customers approximately $36 million through hidden

markup fees as high as 67% on structured notes transactions.[9] To hide their markups, they first traded the notes with one or more accounts in the name of offshore nominee entities they controlled. They also altered the structured note term sheets in half of the transactions by either whiting out or electronically cutting and pasting the markup amounts over the actual price and trade information, and then sending the forged documents to customers. Neves and Luna were both barred from the financial industry, and Luna was ordered to pay disgorgement and prejudgment interest. Neither, however, was charged criminally.

FINRA suspended David Sirianni for 60 days and fined him $100,000 in connection with a fraudulent markup scheme at Oppenheimer, where he was the head municipal bond trader.[10] Sirianni purchased municipal bonds from a broker-dealer on Oppenheimer's behalf, held the bonds in inventory at least overnight, and then made the bonds available for resale at an unfair price to the firm's customers. Sirianni overcharged customers by marking up bonds by as much as 16%. In total, 89 transactions involved undisclosed markups of more than 5% over the cost of the bonds, and in 54 of those transactions, the markups exceeded 9.4%. Oppenheimer was ordered to pay restitution to customers who were charged unfair prices by Sirianni. Sirianni was not charged criminally.

Max International and its CEO David Isolano were also charged by FINRA in connection with a fraudulent markup scheme.[11] In one instance, Max brokers made numerous misrepresentations to customers regarding pricing for the purpose of securing what amounted to undisclosed markups of 54.64%. On top of the egregious, undisclosed markups, Max charged 55

[9] *In the Matter of Neves*, SEC Admin. Proc., No. 3-15765 (Feb. 21, 2014).

[10] *Dep't of Mkt. Regulation v. Sirianni*, FINRA Letter of Acceptance, Waiver and Consent, No. 20090181025-02 (Oct. 7, 2013).

[11] *Dep't of Enforcement v. Max Int'l Broker-Dealer*, FINRA Disciplinary Proc., No. 20070072538-03 (Dec. 10, 2010).

of its customers an additional disclosed commission, increasing its total markup in excess of 60% on these trades. With these disclosed commissions Max deceived their customers into believing that Max's profits on the trades were limited to these commissions when in fact they were much greater. In another instance, Max, under Isolano's direction, fraudulently made undisclosed commissions of 27% from a block purchase and subsequent same-day sale to customers. Max was ordered to pay restitution and a fine, while Isolano was suspended six months and fined $40,000.

Fraudulent overcharges have brought similar fines and suspensions from FINRA, and no criminal charges in numerous other instances. For example, FINRA suspended Shlomi S. Eplboim for 10 days for misrepresenting his cost to customers and charging undisclosed markups of 4.35% to 8.11% on 246 trades.[12] William Kiefer misrepresented the standard fee structure (depriving customers of front-end loads to which they were entitled for purchasing mutual funds) and was suspended by FINRA for 90 days and fined and $15,000.[13]

In its exercise of discretion, the government pursued criminal charges against Mr. Litvak. Yet, other individuals who engage in similar, and many who engage in more egregious conduct, are left to face civil charges alone. This striking discrepancy reflects the historical perspective of criminal authorities on Mr. Litvak's offense conduct—their prevailing position on the seriousness of the offense in this case—and provides further support for the defense's proposed sentence. Whatever aggravating factors the government may argue exist in this case cannot transform what has been treated as a civil violation into a crime deserving of a jail sentence greater than the defense's proposal.

[12] *Dep't of Enforcement v. MAXXTRADE, Inc.*, FINRA Disciplinary Proc., No. 2008011759202 (Mar. 16, 2012).

[13] *Dep't of Enforcement v. Kiefer*, FINRA Disciplinary Proc., No. 2009016691403 (Feb. 12, 2013).

(d) Mr. Litvak's Conduct Was Consistent With Others at Jefferies, Including Management, and Condoned

The established trading culture at Jefferies throughout the relevant time period certainly places Mr. Litvak's conduct into context and mitigates in his favor. (*See* Ex. K, *United States. v. Serageldin*, 12-cr-00090 (AKH) (S.D.N.Y. Nov. 22, 2013), Sentencing Tr. at 9:16-21; 38:14-21) (employer-bank "created a climate that made it conducive to what [defendant] did," which served to "mitigate his culpability in a sense.").[14] As the Court is aware, shortly before Mr. Litvak's trial, Jefferies disclosed a non-prosecution agreement with the government to resolve potential charges relating to Mr. Litvak's offense conduct and other similar conduct at Jefferies, agreeing to pay $25 million in restitution and criminal penalties. The government confirmed this agreement on March 12, 2014, along with the filing of parallel settled civil charges against Jefferies for failing to reasonably supervise employees on its mortgage-backed securities desk who made misrepresentation to customers about pricing between 2009 and 2011. The government's position, as reflected in this agreement, is that others at Jefferies, in addition to Mr. Litvak, "lied to customers about the prices that the firm paid for certain mortgage-backed securities, thus misleading them about the true amount of profits being earned by the firm in its trading."[15]

[14] Kareem Serageldin was sentenced to 30 months in prison for mismarking Credit Suisse's records and hiding over $100 million in losses on one of the company's mortgage-backed securities trading books. *See* Ex. K, *United States. v. Serageldin*, 12-cr-00090 (S.D.N.Y. Nov. 22, 2013), Sentencing Tr. at 37:3-12; 51:19. Serageldin was responsible for pricing RMBS bonds in a way that reflected their fair value. Instead, he directed his team to inflate the price of bonds to artificially reach certain P&L targets and create the appearance of profitability. By manipulating these records, Serageldin directly contributed to the bank's write-down of $540 million in assets. Judge Helerstein estimated the loss attributable to Serageldin's conduct at roughly $4.5 million and calculated a guidelines range of 57-60 months. *See* Ex. K, *Serageldin*, Sentencing Tr. at 3:14-18.

[15] U.S. Attorney Deirdre Daly has stated that "[n]ot only did management tolerate these illegal practices, but the culture within the division encouraged the fraudulent conduct." FBI Press Release, *Jefferies LLC Agrees to Pay $25 Million Related to Fraudulent RMBS Trading Activity* (Mar. 12, 2014), *available at* http://www.fbi.gov/newhaven/press-releases/2014/jefferies-llc-agrees-to-pay-25-million-related-to-fraudulent-rmbs-trading-activity. Christy Romero of SIGTARP observed that "Jefferies supervisors were aware of the lies but turned a blind eye." *Id.*

In fact, senior Jefferies employees engaged in the same tactics as Mr. Litvak, and Mr. Litvak was following their direction. For example, in Mr. Litvak's Indictment, the government charged "that Litvak informed his supervisor, [Bill Jennings,] of misrepresentations that he was planning on making to a RMBS buyer, to which the supervisor responded 'boom!' before completing the purchase of the RMBS from the seller." (Government's Motion *in Limine* To Preclude Evidence Or Argument Concerning Purported Selective Prosecution at 1 (Dec. 3, 2013) [Doc. #100]; Indictment ¶ 37(d)-(e)). To During Mr. Litvak's trial, Johan Eveland, Co-Head of Jefferies's Global Fixed Income Division, testified regarding inventory misrepresentation trades involving multiple Jefferies sales people and traders, including Mr. Eveland and Mr. Jennings. (Tr. at 1694:12-1701:8; 1809:24-1810:2; 1813:10-22 (Eveland)). This testimony and related evidence demonstrated Mr. Litvak's supervisors knew about, condoned, and participated in the very conduct charged here.[16] Mr. Eveland further testified that no "process" was followed regarding any of the individuals involved, including Mr. Jennings and himself. (Tr. at 1821:21-1822:5 (Eveland)). He testified that these practices are acceptable so long as purposely vague words like "in touch with" are used in negotiations, hardly meaningful guidance to traders at the firm. (Tr. at 1868:11-23 (Eveland)).

The government acknowledges that Mr. Litvak was "likely affected to some degree by conditions and co-workers at Jefferies at [sic] permitted or encouraged his criminal conduct." (Letter from Jonathan Francis to Ray Lopez dated June 10, 2014, at 6). So, Mr. Litvak's offense conduct must be evaluated in the context of an environment where, among others, his two long-time supervisors and mentors, Bill Jennings and Johan Eveland, condoned and participated in the actual offensive conduct or other equivalent conduct.

[16] One of the trades about which Mr. Eveland testified (the FNR bond trade in which Jesse had no involvement) generated secret profits, or "loss" as the government would have it, of $2,656,250. This amount exceeds the loss on

(e) The Financial Industry Promoted the Offense Conduct

The "characteristics and circumstances of the financial industry" in which Mr. Litvak worked and the offense conduct transpired are highly relevant mitigating factors and support the defense's proposed sentence. *United States v. Butler*, 2011 WL 4073672, at *3. As established at trial, in addition to the widespread deployment of these tactics at Jefferies, many of the victims engaged in the same or similar-type conduct to Mr. Litvak. For example, a trader from Invesco testified that he understands that sales tactics occur in the RMBS market, including broker-dealers backing up bids, (Tr. at 862:24-863:3 (Norris)), and that it is okay to put out misleading cover (the second place bid) because it is volunteered information (Tr. at 926:7-23 (Norris)). Another trader admitted that it was possible he was lying to Mr. Litvak when negotiating the LXS transaction in Count 10 (Tr. at 985:5-13 (Wollman)). Mr. Canter stated that sales tactics such as providing inaccurate cover are acceptable when it benefits his investors. (Tr. at 573:3-574:1 (Canter)).

The trial testimony here reinforces these concerns—demonstrating that Mr. Litvak was not a rogue trader, or outlier in the professional securities markets. Rather, his conduct was consistent with that of many others within his firm, including management, and across the industry. That does not justify or excuse his tactics; it does however bear on the circumstances of his offense and how he should be sentenced. At the same time, Mr. Litvak's individualized assessment certainly prohibits scapegoating for the travails of the global banking industry.

(f) The Loss Enhancement Offers No Guidance in Determining an Appropriate Sentence and Should Not Be Utilized in This Case

As described above, the PSR's Guidelines calculation is driven principally by the alleged loss it attributes to the offense conduct and produces a sentencing range the imposition of which

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the transactions introduced at Jesse's trial. This trade is not part of Jefferies's settlement with customers.

would result in a sentence incongruous with the Court's statutory mandate. This is precisely the type of situation where due to the impact of the loss enhancement, the Guidelines fail to "provide reasonable guidance," and are of no "help to any judge in fashioning a sentence that is fair, just, and reasonable." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006). "Loss" cannot "bear the weight assigned to it" in the PSR in determining Mr. Litvak's sentence, and any suggestion otherwise cannot withstand the "the boundaries of reasonableness." *United States v. Rigas*, 585 F.3d 109, 122 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 191). A sentence at this level is "[d]ramatically more severe than can be justified by the crime … committed" and well-beyond "the range of permissible decisions" in this case. *Corsey*, 723 F.3d at 378; *Cavera*, 550 F.3d at 189. In a case where its conception of "loss" features no actual harm and no gain to the defendant, the government cannot offer any conceivable rationale for why a sentence approaching the PSR's range is appropriate. (*See* Letter from Jonathan Francis to Ray Lopez dated Apr. 3, 2014, at 8). And, the amount of any "loss," as calculated by the government, is not a reasonable indicia of Mr. Litvak's culpability for all the reasons set forth above.

(i) Application of The Loss Enhancement Undermines Federal Sentencing Objectives

More generally, the fraud guidelines need not and should not be accorded weight. The fraud guideline, which is not based on empirical evidence, does not "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita*, 51 U.S. at 338; *Kimbrough*, 552 U.S. at 89; *United States v. Corsey*, 723 F.3d 366, 378 (2d Cir. 2013). It follows that "unless applied with great care," this guideline "can lead to unreasonable sentences that are inconsistent with what § 3553 requires." *Dorvee*, 616 F.3d at 184. In practice, the significant, arbitrary increases in the loss enhancement yield sentences far greater than the average sentences imposed and prison time actually served before the guidelines were adopted,

which Congress directed the Commission to use as a "starting point." 28 U.S.C. § 994(m). Indeed, because of loss, the PSR's Guidelines sentence bears no resemblance to the average sentence deemed appropriate prior to the adoption of the Guidelines. In fact, this sentence is four and a half times the length of the high-end of the average pre-Guidelines sentence (24 months) for highest-loss offenders in sophisticated frauds (which the offense in this case was not in either respect).[17]

In response to the fraud guideline's progressively increasing severity, judges continue to refer to the original 1987 fraud guideline in making sentencing determinations. (*See* Ex. L, *United States v. Watts*, 10-cr-00627 (KAM) (E.D.N.Y. Apr. 24, 2014), Sentencing Tr. at 18:24-19:5; 45:18-20) (sentencing defendant within 1987 guidelines range based on counsel's recommendation); Ex. M, *United States v. Hochfeld*, 13-cr-00021 (PAC) (S.D.N.Y. Aug. 5, 2013), Sentencing Tr. at 20:4-9; 21:6-9 (using 1987 manual to calculate 30 to 37 month guidelines range in lieu of applying the "harsh result" using the current manual)). Under the 1987 fraud guideline, adopting the government's loss figure, without any downward departures, Mr. Litvak's offense level would be 19, with a sentencing range of 30-37 months. *See* U.S.S.G. § 5A (1987). Eliminating the loss for which the government's threshold fraud evidence is insufficient reduces the offense level to 18, which features a 27-33 month sentencing range. *See id.* And, eliminating loss altogether for the reasons explained above further reduces the offense level to 10, resulting in a sentencing range of 6 to 12 months. *Id*.

[17] *See* U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 23, 33 (1987), *available at* http://www.src-project.org/wpcontent/pdfs/reports/USSC_Supplementary%20Report.pdf (last visited June 27, 2014). *See also* U.S.S.G. § 5A (1987).

(ii) Judicial Critiques and Reform Efforts Reinforce the Loss Enhancement's Inapplicability

Unsurprisingly, given the circumstances around its adoption and its amendments, the fraud Guidelines are widely criticized for producing excessive sentences for first-time offenders, largely due to the prominence loss is given when determining a sentencing range. Critics focus on its blind arithmetic calculations, which cause sentencing ranges driven principally by "numbers … drawn from nowhere." (*See, e.g.*, Jed S. Rakoff, *Why The Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent'g Rep. 6, 6-9 (October 2013)). Plagued by these deficiencies, it is readily apparent that in this case the result of the loss enhancement adopted in the PSR is inconsistent with Section 3553 and is accordingly unhelpful to the Court in crafting an appropriate sentence for Mr. Litvak. *See Rita*, 551 U.S. a 349-51. As one court recently explained:

> [T]he … Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss or gain occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the … Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, see 18 U.S.C. §3553(a), and, by contrast, effectively guaranteed that many such sentences would be irrational on their face.

United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012). Employing loss as the principal proxy for culpability in determining fraud sentences is a dubious proposition, if not contrary to the law, and indeed imposing a sentence on Mr. Litvak approaching the Guidelines range calculated in the PSR would be "irrational" on its face, and substantively unreasonable.

The Commission itself knows it has a problem, and has been engaged in reviewing economic crimes, including "a comprehensive, multi-year study of Sec. 2B1.1 … and related guidelines, including examination of the loss table and the definition of loss…." 78 Fed. Reg. 51820-51821 (Aug. 21, 2013). That ongoing study has sought input from the bench and bar to

determine what amendments to the loss table may be appropriate. Recognition of the need for reform follows from the constant flow of sentencing decisions featuring what the Court confronts here—the loss enhancement driving Guidelines sentencing ranges for defendants above and beyond what is necessary, reaching levels equivalent to those imposed for more serious fraudsters with lower "loss" figures, and other crimes exceedingly more heinous by any reasonable standard, including those involving violence against children and resulting in death or grievous physical injuries.[18]

Last year, a special task force of the American Bar Association ("Task Force"), comprised of, among others, judges from within this Circuit, proposed to the Commission substantial amendments to the Guidelines for economic crimes.[19] The report begins with a base offense level and requires a sentencing court to make specific calculations relating to: (1) actual loss; (2) culpability; and (3) victim impact. (*See* Ex. N, ABA Report at Economic Offense § (b)). The PSR in this case suggested that the Court "may wish to consider the Task Force's report in considering whether the Guidelines range overstates the seriousness of the offense."

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[18] *Compare* USSG § 2B1.1 (2012) (offense level 31 for loss over $2.5 million, broker dealer affiliation and victim enhancements) with § 2G2.1 (base offense level 32 for sexually exploiting a minor by production of sexually explicit visual or printed material); § 2E1.4 (base offense level 32 for use of interstate commerce facilities in the commission of murder-for-hire); § 2A3.1 (base offense level 30 for criminal sexual abuse (of a person above 16) by a registered sex offender); § 2D1.1 (base offense level 30 for manufacture or sale of a controlled substance with death or serious bodily injury resulting from the use of the substance involving a defendant with one or more prior convictions for a similar offense); § 2G1.3 (base offense level 30 for sex trafficking of children between 14 and 18); § 2B3.1 (base offense level of 26 for robbery involving permanent or life threatening injury); § 2A2.1 (offense level 33 for assault with intent to commit first degree murder); § 2A4.1 (offense level 32 for kidnapping); § 2K1.4 (offense level 24 for arson creating substantial risk of death or serious bodily injury); § 2A1.3 (2012) (offense level 29 for voluntary manslaughter); and § 2D1.1 (2012) (base offense level 38 for manufacture or sale of 1 kilogram of heroin with death or serious bodily injury resulting from the use of the substance). If Jesse's "loss" was one category higher he would be in at the same offense level for conspiracy to commit murder and committing a forced sexual act with a child under the age of 16.

[19] *See* Ex. N (American Bar Association, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, Second Draft (May 15, 2014), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf (last visited June 27, 2014) ("ABA Report").

Loss. The report offers a modified loss table and focuses exclusively on actual loss, which, as explained above, is absent here. (*See* Ex. N, ABA Report at Economic Offense § (b)(1)). But even applying the government's theory, the loss would result in an increase of 8 or 10 offense levels rather than the 18 levels under the Guidelines.

Culpability. The proposal would require judges to make explicit findings for "culpability" on a five-level scale from "lowest" to "highest," with corresponding offense level adjustments, ranging from 6 to 10 offense levels down and up, based on various factors. (*See* Ex. N, ABA Report at Economic Offense § (b)(2)). Many of these factors, including, but not limited to, lack of personal gain, lack of sophistication, and engaging in other-initiated conduct all weigh in favor of assigning Mr. Litvak a low culpability level. (*See* Ex. N, ABA Report at 1-5).

Victim Impact. The proposal includes four levels of "victim impact" with increases of zero to six levels. (*See* Ex. N, ABA Report at Economic Offense § (b)(3)). Similar to its multifactor analysis of the culpability levels, the proposal directs courts to consider a variety of factors to arrive at the appropriate level. (*See* Ex. N, ABA Report at 5-6). Here, the professional sophisticated counterparties with whom Mr. Litvak traded were not vulnerable and did not suffer any harm. They received the exact security bargained for, the investment value of which was unaffected by the offense conduct, and largely profited from the transactions.

Cap for Non-Serious Offenses by First-Time Offenders. Finally, the Task Force proposes that first-time offenders who have committed offenses that are not "otherwise serious" have a cap of level 10 in their offense level. (*See* Ex. N, ABA Report at 6-7). The proposal sets forth a long list of factors in determining whether an offense is "otherwise serious" including, but not limited to, the following: the amount of loss; whether loss was intended at the outset of the

offense conduct; whether the defendant's offense conduct lacked sophistication; the duration of the offense conduct; and the nature of the victim impact caused by the offense. (*See* Ex. N, ABA Report at 6-7).

Under the government's theory, the offense level under the ABA proposal is at most 17, calculated as an offense of level 7, combined with a loss enhancement of 10. (*See* Ex. N, ABA Report at Economic Offense § (b)). There is certainly nothing about the offense conduct that would elevate the associated culpability above the "moderate culpability" heartland, which is "presumptive and would account for the largest number of defendants sentenced under the guideline." The loss enhancement accounts for any "victim impact" and should negate any further enhancement on that ground. Thus, even accounting for the government's alleged loss, and calculating an offense level of 17, results in a sentencing range of 24-30 months' imprisonment in contrast to the PSR's 108-135 month sentencing range. The defense's position is that because there is no loss and minimal victim impact, the offense level under the ABA proposal is 7, which falls within Zone A and a sentencing range of no imprisonment to six months. (*See* Ex. N, ABA Report at Economic Offense § (b)).

3. Sentencing Objectives (18 U.S.C. § 3553(a)(2)) and Maintaining Respect For the Law and Administration of Justice

The defense's proposal satisfies federal sentencing objectives, including those articulated by statute and reflected in the Guidelines. Specific deterrence of Mr. Litvak is certainly unnecessary in this case. The offense conduct was situation-specific and extremely narrow in scope, and with his conviction, Mr. Litvak will be permanently banned from the securities industry, the arena where the offense conduct occurred. The crime at issue was "particularly adapted to his chosen career" and "[t]hat career is over." *United States v. Emmenegger*, 329 F. Supp. 2d 416, 428 (S.D.N.Y. 2004) (finding no chance of recidivism because defendant's career

was over). Mr. Litvak poses no societal risk, and need not be deterred—through an overly lengthy prison sentence or otherwise—from engaging in any similar conduct in the future. As the PSR observes, Mr. Litvak has been a model citizen in the two and a half years since he left Jefferies.

Likewise, Mr. Litvak's well-publicized arrest, indictment and conviction, coupled with any incarceration, completely satisfies general deterrent interests. Market participants are certainly on notice that engaging in the offense conduct, which is apparently widespread in the professional securities markets, may subject them to criminal process and prison. In terms of the length of any incarceration, there is no evidence that a period approaching the PSR's Guidelines range will have any greater deterrent effect than the sentence called for by the defense's Guidelines calculation or the ABA proposal. *United States v. Gupta*, 904 F. Supp. 2d 349, 355 (S.D.N.Y. 2012) ("[C]ommon sense suggests that most business executives fear even a modest prison term to a degree that more hardened types might not. Thus, a relatively modest prison term . . . is 'sufficient, but not more than necessary' for (general deterrence) purposes."); *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006) ("there is a considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders"). Just punishment may be imposed and proper respect for the law promoted with a sentence consistent with the defense's proposal. Sentencing Mr. Litvak to anything remotely nearing the seemingly government advocated PSR range would be altogether unjust and have quite the opposite impact. (*See* Letter from Jonathan Francis to Ray Lopez dated Apr. 3, 2014, at 8).

4. The Need to Avoid Unwarranted Sentencing Disparities and Promote Consistency in Sentencing

It is well-established that Guidelines sentences may create unwarranted sentencing disparities, and here, imposition of a sentence within the PSR's Guidelines range, as the government advocates, would realize this very result. *United States v. De La Cruz*, 397 Fed. Appx. 676, 678-79 (2d Cir. 2010) (citing *Kimbrough*, 552 U.S. at 91). Statistics released by the Commission for fiscal year 2013 confirm the gross excessiveness of such a sentence, while at the same time, validate the defense's proposal. These statistics bear out that courts have accepted that the fraud Guidelines are of limited utility.

Sentence length and variance data for fraud cases is quite instructive. For example, during the Commission's fiscal year 2013, only 35% of fraud sentences in the Second Circuit were within or above the Guidelines range.[20] Nationwide, below-Guidelines sentences imposed based on "Booker/18 U.S.C. 3553," where fraud was the primary offense category, had median decreases from the Guidelines minimum of 52.9% over 1,575 cases.[21] The mean sentence length where fraud was the primary offense category was 26, while the median was 12.[22] Quarterly data released in April 2014 is consistent with that of the prior year.[23]

Also noteworthy is that throughout the Commission's 2009 and 2013 fiscal years, courts in the District of Connecticut imposed only 32 sentences of more than 60 months on criminal

[20] U.S. Sentencing Comm'n, Statistical Information Packet, Second Circuit (FY2013), Table 10, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2013/2c13.pdf (last visited June 27, 2014).

[21] U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (FY2013), Table 31C, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table31c.pdf (last visited June 27, 2014).

[22] U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (FY2013),Table 13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf (last visited June 27, 2014).

defendants in the 327 cases where the primary offense category was fraud (9.79% of defendants convicted principally of fraud).[24] The few particularly lengthy sentences imposed in fraud cases in this district were imposed in cases where the court found aggravating factors not present in this case, and did not find the mitigating qualities present here. For example, in sentencing Robert Rivernider to 12 years imprisonment, the court found that he had operated two investment schemes, and found losses of over $25 million to individuals and lenders.[25] In imposing sentence, the Court found that instead of investing the money as promised, it was put to personal use and to pay the preexisting debts of other investors. Even there, despite its finding more than $25 million in losses, the Court found that the Guidelines calculation (324-405 months) "significantly overstate[d] [Rivernider's] culpability" and relied instead on the preferable approach outlined in the ABA Task Force's sentencing recommendations. (*See* Ex. O, *Rivernider*, Sentencing Tr. at 206:10-13; 212:5-14).

Mr. Litvak's offense conduct is nothing like that of the other criminal defendants on the higher-end of fraud sentences imposed in this district and elsewhere. It lacks virtually of all the aggravating factors which drove those sentences, including breadth, abuse of trust,

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[23] *See*, *e.g.*, U.S. Sentencing Comm'n, Preliminary Quarterly Data Report (Q1 2014), Tables 12, 19, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-1st.pdf (last visited June 27, 2014).

[24] *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (FY2009), Appendix B, D. Conn. Sentences, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/ct09.pdf (last visited June 27, 2014) (2 cases); *Sourcebook of Federal Sentencing Statistics* (FY2010), Appendix B, D. Conn. Sentences, *available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Stats_CT.pdf* (last visited June 27, 2014) (4 cases); *Sourcebook of Federal Sentencing Statistics* (FY2011), Appendix B, D. Conn. Sentences, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and sourcebooks/2011/stats_CT.pdf (last visited June 27, 2014) (5 cases); *Sourcebook of Federal Sentencing Statistics* (FY2012), Appendix B, D. Conn. Sentences, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/stats_CT.pdf (last visited June 27, 2014) (12 cases); *Sourcebook of Federal Sentencing Statistics* (FY2013), Appendix B, D. Conn. Sentences, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/stats_CT.pdf (last visited June 27, 2014) (9 cases).

[25] *See* Ex. O, *United States v. Rivernider*, 10-cr-00222 (RNC) (D. Conn. Dec. 18, 2013), Sentencing Tr. at 57:2-5; 58:23-25; 216:17-18.

sophistication, quantifiable, immediate victim loss and personal gain, impact on and nature of the victims, and intimidation and obstruction. Here, Mr. Litvak caused his counterparties—sophisticated investment managers—to pay a small percentage more for RMBS than they might have agreed to pay had they known the truth about Jefferies's costs and profits. The evidence conclusively demonstrated (and the government does not dispute) that the counterparties continue to believe the total dollar amount paid or received reflected the investment value of the RMBS regardless of anything Mr. Litvak said or did. The evidence showed that these sophisticated professional investors would repeat the trades at the price in question if given the opportunity, negating any tangible harm attributable to Mr. Litvak's offense conduct. No one disputes that the counterparties would only pay for RMBS what their own models and analysis indicated was a fair price. So, no matter what misrepresentations Mr. Litvak made, his counterparties were going to walk away with a price that reflected fair value for what they sold or received. These mitigating factors are rarities in fraud cases and certainly place Mr. Litvak's offense conduct well-outside the heartland of traditional fraud. It certainly removes Mr. Litvak from the few most egregious cases in which courts in this district impose sentences above 60 months, let alone near the PSR's sentencing range.

Mr. Litvak's sentence must also be considered relative to the government's response to other Jefferies employees, including his supervisors and members of management, who engaged in identical conduct, as described above. (*See* Government's Motion *in Limine* To Preclude Evidence Or Argument Concerning Purported Selective Prosecution at 1 (Dec. 3, 2013) [Doc. #100]) (acknowledging "evidence that others knew about—and, in some instances, participated in—[Mr. Litvak's] conduct."). Even accepting the government's position that Mr. Litvak engaged in his offense conduct more frequently than his managers and fellow traders does not

support a sentence approaching the PSR's draconian calculation where no one else, including those above him in the organization, has been charged (even civilly).[26]

(a) Investment and Mortgage Fraud Sentencings

Investment and mortgage fraud sentencings support a substantial variance and imposition of a sentence consistent with the defense's proposal. To sentence Mr. Litvak otherwise would generate significant unwarranted sentencing disparities. The manner in which these courts have weighed the various factors pertinent to sentencing, including victim loss and the defendant's personal gain, demonstrates that a sentence approaching the PSR's Guidelines calculation would be disproportionate, and suggests the unduly punitive tack the government would be taking with respect to Mr. Litvak in advocating for such a sentence.

The CEO of General Re Corp., Ronald Ferguson, was sentenced to two years imprisonment by Judge Droney, in this district, following his conviction in connection with a scheme to falsely inflate AIG's reported loss reserves, a key indicator of financial health to insurance industry analysts and investors.[27] The court attributed $544 million in losses to his offense conduct, which set the Guidelines range at life in prison.[28] The government requested "substantial" jail time.[29] AUSA Glover stated at sentencing that "there isn't a more serious white

[26] While the government has made this claim, it has effectively admitted it does not truly know how the scope of Mr. Litvak's misconduct compares to anyone else's at Jefferies. The government produced a spreadsheet purporting to show which "victim" clients have been reimbursed by Jefferies and which have not. The spreadsheet is exhaustive as to trades involving Mr. Litvak but reflects a search of only 20% of transactions involving other traders. On its face, the spreadsheet does not appear to reflect searches of all relevant traders at Jefferies, including certain traders who the evidence has shown used the same tactics for which Jesse is being sentenced.

[27] DOJ Press Release, *Former Gen Re Chief Executive Officer Sentenced for Role in Fraudulent Manipulation Scheme* (Dec. 16, 2008), *available at* http://www.justice.gov/usao/ct/Case%20Updates/Ferguson12162008.pdf (last visited June 27, 2014).

[28] *See id.*

[29] Colleen Mccarthy, *Ferguson Gets Two-Year Sentence for Finite Fraud* (Dec. 16, 2008), *available at* http://www.businessinsurance.com/apps/pbcs.dll/article?AID=9999200014797 (last visited June 27, 2014).

collar crime than manipulating the earnings of a public company."[30] While the court rejected the defense's contention that Ferguson did not play a central role in the scheme, it noted Ferguson's character and history of volunteerism and community service, along with the tremendous outpouring of support he received in determining an appropriate sentence.[31]

Bradford Rieger received 24 months in prison for his role in a multimillion dollar fraud targeting mortgage lenders and financial institutions.[32] An attorney, Rieger closed fraudulent transactions, which caused more than $2.2 million in losses to lenders. (*See* Ex. P, *Rieger*, Sentencing Tr. at 3:16-18). Despite Rieger's necessary role in the scheme and a guidelines range of 41 to 51 months, this Court imposed a non-guidelines sentence. (*See* Ex. P, *Rieger*, Sentencing Tr. at 4:12-13). The Court found that "too much of the calculation in deriving the guidelines" resulted from the loss "factor of the offense in proportion to the other characteristics of th[e] offense." (*See* Ex. P, *Rieger*, Sentencing Tr. at 40:20-24). The Court ultimately concluded that a 24-month sentence was a "significant punishment" for a "very serious" crime. (*See* Ex. P, *Rieger*, Sentencing Tr. at 40:15-16; 41:2-4). Further, this Court sentenced Genevieve Salvatore, also an attorney, to 24 months in prison for the same conduct in connection with the same mortgage fraud scheme.[33]

Michael Balboa, a portfolio manager, was recently sentenced on June 23, 2014, to four years in prison for overstating the value of the fund he managed by $80 million and "systematically engag[ing] in deceptive conduct that defrauded his Fund's investors." (*United*

[30] *Id.*

[31] The Second Circuit overturned Ferguson's conviction on appeal based on unfair prejudice resulting from the admission of certain evidence, and a jury instruction that directed the verdict on causation. The appellate decision did not address his sentencing.

[32] *See* Ex. P, *United States v. Rieger*, 12-cr-00162 (JCH) (D. Conn. Nov. 16, 2012), Sentencing Tr. at 41:2-4.

States v. Balboa, 12-cr-00196 (S.D.N.Y. June 18, 2014), Gov't Sentencing Mem. at 8 [Doc. #157]). Balboa's fraud enticed new investors and persuaded old ones to remain with the fund. *See id.* at 2-3. His scheme generated millions of dollars in illegitimate management and performance fees, making Balboa personally as much as $6.5 million. *See id.* The scheme ended when the fund collapsed, at which point Balboa took affirmative steps to cover up the fraud. *See id.* According to the government, Balboa faced a possible life sentence under the Guidelines because the scheme cost investors more than $390 million in losses, there were 50 or more victims, and he was an investment adviser and the leader of the scheme. *See id.* at 5-6. Judge Crotty found that the Guidelines life sentence "vastly overstate[d] the seriousness of the offense" and that "[a] sentence of 48 months [wa]s appropriate."[34]

Lestor and Lennox Parris were convicted of securities fraud for engaging in a "pump and dump" penny-stock scheme. *United States v. Parris*, 573 F. Supp. 2d 744, 746 (E.D.N.Y. 2008). The Parris brothers gained nearly $5 million from the scheme and faced a guidelines range of 360 months to life in prison. *Id*. at 745, 748. Rejecting the "piling on" and "'one-shoe-fits-all' approach" to enhancements under the guidelines, the court found that this sentence would be "draconian" and "unreasonable as a matter of law," and instead imposed a term of five years imprisonment. *Id*. at 745, 755.

Credit Suisse broker Eric Butler was sentenced to five years in prison for orchestrating a "massive [securities] fraud" scheme that had a "severe impact . . . on the international short-and

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[33] *See* Ex. Q, *United States v. Salvatore*, 11-cr-00192 (JCH) (D. Conn. Mar. 11, 2014), Sentencing Tr. at 45:18-20. Salvatore was held responsible for a similar loss figure and also faced a guidelines range of 41 to 51 months in prison. *See* Ex. Q, *Salvatore*, Sentencing Tr. at 5:11-14; 11:20-22.

[34] Patricia Hurtado, Bloomberg News, *Ex-Millennium Fund Manager Gets Four Years in Prison* (June 23, 2014), *available at* http://news.hihid.co/read/2014/06/ex-millennium-fund-manager-gets-four-years-in-prison/ (last visited June 27, 2014).

long-term securities markets." *United States v. Butler*, 264 F.R.D. 37, 38 (E.D.N.Y. 2010).[35] Butler used investors' funds to purchase risky, high-commission auction rate securities ("ARS") tied to collateralized debt obligations when they had only authorized purchases of safer ARS backed by federally guaranteed student loans. When the mortgage market collapsed, the victims became effectively frozen in securities they did not know they even owned. Two victims submitted letters wherein they stated that years later they had no access to $16 million and $49 million invested in unauthorized securities, respectively. (*See* Ex. R, *Butler*, Sentencing Tr. at 66:19-24).[36] The government calculated a guidelines range of life imprisonment based largely on losses of approximately $1.1 billion, and requested a sentence of at least 15 years. 264 F.R.D. at 38. The court was uncomfortable relying on the government's loss figure, and calculated a range of 87-108 months. *Id*. at 39. The court mitigated Butler's sentence due primarily to his "young child and loving wife (which) suggest[ed] the desirability of defendant's early presence at home, working and supporting his family economically and psychologically"; "a strong supportive network of extended family, friends, teachers, and potential employers, as well as his positive reaction to supervision since his arrest, indicat[ing] a high probability of rehabilitation." *Id*. at 38. It also gave consideration to the "pervasive culture of corruption in the financial services industry," Credit Suisse's own practices and victim sophistication. *Id*. at 37, 40.

Rodney Watts was sentenced to 37 months' imprisonment, for defrauding a bank in applying for and receiving fraudulent loans in excess of $15 million dollars on behalf of their holding company.[37] The court rejected the 97 to 121 month guideline range after Watts's

[35] *See* Ex. R, *United States v. Butler*, 08-cr-00370 (JBW) (E.D.N.Y. Jan. 22, 2010), Sentencing Tr. at 66:16-18.

[36] *See also* Patricia Hurtado, Bloomberg News, Ex-Credit Suisse Broker Butler Gets Five-Year Prison Sentence (Jan. 23, 2010), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ao3g1KEa21x4.

[37] *See* Ex. L, *United States v. Watts*, 10-cr-00627 (KAM) (E.D.N.Y. Apr. 24, 2014), Sentencing Tr. at 44:15-17; 45:18-20.

counsel argued that it was "unfairly high in light of his offense" and the fact "that the current fraud guidelines counsel higher sentences than they have in the past and perhaps will in the future." (*See* Ex. L, *Watts*, Sentencing Tr. at 34:4-7; 43:18-21; 44:15-17). The court also found that Watts's extenuating family circumstances—he had two young children with health problems—cautioned against imposing a guidelines sentence. (*See* Ex. L, *Watts*, Sentencing Tr. at 42:4-6; 44:12-13). As his counsel noted, Watts's sentence is roughly the term calculated under the 1987 guidelines and the ABA Proposal. (*See* Ex. L, *Watts*, Sentencing Tr. at 18:24-19:5).

(b) Sentencing of Government-Related Frauds

Sentences imposed across the country in connection with government-related frauds, including frauds implicating TARP, offer further support for the defense's proposed sentence.

Earlier this year, Judge Thompson in this district sentenced Marleen Shillingford to 36 months' imprisonment for her participation in a roughly decade-long multimillion-dollar mortgage fraud scheme, involving more than 40 properties.[38] Dozens of these properties ended up in foreclosure, blighting neighborhoods and costing lenders millions. The parties stipulated to losses between $2.5 million and $7 million as a result of this scheme, and the Guidelines range provided between 63 and 78 months' imprisonment. (*See* Ex. S, *Shillingford*, Sentencing Tr. at 4:6-15).

Also in this district, Richard Pinto was sentenced to 60 months' imprisonment in connection with a multimillion-dollar fraud scheme at Oxford Collection Agency, where he served as board Chairman.[39] The fraud included issuing falsified statements to a bank that

[38] *See* Ex. S, *United States v. Shillingford*, 11-cr-00201 (AWT) (D. Conn. Jan. 28, 2014), Sentencing Tr. at 6:4-10; 22:17-20.

[39] *See* Ex. T, *United States v. Pinto*, 12-cr-00101 (SRU) (D. Conn. Jan. 30, 2013), Sentencing Tr. at 9:20-21; 51:7-13.

received TARP funds, which increased Oxford's credit line to $6 million, and laundering funds from the credit line to promote the ongoing fraud scheme against their clients. (*See* Ex. T, *Pinto*, Sentencing Tr. at 39:23-40:2). Some investors' funds were deposited into Pinto's personal bank account without their knowledge. Despite playing a key role in causing more than $12 million in loss, Pinto received a below-Guidelines 60 month sentence. (*See* Ex. T, *Pinto*, Sentencing Tr. at 14:16-18; 49:6-8; 51:7-9).

Deutsche Bank broker David Parse was sentenced by Judge Pauley to 42 months in prison for his role in promoting fraudulent tax shelters in a scheme deemed "breathtaking in its scope and in the damage to our nation."[40] The scheme deprived government bodies of nearly $1.6 billion in revenue. (*See* Ex. U, *Parse*, Sentencing Tr. at 20:7-9). Parse had "a central and longstanding role," and the government claimed he personally received over $3 million in commissions for his participation, while using these very same tax shelters to hide his own income. (*See* Ex. U, *Parse*, Sentencing Tr. at 9:11-13; 18:21-22; 22:17-19). The loss-driven Guidelines range was 292-365 months, and prosecutors sought approximately eight years imprisonment. (*See* Ex. U, *Parse*, Sentencing Tr. at 17:16-18; *Parse*, 09-cr-00581 (S.D.N.Y. Mar. 18, 2013), Def. Reply Sentencing Mem. at 9 [Doc. #606]).

Judge Wood sentenced Peter Ghavami to 18 months' imprisonment for being a leading participant in a lengthy conspiracy among financial institutions and a broker to rig municipal bond auctions and finance contracts.[41] The government proved that Ghavami, who worked at UBS, conspired to corrupt the bidding process for numerous auctions and contracts in order to increase profitability to UBS to the detriment of millions of dollars to municipalities. (*See* Ex. E,

[40] *See* Ex. U, *United States v. Parse*, 09-cr-00581 (WHP) (S.D.N.Y. Mar. 22, 2013), Sentencing Tr. at 20:5-7; 24:5-10.

[41] *See* Ex. V, *United States v. Ghavami*, 10-cr-01217 (KMW) (S.D.N.Y. July 24, 2013), Sentencing Tr. at 158:19-22.

Ghavami, Sentencing Tr. at 16:3-5; 77:18-78:2). The conspiracy deprived the municipalities of competitive interest rates for their bond proceeds. The government had initially sought a sentence of at least 17 and a half years for Ghavami based on the alleged loss, which the court largely dismissed as "theoretical." (*See* Ex. E, *Ghavami*, Sentencing Tr. at 8:15-18; *Ghavami*, 11-cr-01217 (S.D.N.Y. May 8, 2013), Gov't Sentencing Mem. at 1 [Doc. #374]).

Marie Baran was sentenced to 60 months in prison for playing a key role in a scheme whereby Long Island Railroad (LIRR) workers collected disability benefits based on fraudulent applications.[42] Baran accepted cash payments from LIRR workers in exchange for completing fraudulent disability payments on their behalf. (*See Baran*, 11-cr-01091 (S.D.N.Y. Mar. 25, 2014), Gov't Sentencing Mem. at 29-30 [Doc. #683]). Baran's role in the scheme was traced to roughly $31 million in fraudulent payments, driving her guidelines range to 108 to 135 months. (*See* Ex. W, *Baran*, Sentencing Tr. at 14:1-6; 15:22-24).

Reginald Harper, the President and Chief Executive Officer of First Community Bank, was sentenced to 24 months' imprisonment in connection with an elaborate scheme to avoid reporting the delinquency on certain loans.[43] The scheme impacted the bank's application for TARP funds, and the fraudulent methods employed by Harper harmed First Community Bank and the local economy. (*See* Ex. X, *Harper*, Sentencing Tr. at 11:19-13:3). Although the Guidelines called for 97 to 121 months' imprisonment, the court reasoned that Harper's "lack of a prior criminal record, stable employment history, and circumstances of the offense" warranted a reduced sentence. (*See* Ex. X, *Harper*, Sentencing Tr. at 16:2-6; 16:16-21).

[42] *See* Ex. W, *United States v. Baran*, 11-cr-01091 (VM) (S.D.N.Y. Apr. 4, 2014), Sentencing Tr. at 16:19-21.

[43] *See* Ex. X, *United States v. Harper*, 12-cr-00106 (NJB) (Ed. La. Apr. 4, 2013), Sentencing Tr. at 16:14-21).

Christopher Godfrey and Dennis Fischer were sentenced to 84 months in prison for defrauding thousands of homeowners in a $4 million dollar nationwide scheme.[44] The two made a series of fraudulent misrepresentations to induce struggling homeowners to pay fees in exchange for their help in obtaining federally funded home loan modifications under a TARP-related mortgage-assistance program. (*See* Ex. Y, *Godfrey*, Sentencing Tr. at 9:19-10:9). The Guidelines range was 262 to 327 months and the government requested 120 months. (*See* Ex. Y, *Godfrey*, Sentencing Tr. at 7:3-14). The court sentenced defendants even lower because Judge Zobel stated that "the Guideline calculation reaches a grossly excessive result. The emphasis on quantities, that is amounts of money, number of victims, . . . is not, especially in this case, a reliable indicator of a proper sentence." (*See* Ex. Y, *Godfrey*, Sentencing Tr. at 31:2-6).

Joseph Richards was sentenced to 27 months in prison for his role in fraudulently using a front company to obtain over $6 million in funds earmarked for minority-owned and disadvantaged small businesses under a government program.[45] Richards and others received "pass-through" kickbacks from subcontractors that they arranged to carry out contracts. (*See* Ex. Z, *Richards*, Sentencing Tr. at 9:12-16). The government calculated the loss at more than $6 million to include inflated billing and loss of "a fair opportunity to bid on these contracts." (*See* Ex. Z, *Richards*, Sentencing Tr. at 8:12-21). The court agreed that a Guidelines range of 57 to 71 months overstated Richards's culpability because the "programmatic goals" were satisfied and the work of the subcontractors "met the terms of the contracts in question." (*See* Ex. Z, *Richards*, Sentencing Tr. at 3:9-10; 18:23-25; 19:10-12).

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[44] *See* Ex. Y, *United States v. Godfrey, et al*., 11-cr-10279 (RWZ) (D. Mass. Feb .20, 2014), Sentencing Tr. at 31:15-18.

[45] *See* Ex. Z, *United States v. Richards*, 13-cr-00076 (LMB) (E.D. Va. Jun. 14, 2013), Sentencing Tr. at 8:9-11; 24:13-15.

The foregoing cases reveal widespread acceptance that the fraud Guidelines are of limited to no utility where "loss" is the predominant factor in calculating the offense level. In these cases, defendants caused meaningful, in some instances life-altering losses to their victims, and directly benefitted financially from the offense conduct. The defendants set out to defraud and succeeded, quite frequently with grave consequences. These and other aggravating factors are absent here, and to avoid unwarranted sentencing disparities, the Court should consider how these defendants were sentenced despite these offense characteristics, and sentence Mr. Litvak accordingly, which should result in a sentence of no more than 14 months.

CONCLUSION

Jesse Litvak understands fully that he stands convicted of federal crimes and that these convictions will have consequences. The arguments that we advance on his behalf therefore recognize that some term of imprisonment is likely. These arguments do not in any way seek to diminish the actual seriousness of the crimes for which he has been convicted. Rather, we simply ask the Court to take into account where these offenses fall on the spectrum of white collar crimes. The lack of real victim loss and the absence of personal gain are powerful mitigating factors that counsel moderation in the imposition of sentence. Mr. Litvak's personal circumstances also suggest leniency. We therefore respectfully submit that the Guidelines sentence indicated by the PSR would be terribly disproportionate in these circumstances. For these reasons, 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, and order a term of supervised release.

Respectfully submitted,

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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
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