IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ANYSTATE

UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**No. 3:00-00000**
	)	**DISTRICT JUDGE**
	)	
JAMES B. CLIENT	**)**	

SENTENCING MEMORANDUM ON BEHALF OF JAMES B. CLIENT

James B. Client submits this sentencing memorandum in support of his request for a sentence of 35 months' imprisonment (the time he has served in pretrial detention), followed by five years of supervised release to begin with six months of home confinement, with permission to leave home for medical appointments and work. The sentence requested is "sufficient, but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

As set forth below, the seriousness of Mr. Client's offense is substantially mitigated by emotional distress over personal losses that motivated the offense and the mental illness that contributed to it, as well as his demonstrated remorse and efforts at restitution. There is no need to further incapacitate Mr. Client to prevent him from committing further crimes, given his extraordinarily low risk of recidivism, as well as his voluntary debarment from participation in the financial and insurance industries. Mr. Client has already been subjected to punishment far in excess of what is just at the county jail where he has been detained without minimally adequate care to treat a multitude of serious and painful medical problems caused or exacerbated by conditions at the facility. As a result of this mistreatment, it is now imperative that Mr. Client be released to home confinement so that he can obtain necessary medical treatment in an effective manner.

The guideline range applicable in this case, 151-188 months, provides no useful advice, as it was not developed based on empirical data or national experience, and is far greater than necessary to satisfy any purpose of sentencing.

I. FACTUAL BACKGROUND

James B. Client was a law-abiding citizen with no criminal history before committing the instant offense. After having raised three foster children for six years, he was ordered to return them to their biological mother, from whom they had been removed when she was deemed unfit. He also suffered from bipolar disorder. Devastated by the loss of the children and fearing for their welfare, compounded by the breakup of his marriage and his mental illness, Mr. Client took actions that were illegal in a desperate effort to regain custody of the children.

Mr. Client started InvestmentSolutions as a legitimate business. He sought to grow the business rapidly, believing that the more successful he became, the more influence he could wield in the custody dispute. Eventually, he misused a portion of the invested funds in an effort to grow the business. The fraud went undetected when InvestmentSolutions' insurer, AIG, did not inspect the company's securities-related activity. Mr. Client hoped that the business would become profitable enough to repay the funds that he had misappropriated, but had not succeeded in doing so by the time he was charged in this case. Since his arrest, Mr. Client has cooperated with attorneys representing victims in a lawsuit against AIG, and a settlement for $7.2 million has been reached.

Mr. Client asks the Court to consider not just his criminal acts, but also his lack of prior criminal history, the mental illness and personal losses that fueled his crimes, and his genuine desire to make restitution to the victims. A sentence within the advisory

guideline range is far in excess of what is just or necessary in this case. A sentence of 35 months' time served followed by six months' home detention and five years of supervised release is the just result.

A. The Founding of InvestmentSolutions, LLC

Mr. Client started InvestmentSolutions, LLC in 1999. The company was engaged in the business of managing employee benefit plans, such as 401(k) pension plans and health savings accounts, for businesses and other entities. Prior to establishing InvestmentSolutions, Mr. Client worked as a sales agent, primarily in the insurance industry, and had no experience managing pension plans or health savings accounts. Despite his lack of experience, Mr. Client successfully grew InvestmentSolutions from a very small company with one employee to a large company with approximately eighty employees managing millions of dollars in fiduciary funds. As a result of the company's quick growth, Mr. Client was featured in a number of trade publications and news reports and InvestmentSolutions was viewed as a fast-growing and effective company for the management of pension plans and health savings accounts.

B. The Origin of the Fraud

In 1994, Mr. Client and his then-wife became foster parents to three children. One child was two weeks old; the others were two and three years old. The children's biological mother suffered from major depression with psychotic features and was deemed unfit to care for them. For six years, the Clients raised the children as if they were their own. Over time, they stopped fearing that the children would be returned to their biological mother.

In 1997, the Clients filed a petition in Local County Chancery Court to terminate the parental rights of the biological mother. The Chancery Court granted the Clients'

petition, but the ruling was reversed on appeal by the State Court of Appeals. The State Supreme Court denied permission to appeal. The children were returned to their biological mother. Mr. Client genuinely believed that it was not in their best interests to live with their biological mother and sought to convince the authorities to return the children to him and his wife.

Mr. Client suffers from bipolar disorder and developed an obsession with the loss of his foster children.[1] His extreme emotional distress at the loss of the children, subsequent break-up of his marriage, and mental illness provoked grandiose and impulsive actions. He recalled from his past involvement in political campaigns the sorts of political favors politicians can do for their financial backers. During the 1990s, Mr. Client had worked with the State Democratic Party and was closely involved in the campaign to elect John B. Governor as mayor of Anytown and later governor of Anystate. After Governor was elected, Client became a member of the Governor's Roundtable, a quarterly lunch meeting the Governor held with financial contributors. Mr. Client began to view his connections with the Governor as a way to gain influence in the custody dispute. He hoped that the Governor might be able to persuade the Department of Children's Services to revisit the custody issue.

After some initial overtures to the Governor and two meetings with the director of the Department of Children's Services, Mr. Client came to believe that his stature was not impressive enough to obtain the favor he needed. He believed that if he could grow

[1] The reports of A. Psychiatrist, M.D. and M. Psychologist, PhD will be filed with the Court before the sentencing hearing.

InvestmentSolutions into a bigger, more successful business, he would be able to convince the Governor's administration to intervene on his behalf.

C. The Fraud and Client's Arrest

In an effort to grow InvestmentSolutions as quickly as possible, Mr. Client made the grave mistake of beginning to use his clients' investment funds to hire more sales agents and solicit more business. He funneled an increasing percentage back into the business for operating costs. Mr. Client also began using client funds for personal expenses and tangential business expenditures (*e.g.*, fundraising events, a charitable foundation, and political contributions). He viewed these expenditures as essential to raising the profile of InvestmentSolutions, thus enhancing his influence with those he believed were in a position to help him.

In 2006, several civil lawsuits were filed against Mr. Client by companies seeking the return of monies entrusted to InvestmentSolutions. As it became clear that Mr. Client could not promptly return the investment funds to the companies, he was charged with embezzlement from an employee benefit plan. In November 2006, a month after the initial charges were filed, he was indicted in six counts of embezzlement from an employee benefit plan. On May 9, 2007, the government filed a seventy-eight count superseding indictment. Mr. Client has pled guilty to a number of charges in the superseding indictment. He has been continuously jailed, without bond, since October 13, 2007.

Mr. Client accepts responsibility for his wrongdoing and is sincerely remorseful for his conduct. He knows that his mismanagement of the funds has created a severe hardship on the individuals who entrusted him with their retirement savings. He is deeply sorry for his actions and looks forward not only to expressing remorse to the

victims at the upcoming hearing, but also to dedicating the remainder of his working life to making restitution to them.

D. Mr. Client's Insurer Has Agreed to Return Funds to Plan Participants, in Part Due to Mr. Client's Cooperation.

Mr. Client held a securities license which enabled him to operate InvestmentSolutions' business of managing fiduciary funds. AIG insured Mr. Client and was to supervise the business, including conducting an annual inspection. Tragically, given Mr. Client's desperation and mental illness, AIG did not conduct these inspections. Had it done so, the fraud would have been discovered much earlier and the losses would not have been nearly as great. Fortunately, after the fraud was discovered, a group of victims reached a settlement with AIG for $7.2 million which will be returned to the plan participants who were victimized by the fraud.

Mr. Client met and cooperated with the attorney representing a number of the victims in their civil lawsuits against AIG. Partly as a result of Mr. Client's cooperation, the civil lawsuits were settled favorably to the victims. The victims' attorney states that Mr. Client's cooperation and provision of information was "very helpful" in achieving the settlement.

E. Collateral Consequences

Since his arrest in October 2007, Mr. Client has been subject to unusually harsh conditions of pretrial incarceration. He has had a host of medical problems, including worsening of his diabetes, an undiagnosed and untreated blood disorder, and liver damage. Medical personnel wrongly diagnosed the cause of Mr. Client's blood disorder as leukemia and then lymphoma. The initial cancer diagnoses were not ruled out until after he was subject to a bone marrow biopsy and a lymph node biopsy. As a result of

the lymph node biopsy, Mr. Client contracted a serious infection, which led to substantial blood loss and required hospitalization and surgery. Most recently, physicians at the state jail have speculated that Mr. Client has autoimmune hepatitis.

Mr. Client's father passed away in December 2007. Mr. Client was unable to attend the funeral as he was incarcerated. Under the stress of the loss of the children and these charges, his marriage disintegrated and his wife is seeking a divorce. As his family support system has disappeared, Mr. Client's human contact has become limited to the state jail inmates with whom he is housed, many of whom are charged with serious violent crimes like rape and murder.

As a result of this offense, Mr. Client has suffered the loss of his business, his professional reputation, and his ability to work in the financial industry. He was a highly successful licensed insurance agent from 1992 to 2007, but has voluntarily surrendered his insurance license. He has also agreed never to participate in the affairs of any financial institution insured by the Federal Deposit Insurance Corporation (FDIC), never to serve as an officer, director or employee of any institution or agency specified in 12 U.S.C. § 1818(e)(7)(A), and never to serve in any position related to any employee benefit plan.

F. Advisory Guideline Range

The Probation Officer has calculated an advisory guideline range of 151 to 188 months, resulting from an adjusted offense level of 34 and Criminal History Category I. The guideline range offers no useful advice because it (1) is the product of a guideline that is not based on empirical evidence or national experience; (2) fails to take any account of Mr. Client's culpability, low risk of recidivism, need for effective medical care, need to make restitution, or collateral punishment; (3) would result in unwarranted

disparity as compared with sentences for similarly situated defendants; and (4) is far greater than necessary to promote the goals of sentencing in this case.

II. A SENTENCE OF THIRTY-FIVE MONTHS' TIME SERVED FOLLOWED BY SIX MONTHS OF HOME CONFINEMENT AND FIVE YEARS OF SUPERVISED RELEASE WOULD BEST SATISFY THE GOALS OF § 3553(a).

The Court must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)," which are "the need for the sentence imposed—

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2). In "determining the particular sentence to be imposed," the Court must consider these purposes, the nature and circumstances of the offense and the history and characteristics of the defendant, the need to avoid unwarranted disparities, and the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a)(1)–(7).

"While the fraud guideline focuses primarily on aggregate monetary loss and victimization, it fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment, in a particular case." Allan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011); *see also United States v. Ovid*, slip op., 2010 WL 3940724, *1 (E.D.N.Y. Oct. 1, 2010) ("[T]he fraud guideline, despite its excessive complexity, still

does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so."). A substantial variance is needed in this case because of the following mitigating factors, all of which are highly relevant to the purposes of sentencing and none of which is taken into account by the guideline range.

A. Need for Just Punishment in Light of the Seriousness of the Offense

The need for retribution is measured by the degree of "blameworthiness," which "is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005). The guidelines include none of the factors bearing on Mr. Client's degree of culpability.

1. Mr. Client was not motivated by greed and intended to replace the misappropriated funds.

A defendant's motive is highly relevant at sentencing. *See Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993); *United States v. Mahan*, 2007 WL 1430288, at *3 (10th Cir. 2007) (sentence was procedurally unreasonable where district court refused to consider defendant's stated motive for possessing unloaded shotgun, *i.e.*, that he had been violently beaten by three men and sought to defend his wife); *United States v. Milne*, 384 F. Supp. 2d 1309, 1310-11 (E.D. Wis. 2005) (granting variance where "defendant did not take the bank's money out of greed or a desire to live a lavish lifestyle, [but in effort] to keep a sinking business afloat"); *United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D.

Wis. 2005) (defendant did "not act for personal gain or for improper personal gain of another").

Mr. Client began unlawfully withdrawing funds from InvestmentSolutions investment accounts in a misguided effort to wield greater influence in the custody dispute over his three foster children by growing the company and raising his profile in the business community. Having parented one of the children from infancy and the other two from the time they were toddlers, and given their birth mother's history of depression with psychotic features, Mr. Client was bereft and deeply concerned for their welfare. While Mr. Client's belief that he could gain influence in the custody dispute if he were a more powerful businessman was surely irrational, he suffers from bipolar disorder. His mental illness amplified his feeling of desperation over the loss of the children and clouded his judgment regarding appropriate responses.

Mr. Client did not set out to permanently deprive the plan participants of their funds. Shortly before his arrest, Mr. Client was negotiating with American Express to obtain a contract to administer flexible spending accounts (FSAs). He genuinely believed that this new FSA business would generate enough profits to repay all of the money he had misappropriated.

In short, this case is distinguishable from a case in which a defendant misappropriates money to support a lavish lifestyle. Mr. Client's motive was to regain custody of his children. He believed, however unrealistically, that he would eventually be able to repay the funds he had taken and was devising ways to do so up to the time of his arrest.

2. Mr. Client's offense was motivated by his personal losses and exacerbated by his bipolar disorder.

Mr. Client has been evaluated by A. Psychiatrist, M.D., aided by psychological testing by Dr. M. Psychologist, PhD. Dr. Psychiatrist found that Mr. Client suffers from bipolar disorder, multiple medical problems, and an obsession with the loss of his foster children. Dr. Psychiatrist found that Mr. Client's mental illness contributed to the commission of the offense. In particular, Mr. Client's bipolar disorder, the loss of his foster children, and the breakup of his marriage "combined to result in his criminal behavior in an attempt to recoup what he could of his emotional losses." Mr. Client's extreme emotional distress at the loss of his foster children provoked a "hypomanic episode at which he became grandiose and impulsive as manifestations of an underlying severe mental disease that is treatable with medication and psychotherapy." Dr. Psychiatrist explains:

> While he did not remain hypomanic throughout the entire period of his illegal behavior, he acknowledged feeling trapped by his initial actions and could not figure another way out; thus, he persisted in the plan, hoping to eventually repay all that he had misappropriated. Were it not for the multiple, severe stressors of his several personal losses, which combined to provoke an episode of his severe mental disease, bipolar disorder, it is unlikely that Mr. Client would have engaged in the behavior that he did. He does not have a prior criminal history, indicating this was exceptional behavior for him.

3. Mr. Client's conduct was aberrant.

Mr. Client lived a law-abiding life until the instant offense began in his late 40s. He was an active member of the community and a dedicated husband and father. He did not engage in criminal conduct until he became emotionally distraught over the loss of his foster children, exacerbated by his bipolar disorder. His offense is completely uncharacteristic when viewed in the context of his entire productive adult life. This Court should grant a variance based on the aberrant nature of his conduct. *See, e.g.*, *United States v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (variance based on "isolated

mistake" in otherwise long and entirely upstanding life); *United States v. Hadash*, 408 F.3d 1080, 1084 (8th Cir. 2005) (defendant was a "law abiding citizen, who [did] an incredibly dumb thing"); *United States v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (defendant was a first offender who had worked throughout his 15-year marriage to educate his six children and whose offense was prompted by economic pressures).

4. The seriousness of the offense has been partially mitigated by Mr. Client's assistance in the civil lawsuit against AIG.

In part due to Mr. Client's assistance in the civil lawsuits against AIG, the lawsuits were settled and the victims stand to recover $7.2 million dollars. The victims' attorney states that Mr. Client's cooperation and provision of information was "very helpful" in the settlement. Mr. Client's efforts reduced the victims' losses, and also demonstrate his genuine remorse and acceptance of responsibility.

5. Mr. Client has been punished far beyond what is just.

Mr. Client has not only lost his business, his professional reputation, and his ability to work in the financial and insurance industries, but has experienced exceedingly harsh conditions of pre-trial confinement. He entered jail a relatively healthy man (with his diabetes under control) and now has a host of medical problems which have not been even adequately treated. He has developed a blood disorder repeatedly misdiagnosed by medical staff, experienced a worsening of his diabetes due to poor diet, and suffered permanent liver damage. When medical staff first confirmed that his blood levels were shockingly low, they told him he had leukemia. When tests disproved this initial diagnosis, he was told that he had lymphoma. After being subjected to two biopsies, doctors finally confirmed that he did not have cancer at all. They have been unable to determine the cause of his serious blood disorder, but have now given a diagnosis of

autoimmune hepatitis. These poorly treated medical problems and misdiagnoses have caused Mr. Client physical pain and intense emotional anguish.

This Court should consider Mr. Client's loss of profession and reputation, *see, e.g.*, *United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y. 1993) (granting downward departure where defendant was punished by the loss of his business); *United States v. Vigil*, 476 F. Supp. 2d 1231, 1235 (D.N.M. 2007) (finding variance appropriate where defendant was collaterally punished by loss of his position and reputation, widespread media coverage, and emotional toll of two lengthy public trials); *United States v. Samaras*, 390 F. Supp. 2d 805, 809 (E.D. Wis. 2005) (granting variance in part because defendant lost a good public sector job as a result of his conviction), as well as the exceedingly harsh conditions of his pretrial confinement. *See, e.g.*, *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) ("the extraordinary trauma Mateo has already suffered during the time she has served in custody," when left unattended in her cell without medical attention during fifteen hours of labor, "the full effects of which can never be comprehensively gauged, has inflicted forms of pain and suffering that have effectively enhanced, to a disproportionate degree, the level of punishment contemplated to be experienced by inmates in the typical case during the period of incarceration prescribed by the Guidelines."); *United States v. Pressley*, 345 F.3d 1205, 1218-19 (11th Cir. 2003) (district court had discretion to grant downward departure because defendant was on 23-hour-a-day lockdown during five years of pretrial confinement); *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001) ("pre-sentence confinement conditions may in appropriate cases be a permissible basis for downward departures").

It would be unjust and dangerous to subject Mr. Client to further imprisonment in view of the likelihood that he cannot receive effective treatment from the Bureau of Prisons. This issue is addressed in Part D, *infra*.

B. Need for Deterrence

Research has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). "Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence." *Id*.; *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity."). Typical of the findings on general deterrence are those of the Institute of Criminology at Cambridge University. *See* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999), summary available at http://members.lycos.co.uk/lawnet/SENTENCE.PDF. The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. *Id*. at 1. It examined the effects of changes to both the certainty and severity of punishment. *Id*. While significant correlations were found between the certainty of punishment and crime rates, the "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance." *Id.* at 2. The report concluded that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences is capable of enhancing deterrent effects." *Id*. at 1. Research regarding white collar offenders in particular (presumably the most rational

of potential offenders) found no difference in the deterrent effect of probation and that of imprisonment. *See* David Weisburd *et al., Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); *see also* Gabbay, *supra*, at 448-49 ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."). According to "the best available evidence, . . . prisons do not reduce recidivism more than noncustodial sanctions." Francis T. Cullen *et al., Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011).

C. Need for Incapacitation

1. Mr. Client has an exceptionally low risk of recidivism.

Mr. Client is 51 years old, a first offender, a college graduate, was employed throughout his adult life, was married for twenty years, and has no history of drug or alcohol abuse. For all male offenders in Criminal History Category I, the recidivism rate is 15.2%. For those over age 50 at the time of sentencing, however, the rate in Category I is only 6.2%. For those who are college graduates, the rate in CHC I is just 7.1%; for those who have been employed, the rate is 12.7%; and for those who were ever married, the rate is 9.8%. For those with no history of illicit drug use, the recidivism rate is half that of those who do have a drug history. For those like Mr. Client who are educated, have been employed, have been married, are drug free and over 50, the recidivism rate is certainly much lower. *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at Exh. 9, at 28; Exh. 10, at 29 (May 2004) [hereinafter *Measuring Recidivism*]. For all Category I defendants convicted of fraud, the recidivism rate is just 9.3%, the lowest of any offense category, which is 45% below the rate for all fraud offenders. *Id*., Exh. 11, at 30. Finally,

offenders like Mr. Client with zero criminal history points have a rate of recidivism half that of offenders with one criminal history point. *See* Sent'g Comm'n, *Recidivism and the "First Offender,"* at 13-14 (May 2004) [hereinafter *First Offender*].

The Commission has recognized the advisability of revising the guidelines to take age and first offender status into account. *See First Offender* at 1-2 (identifying goal of "refin[ing] a workable 'first-offender' concept within the guideline criminal history structure"); *Measuring Recidivism* at 16 (noting that "[o]ffender age is a pertinent characteristic" that would "improve [the] predictive power of the guidelines "if incorporated into the criminal history computation"). The Commission has not implemented any such revisions to the criminal history guidelines, but has recently stated that age "may be relevant" in granting a departure. USSG § 5H1.1, p.s.

In imposing the least sentence sufficient to account for the need to protect the public from further crimes of Mr. Client, this Court should consider the statistically low risk of recidivism presented by Mr. Client's history and characteristics. *See, e.g.*, *United States v. Darway*, 255 Fed. Appx. 68, 73 (6th Cir. 2007) (upholding downward variance on basis of defendant's first-offender status); *United States v. Hamilton*, 323 Fed. Appx. 27, 31 (2d Cir. 2009) ("the district court abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines"); *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir. 2007) (affirming below-guideline sentence based on defendant's age, which made it unlikely that he would again be involved in a violent crime); *United States v. Urbina*, slip op., 2009 WL 565485, *3 (E.D. Wis. Mar. 5, 2009) (considering low risk of recidivism indicated by defendant's lack of criminal record, positive work history, and strong family ties); *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) (granting variance because defendants "with

zero criminal history points are less likely to recidivate than all other offenders"); *Simon v. United States*, 361 F. Supp. 2d 35, 48 (E.D.N.Y. 2005) (basing variance in part on defendant's age of 50 upon release because recidivism drops substantially with age); *United States v. Nellum*, 2005 WL 300073 at *3 (N.D. Ind. Feb. 3, 2005) (granting variance to 57-year-old defendant because recidivism drops with age); *United States v. Ward*, 814 F. Supp. 23, 24 (E.D. Va. 1993) (granting departure based on defendant's age as first-time offender since guidelines do not "account for the length of time a particular defendant refrains from criminal conduct" before committing his first offense).

2. Due to his voluntary debarment and surrender of his license, Mr. Client will be unable to commit a similar offense in the future.

Under the plea agreement in this case, Mr. Client has agreed never to participate in the affairs of any financial institution insured by the Federal Deposit Insurance Corporation (FDIC), never to serve as an officer, director or employee of any institution or agency specified in 12 U.S.C. § 1818(e)(7)(A), and never to serve in a position related to an employee benefit plan. Additionally, he has voluntarily surrendered his insurance license. In determining whether there is a need for imprisonment to prevent future crimes, the defendant's inability to commit similar crimes in the future is highly relevant. *See, e.g., United States v. Olis*, 2006 WL 2716048, at *13 (S.D. Tex. Sept. 22, 2006) (granting substantial variance in part because "the attendant negative publicity, the loss of his job and accounting and law licenses, and the need to provide support for his family will provide adequate deterrence against any potential future criminal conduct."). No further term of imprisonment is necessary to prevent Mr. Client from committing similar crimes in the future.

D. Needed Medical Treatment in the Most Effective Manner

The sentence imposed must ensure that "needed . . . medical care" is provided "in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). The Commission now recognizes that "[p]hysical condition . . . may be relevant in determining whether a departure is warranted," and has always recognized that "in the case of a seriously inform defendant, home detention may be as efficient as, and less costly than, imprisonment." USSG § 5H1.4, p.s. (2010).

Mr. Client is not likely to receive effective medical care in a Bureau of Prisons facility. A recent audit by the Office of the Inspector General found systemic deficiencies in the Bureau of Prisons' delivery of health services. It found that at a number of institutions, the Bureau of Prisons "did not provide required medical services to inmates," including inadequate treatment for chronic conditions, failure to properly monitor side effects of medication, allowing unqualified providers to render medical services, and failure to meet performance target levels on treatment of serious conditions, including diabetes. *See* U.S. Dep't of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care* ii-xix, 32-34 (2008), *available at* www.justice.gov/oig/reports/BOP/a0808/final.pdf.

Mr. Client's treatment at the county jail has placed him in serious jeopardy that now requires not just adequate treatment, but "the most effective" treatment. *See* 18 U.S.C. § 3553(a)(2)(D). In light of the Inspector General's audit, there is no reason to believe that the Bureau of Prisons will provide "the most effective" treatment. Further imprisonment without "the most effective" treatment is likely to further damage Mr. Client's health and shorten his life. As soon as possible, he should be released to home detention with permission to attend medical appointments. *See United States v. Martin*,

363 F.3d 25, 49-50 (1st Cir. 2004) (upholding departure when BOP had policy of not administering the only medication successful in treating defendant's Crohn's disease); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000) (finding no abuse of discretion where district court concluded BOP's letter stating its ability to handle medical conditions of all kinds was merely a form letter and that imprisonment posed a substantial risk to the defendant's life).

E. Need to Avoid Unwarranted Disparities and Unwarranted Similarities

The Court must consider the need to avoid unwarranted disparities among defendants with similar criminal histories convicted of similar criminal conduct. 18 U.S.C. § 3553(a)(6). The court should avoid unwarranted similarities in sentencing among defendants who are different in ways not accounted for in the guideline range, *see Gall v. United States*, 552 U.S. 38, 55 (2007) ("need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated"); *United States v. Ovid*, 2010 WL 3940724 (E.D.N.Y. 2010) (sentencing two defendants with similar guideline ranges to 60 months and 126 months respectively based on distinctions in circumstances of the offenses and characteristics of the defendants), and unwarranted differences among defendants whose conduct and characteristics are similar. *See United States v. Parris*, 573 F. Supp. 2d 744, 753, 756-62 (E.D.N.Y. 2008).

In fiscal year 2012, sentences below the guideline range were imposed in 47.5% of all fraud cases; 23.7% were government-sponsored, 23.8% were non-government sponsored. *See* U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl.27. The chart below includes a sample of fraud cases from districts across the country, many of which involved losses far greater than in this case, in which defendants received sentences substantially below the guideline ranges applicable in those cases, and

substantially below the guideline range of 151-188 months applicable here. As here, none of the defendants in these cases received a departure based on cooperation. This Court should take into account the national sentencing trend exemplified by the Commission's data and this chart.

In *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), Judge Block in the Eastern District of New York took a similar collection of cases into account in fashioning an appropriate sentence for two securities fraud offenders. At the court's request, each party submitted a sample group of cases to illustrate the sentences imposed in other securities fraud cases. *Id*. at 752. Based on these samples, the court concluded that "[t]hose [defendants] who were not cooperators and were responsible for enormous losses were sentenced to double-digit terms of imprisonment (in years); [while] those whose losses were less than $100 million were generally sentenced to single-digit terms." *Id.* at 753. The court relied on this national pattern in arriving at a sentence of 60 months for the two defendants who faced an advisory guideline range of 360 months to life, which was 16.7% of the bottom of the applicable guideline range. *Id.* at 745.

Mr. Client has already served a prison sentence that is 23% of the bottom of the applicable guideline range. Unlike the defendants in *Parris*, who had no particular mitigating factors, there are substantial mitigating factors here. The Court should impose a sentence of 35 months' time served, followed by six months of home confinement.

NOTE—THIS CHART IS A FEW YEARS OLD AND SHOULD BE UPDATED AND ADAPTED TO YOUR CASE AS APPROPRIATE.

GOVERNMENT WEBSITES ARE ONE GOOD STARTING POINT, e.g.:

U.S. Department of Health and Human Services, Office of the Inspector General

http://oig.hhs.gov/fraud/enforcement/criminal/index.asp

Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases (January 2007 to the present: updated May 2, 2012)

http://www.justice.gov/nsd/docs/export-case-fact-sheet.pdf

Securities Fraud cases – search for "securities fraud" on http://www.justice.gov/agencies/index-list.html

FIND EXAMPLES IN PUBLISHED DECISIONS, MEDIA SEARCHES ON WESTLAW AND GOOGLE, EMAIL LIST INQUIRIES.

SUPPLEMENT WITH INFORMATION REGARDING PLEA AGREEMENTS AND SENTENCES FROM DOCUMENTS ON PACER.

Case	Conviction	Loss	Guideline Range	Sentence Imposed/% of guideline range
Christian Milton, AIG, Vice President (D. Conn. 2009)	Convicted at trial of various counts of fraud.		**LIFE imprisonment**	**48 months**[1] 10% of guideline range; life treated as 470 months
Ronald Ferguson, CEO, General Reinsurance Corp. (D. Conn. 2008)	Convicted at trial of conspiracy, securities fraud, false statements to SEC, and mail fraud.	**$544 million**	**LIFE imprisonment**	**24 months**[2] 5% of guideline range; life treated as 470 months
Travis Correll, (N.D. Ga. 2008)	Pled guilty to wire fraud (related to Ponzi scheme).	**$29 million** (ordered in restitution)	**188-235 months**	**144 months** 76% of guideline range (Correll was initially sentenced to 144 months, but later received a further reduction to 108 months under Rule 35.[3])
Robert Cole, Sales Rep., Diebold (N.D. Ohio 2008)	Pled guilty to securities fraud.	**$509,000**	**30-37 months**	**12 months and 1 day**[4] 40% of guideline range

William Ledee, Founder of fictitious insurance company (N.D. Ga. 2007)	Pled guilty to making false financial statements, engaging in business of insurance as a convicted felon, mail fraud, conspiracy to commit money laundering, etc.	**$21.6 million** (ordered in restitution)	The PSR indicated a total offense level of 51, and criminal history category II, resulting in a guideline range of **LIFE**.[5]	**70 months** 15% of guideline range; life treated as 470 months (varied below type C agreement's cap of 7.5 years[6])
John Whittier, Manager, Wood River Partners (S.D.N.Y. 2007)	Pled guilty to securities fraud, failure to disclose ownership in excess of 5% of publicly traded security, and failure to disclose ownership in excess of 10% of publicly traded security.	**$88 million** (ordered in restitution)	**188-235 months**	**36 months**[7] 19% of guideline range
Hector Orlansky, President, E.S. Bankest (S.D. Fla. 2007)	Convicted at trial of conspiracy to commit bank fraud and wire fraud, bank fraud, making false statements, wire fraud, conspiracy to commit money laundering, and money laundering.	**$164.5 million** (ordered in restitution)	**262-327 months**	**240 months**[8] 91.6% of guideline range
Richard Adelson, CEO & President, Impath (S.D.N.Y. 2006)	Convicted at trial of conspiracy, securities fraud, and filing false reports with SEC.	**$50 - $100 million** (court ordered restitution of $50 million)	Guidelines called for **life imprisonment**; statutory maximum was **85 years**.	**42 months**[9] 9% of guideline range; life treated as 470 months
Jamie Olis, Tax Lawyer, Dynegy (S.D. Tex. 2006)	Convicted at trial of: (1) conspiracy to commit securities fraud, mail fraud, wire fraud, (2) securities fraud, (3) mail fraud, and (4) wire fraud.	**$79 million**	**151 -188 months**	**72 months**[10] 47% of guideline range
E. Kirk Shelton, Vice Chairman, Cendant Corporation (D. Conn. 2005)	Convicted at trial of: (1) conspiracy to commit securities fraud, mail fraud, wire fraud, and false statements to SEC, (2) mail fraud, (3) wire fraud, (4) false statements to SEC, (5) securities fraud.	**$3.275 billion** (ordered in restitution)	**151-188 months** (1997 Guidelines were used; 2006 Guidelines would have called for life imprisonment, limited by a statutory cap of 300 months)	**120 months**[11] 79% of guideline range
Bernard Ebbers, CEO, WorldCom (S.D.N.Y. 2005)	Convicted at trial of conspiracy, securities fraud, making false filings with the SEC.	**Over $1 billion**	**360 months to life**	**300 months**[12] 83% of guideline range

Sanjay Kumar, CEO, Computer Associates Int'l (E.D.N.Y. 2006)	Pled guilty to conspiracy to commit securities fraud and wire fraud, securities fraud, false statements to SEC, conspiracy to obstruct justice, obstruction of justice, and false statements.	**$2.2 billion** (according to Gov't's Sent'g Memo)	**LIFE imprisonment** under 2005 Guidelines **188 to 235** under 1998 Guidelines (Unclear how District Court resolved dispute over which version should apply.)	**144 months**[13] 30% of guideline range; life treated as 470 months
Stephen Richards, Sr. Vice President, Computer Associates (E.D.N.Y. 2006)	Pled guilty to conspiracy to commit securities fraud and wire fraud, securities fraud, false statements to SEC, conspiracy to obstruct justice, obstruction of justice, and perjury.	**$2.2 billion** (according to Government's Sentencing Memorandum)	**LIFE imprisonment** under 2005 Guidelines **151 to 188** under 1998 Guidelines (Unclear how District Court resolved dispute over which version should apply.)	**84 months**[14] 18% of guideline range; life treated as 470 months
Mehdi Gabayzadeh, CEO, American Tissue (E.D.N.Y. 2006)	Convicted at trial of conspiracy to commit securities fraud, conspiracy to commit bank fraud, bank fraud, wire fraud, interstate transport of property obtained by fraud, bankruptcy fraud, conspiracy to commit perjury, and obstruction of justice.	PSR found total loss of **$193 million** (Court ordered $65 million in restitution.)	**LIFE imprisonment**	**180 months**[15] 38% of guideline range; life treated as 470 months
John Rigas, Founder, Adelphia (S.D.N.Y. 2004)	Convicted at trial of securities fraud, bank fraud, and conspiracy to: (a) commit securities fraud, (b) commit bank fraud, and (c) make or cause to be made false statements in filings to SEC.	**$2.3 billion**	Guideline range was **LIFE imprisonment**; however, **statutory maximum was 185 years**.	**144 months**[16] 31% of guideline range; life treated as 470 months; 6% of statutory maximum cap
Timothy Rigas, CFO, Adelphia (S.D.N.Y. 2004)	Convicted at trial of securities fraud, bank fraud, and conspiracy to: (a) commit securities fraud, (b) commit bank fraud, and (c) make or cause to be made false statements in filings to SEC.	**$2.3 billion**	Guideline range was **LIFE imprisonment**; however, statutory maximum was **185 years**.	**204 months**[17] 43% of guideline range; life treated as 470 months; 9% of statutory maximum cap
Jacob Jacobowitz, Executive VP, Allou Healthcare (E.D.N.Y. 2007)	Pled guilty to making false statements in reports to the SEC.	**$30 million** (ordered in restitution)	Guideline range was **168-210 months**; however, statutory maximum was 120 months.	**84 months**[18] 50% of guideline range; 70% of statutory maximum cap

Herman Jacobowitz CEO, Allou Healthcare (E.D.N.Y. 2007)	Pled guilty to conspiracy to commit bank, securities, and mail fraud *and* making false statements in reports to SEC.	**$176 million** (ordered in restitution)	Guideline range would have been **LIFE imprisonment**; plea agreement structured to provide statutory maximum of 180 months.	**180 months**[19] 38% of guideline range; life treated as 470 months
Aaron Jacobowitz Manager of various companies controlled by Jacobowitz family (E.D.N.Y. 2007)	Pled guilty to money laundering.	**$176 million** (ordered in restitution)	Guideline range was **LIFE imprisonment**; plea agreement structured to provide statutory maximum of 120 months.	**120 months**[20] 25% of guideline range; life treated as 470 months
Carole Argo CFO, SafeNet, Inc. (S.D.N.Y. 2008)	Pled guilty to securities fraud.	**$1 - 2.5 million** (stipulated loss amount)	**97 - 121 months**	**6 months**[21] 6% of guideline range
Lennox Parris, Director, Queench, Inc. (E.D.N.Y. 2008)	Convicted at trial of conspiracy to commit securities fraud, securities fraud, conspiracy to commit witness tampering, and witness tampering.	**Between $2.5 and $7 million**	**360 months to LIFE**	**60 months**[22] 16.7% of guideline range
Lester Parris, Director, Queench, Inc. (E.D.N.Y. 2008)	Convicted at trial of conspiracy to commit securities fraud, securities fraud, conspiracy to commit witness tampering, and witness tampering.	**Between $2.5 and $4.9 million**	**360 months to LIFE**	**60 months**[23] 16.7% of guideline range
Raquel Kohler, Mutual Benefit Corp. (S.D. Fla. 2007)	Pled guilty to conspiracy to commit securities fraud.	**$471 million** (ordered in restitution)	Guideline range **324- 405 months**, statutory maximum **120 months**.	**60 months**[24] 18.5% of guideline range; 50% of statutory maximum cap
Marc Dreier, Managing Partner, Dreier LLP (S.D.N.Y. 2009)	Pled guilty to securities fraud, wire fraud, and conspiracy to commit securities and wire fraud.	**$387 million** (ordered in restitution)	Guideline range **LIFE**, statutory maximum limited sentence to **145 years**.	**240 months**[25] 51% of guideline range; life treated as 470 months; 13.8% of statutory maximum cap

F. Need to Provide Restitution to Victims of the Offense

In determining the appropriate sentence, this Court must consider "the need to provide restitution to any victims of the offense." *See* 18 U.S.C. §3553(a)(7); *see also, e.g., United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) (acknowledging district court's discretion to depart from guidelines to impose probationary sentence, since the "goal of obtaining restitution for the victims of Defendant's offense . . . is better served by a non-incarcerated and employed defendant"); *United States v. Peterson*, 363 F. Supp. 2d 1060, 1061-62 (E.D. Wis. 2005) (granting a variance so that defendant could work and pay restitution).

The victims in this case have stressed the need for restitution, and Mr. Client wishes to provide it. He is college-educated, hardworking, and a particularly talented salesperson. He was highly successful in selling insurance for over a decade. There is every reason to believe that he can obtain a reasonably well-paying sales job once he is released and properly treated for his medical problems. If Mr. Client were sentenced within the advisory guideline range, he would not be released until his early seventies. At that point, his age, health problems, and life expectancy would make it nearly impossible for him to make any restitution. This Court should seek to maximize, rather than eliminate, Mr. Client's ability to make the restitution the victims have demanded.

G. Kinds of Sentences Available

This Court must now consider all of "the kinds of sentences available" by statute, § 3553(a)(3), even if the "kinds of sentence . . . established [by] the guidelines" zones recommend only a lengthy prison term. *See Gall*, 552 U.S. at 59 & n.11. The split sentence requested by Mr. Client is especially appropriate in light of his immediate need for effective medical care.

Congress directed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Congress issued this directive in the belief that "sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society," and that "in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service." *See* Pub. L. No. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (set forth at 18 U.S.C. § 3551 note). Mr. Client is plainly not a "violent and serious offender" who "pose[s] the most dangerous threat to society." He needs medical attention from competent providers, wishes to work in order to make restitution, and should be released from prison to home confinement.

III. THE GUIDELINE RANGE PROVIDES NO USEFUL ADVICE BECAUSE IT IS NOT BASED ON EMPIRICAL EVIDENCE OR NATIONAL EXPERIENCE, AND FAILS TO PROMOTE ANY PURPOSE OF SENTENCING.

When Congress enacted the Sentencing Reform Act of 1984, it directed the Commission to promulgate guidelines that "assure the meeting of the purposes of sentencing," 28 U.S.C. § 991(b)(1)(A), and to use average sentences imposed and prison time actually served in the pre-guidelines period as a "starting point." 28 U.S.C. § 994(m). The Commission was then to continually review and revise the guidelines in light of sentencing data, criminological research, and consultation with frontline actors in the criminal justice system. *See* 28 U.S.C. §

991(b)(1)(C), § 991(b)(2), § 994(o), § 995(13), (15), (16). The original Commissioners abandoned the effort to design the guidelines based on the purposes of sentencing because they could not agree on which purposes should predominate, and instead purportedly based the guidelines on an empirical study of time served for various offenses before the guidelines. *See* USSG, Ch. 1 Pt. A(3); Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988).

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

The Court recognized, however, that not all guidelines were developed in this manner. *See Gall v. United States*, 552 U.S. 38, 46 & n.2 (2007); *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). When a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role," because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Id.* at 109-10.

The fraud guideline is not based on empirical data of past practice or on national experience since then. Because the Commission failed to rely on empirical data or national experience in promulgating or amending § 2B1.1, and thus failed to fulfill its institutional role,

this Court is free to disagree, on reasoned policy grounds, with its recommendation. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009); *Kimbrough*, 552 U.S. 101-02, 109-10; *Rita*, 551 U.S. at 351, 357.

A. Mr. Client's guideline range is 500% of the average past practice sentence and the original guideline range.

Mr. Client's guideline range is 151-188 months. Before the guidelines, first offenders convicted of sophisticated embezzlement involving the highest loss amounts who were sentenced to prison served, on average, 30-37 months, and 1% of such defendants received probation. *See* U.S. Sent'g Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 30 (1987), http://www.src-project.org/wp-content/pdfs/reports/USSC_Supplementary%20Report.pdf. First offenders convicted of sophisticated fraud involving the highest loss amounts who were sentenced to prison served, on average, a prison sentence of 18-24 months, and 18% of such defendants received probation. *Id*. at 33.

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

Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 56 (2004) [hereinafter *Fifteen Year Report*] (Commission sought to ensure that white collar offenders faced "short but definite period[s] of confinement").

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

Moreover, the Commission quickly abandoned its original goal of ensuring "short but definite" sentences. Beginning just two years after the Guidelines went into effect, prison sentences for fraud offenders were steadily increased. The effect of those increases on this case was to add four levels for loss in 1989, to add five more levels for loss in 2001, to increase the base offense level by one level in 2003, and to add six levels for the number of victims in 2001 and 2003. As a result, James Client's advisory guideline range is now five times the range under the original 1987 guideline, increased as follows:

- **1987**

2F1.1(a) – base offense level:	6
2F1.1(b)(1) – amount of loss over $5 million	11
2F1.1(b)(2) – more than minimal planning and/or multiple victims	2
3B1.3 – abuse of position of trust	2
	21
3E1.1 – acceptance of responsibility	-2

TOTAL OFFENSE LEVEL	**19**
GUIDELINE RANGE	**30 - 37 months**

· **1989**

2F1.1(a) – base offense level:		6
2F1.1(b)(1) – amount of loss between $10 and 20 million		15
2F1.1(b)(2) – more than minimal planning and/or multiple victims		2
3B1.3 – abuse of position of trust		2
		25
3E1.1 – acceptance of responsibility		-2
TOTAL OFFENSE LEVEL	23	
GUIDELINE RANGE	**46 – 57 months**	

· **2001**

2B1.1(a) – base offense level:		6
2B1.1(b)(1) – amount of loss between $7 and 20 million	20	
2B1.1(b)(2)(B) – more than 50 victims	4	
2B1.1(b)(8)(C) – sophisticated means	2	
3B1.3 – abuse of position of trust		2
		34
3E1.1 – acceptance of responsibility		-3
TOTAL OFFENSE LEVEL	**31**	
GUIDELINE RANGE	**108 - 135 months**	

· **2003**

2B1.1(a)(1) – base offense level:		7
2B1.1(b)(1) – amount of loss between $7 and 20 million	20	
2B1.1(b)(2)(C) – more than 250 victims	6	
2B1.1(b)(9)(C) – sophisticated means	2	
3B1.3 – abuse of position of trust		2
		37
3E1.1 – acceptance of responsibility		-3
TOTAL OFFENSE LEVEL	**34**	
GUIDELINE RANGE	**151 – 188 months**	

B. Nine Levels Were Added for the Amount of Loss in this Case Without Basis in Empirical Data or National Experience and Without Any Demonstrated Need to Further Any Purpose of Sentencing.

In 1989, two years after the guidelines went into effect, four levels were added for a loss amount of $20 million. *See* USSG, App. C, Amend. 154 (Nov. 1, 1989). As the official reason for the amendment, the Commission stated only that it sought to "increase the offense levels for offenses with larger losses to provide additional deterrence and better reflect the seriousness of the conduct." *Id*. This reason was soon refuted. According to former Commissioner Michael K. Block (who had just resigned[2]) and former Deputy Chief Counsel Jeffrey S. Parker, the Justice Department's *ex-officio* member of the Commission had persuaded four of six Commissioners "that recent congressional enactments had given oblique 'signals' to the Commission to increase fraud penalties," when the statutes "said no such thing." Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*Mistretta*): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 319 (1989). The Commission "gratuitously" increased punishment for larger fraud cases for reasons that were "overtly political and inexpert," and abandoned its statutory mandates by failing to rely on its own data, failing to measure the effectiveness or efficiency of guideline sentences, and failing to provide analysis of prison impact. *Id*. at 318-20.

In 2001, another five levels were added for a loss amount of $20 million as part of the Commission's Economic Crimes Package. *See* USSG, App. C, Amend. 617 (Nov. 1, 2001). As

[2] Paula Yost, *Sentencing Panel Member Resigns over Research*, Wash. Post, Aug. 23, 1989, at A25 (reporting that Commissioner Block resigned on August 22, 1989 "over what he said is a lack of commitment by commissioners to base decisions on research and scientific data when amending sentencing guidelines").

the official reason for this amendment, the Commission stated that it was responding to "comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that [the fraud guideline] under-punish[es] individuals involved in moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines." *Id.* While the Commission did not identify the "other guidelines" to which it referred, it is clear from the proceedings upon which the amendment was based that it referred to the drug guidelines. At the Commission's Economic Crimes Symposium in 2000, at which the issues and questions underlying the Economic Crimes Package were discussed by judges, stakeholders, and academics over a two-day period, a formal question was posed and provided in writing: "[I]f there is a current problem with the guidelines that is in need of repair, is it that fraud and theft are punished too leniently or that drug crimes are punished too harshly?" U.S. Sent'g Comm'n, *Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses* 54 (2000) [hereinafter *Economic Crimes Symposium*].[3]

Speaking on behalf of the Department of Justice, and in response to the moderator's question asking whether economic crimes should be "punished in the same way that we punish drug offenders," *id.* at 55, Assistant Attorney General James K. Robinson stated that "sentences for economic crimes should not be set, in our view, to match sentences for drug crimes," *id.* at 59, but should be set "in terms of the need to fulfill the purposes of sentencing," *id.* at 58. Judge J. Phil Gilbert, speaking on behalf of the Criminal Law Committee of the Judicial Conference, stated that drug crimes are "punished too harshly," high loss fraud offenses are punished "too

[3]http://www.ussc.gov/Research/Research_Projects/Economic_Crimes/20001012_Symposium/ePlenaryIII.PDF.

leniently," and they cannot be compared because they are "apples and oranges." *Id.* at 56. Dr. Mark Cohen, Professor of Economics at Vanderbilt University, stated that "drug offenses are broke so they need to be fixed," but that there was no "evidence that fraud is broke," and summarized research presented at the symposium demonstrating that increasing sentences for fraud would not serve the purpose of deterrence. *Id.* at 65-66, 69.

Nonetheless, as revealed by the question posed by the Commission and its reference to "penalty levels for offenses of similar seriousness sentenced under other guidelines," USSG, App. C, Amend. 617 (Nov. 1, 2001), the Commission ratcheted up the guideline range – by five levels as applicable in this case – based on the guidelines for drug offenses. This alone demonstrates that the increase was unsound, for the drug guidelines themselves were not based on empirical data or national experience. *See Gall*, 552 U.S. at 46 n.2; *Kimbrough*, 552 U.S. at 96. Instead, they were designed to be "proportional" to statutory mandatory minimums, *see* USSG § 2D1.1 comment. (backg'd) (1987), lack any empirical basis, and dramatically increased sentences for drug offenses "far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." *Fifteen Year Report* at 49. Moreover, contrary to the Commission's vague assertion, the comments the Commission actually received did not indicate that the Commission should increase fraud penalties to approach or match drug penalties.

The explanations offered by the Commission for the two amendments which added nine levels in this case are thus deficient and inaccurate. In both instances, the Commission amended the guideline not in the exercise of its characteristic institutional role as an independent expert body, but instead based on unsupported signals. The Commission ignored the overwhelming empirical research, discussed at length above and at the Economic Crimes Symposium,

demonstrating that increases in sentence severity, as opposed to certainty, have no deterrent value, and it ignored the actual feedback from the district courts. Though the Guidelines explicitly allowed (and still allow) for *upward* departures when the amount of loss does not "fully capture the harmfulness and seriousness of the conduct," *see* USSG § 2F1.1 comment. (n.11) (2000), the sentencing courts granted upward departures in only 1.2 percent of cases sentenced under § 2F1.1 in the year 2000, while they granted downward departures in 11.2% of cases and another 19% received departures for substantial assistance. *See* U.S. Sent'g Comm'n, *2000 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2000); *see also Economic Crimes Symposium* at 63 (remarks of James Felman, co-chair of the Commission's Practitioner's Advisory Group) (citing similar statistics for fiscal year 1999, and also pointing out that in fraud cases, judges sentenced at the high end of the applicable guideline range less frequently than average and at the bottom of the range in the majority of cases). This feedback from judges, the institutional actor best suited to make sentencing determinations, did not support any increase.

The 1989 and 2001 increases in the fraud guideline led to the absurd result that first-time, nonviolent fraud offenders were subject to guideline ranges as high as those imposed on armed drug traffickers and even higher than those applicable to the most violent offenders. *Compare* USSG § 2B1.1 (2001) (offense level 30 for loss over $7 million, sophisticated means, abuse of position of trust) *with* USSG § 2D1.1 (2001) (offense level 30 for trafficking in 3 kilograms of cocaine while possessing a firearm); USSG § 2A2.1 (2001) (offense level 28 for assault with intent to commit first degree murder); § 2A4.1 (2001) (offense level 24 for kidnapping), USSG § 2K1.4 (2001) (offense level 24 for arson creating substantial risk of death or serious bodily injury), USSG § 2A1.3 (2001) (offense level 25 for voluntary manslaughter).

Moreover, while the amount of "loss" is the primary determinant of the offense level for fraud offenders, loss is a highly imperfect measure of the seriousness of the offense. *See United States v. Gupta*, __ F. Supp. 2d __ (SDNY Oct. 24, 2012) ("By making a Guidelines sentence turn on this single factor [loss or gain], the Sentencing Commission ignored [3553(a)] and . . . effectively guaranteed that many such sentences would be irrational on their face."); *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing "the inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss" without any explanation of "why it is appropriate to accord such huge weight to [this] factor[ ]"). The amount of loss is often "a kind of accident" and thus "a relatively weak indicator of [ ] moral seriousness . . . or the need for deterrence." *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004). Defendants rarely set out to defraud others of a specific amount of money; rather, the amount of loss is dependent on the security procedures in place and the point in time when the fraud happens to be detected. *Id.* "Had [the defendant] been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more." *Id*.

C. The Base Offense Level Was Increased By One Level In Response to Political Pressure and Against the Commission's Better Judgment.

In 2003, the base offense level was increased from six to seven for defendants convicted of an offense with a statutory maximum of 20 years. *See* USSG App. C, Amend. 653 (Nov. 1, 2003). The Sarbanes-Oxley Act had raised statutory maximums for most fraud offenses after a "bidding war" in Congress. *See* Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 404 (2004). Thus, the one-level increase resulted in a 10% increase for most fraud offenders, including Mr. Client.

As its stated reason, the Commission pointed to Congress's directive in section 905(b)(2) of the Sarbanes-Oxley Act, Pub. L. No. 107-204, which instructed it to consider whether the guidelines are "sufficient to deter and punish" certain economic crimes "in view of the statutory increases in penalties contained in the Act." *See* USSG App. C, Amend. 653 (Nov. 1, 2003) (Reason for Amendment). Having just substantially raised penalties in 2001, the Commission could have narrowly targeted the high-end corporate scandals that prompted the Sarbanes-Oxley Act. That is what all commentators (other than the Department of Justice) advised, and the empirical evidence showed that across-the board-increases were unnecessary. The Department of Justice, however, placed intense pressure on the Commission to raise sentences for all fraud offenders, privately threatening to go back to Congress for a more specific directive if the Commission did not comply with the Department's wishes. The Commission initially resisted. However, nine months after the Sarbanes-Oxley Act was enacted, one Senator unilaterally inserted into the congressional record a "legislative history" stating that Congress meant the Commission to raise sentences for both high and low-level fraud offenders, with special attention to the "penalty gap" between fraud and narcotics cases. *See* Bowman, *supra*, at 411-32.

Accordingly, the Commission raised the base offense level from six to seven, stating that the amendment "responds to increased statutory penalties" and that the higher base offense level is "intended to calibrate better the base guideline penalty to the seriousness of the wide variety of offenses referenced to that guideline, as reflected by statutory maximum penalties established by Congress." *See* USSG App. C, Amend. 653 (Nov. 1, 2003). In doing so, the Commission once again ratcheted up the fraud guideline to more closely match the unsound drug guidelines, and explicitly tied the base offense level to the statutory maximum, thus abdicating to Congress its independent judgment regarding the seriousness of the offense. *See* Bowman, *supra*, at 434.

D. The Specific Offense Characteristics Applicable in this Case Impose Cumulative Punishment for the Same Harm.

The first fraud guideline, § 2F1.1, included two specific offense characteristics in addition to loss, one with four subparts applicable in the alternative and one that required a floor of 12 levels. *See* USSG § 2F1.1 (1987). Today, § 2B1.1 includes sixteen cumulative specific offense characteristics, many with multiple alternatives. *See* USSG § 2B1.1 (2010). In the initial set of guidelines, if there was "more than minimal planning" and "more than one victim," one 2-level enhancement applied. Today, "sophisticated means" and "250 or more victims" cumulatively produce an 8-level enhancement.

Ten of the levels used to calculate Mr. Client's guideline range -- totaling an additional 100 months -- come from specific offense characteristics in § 2B1.1 (6 levels for number of victims, 2 levels for sophisticated means), and a 2-level adjustment from Chapter Three (2 levels for abuse of a position of trust). These factors are "closely correlated" with each other and with loss. *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 170, 2008 WL 2201039, at *6 (Feb. 2008). "In effect, what the Guidelines have done over time is to tease out many of the factors for which loss served as a rough proxy and to give them independent weight in the offense-level calculus." *Id*. "The result is that many factors for which loss was already a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table where sentencing ranges are wide. . . . Any case involving a corporate officer and a multimillion-dollar fraud will

almost always trigger application of multiple offense-level enhancements that have the effect of punishing the defendant over and over for the same basic thing – conducting a big fraud in a corporate setting." *Id*. at *7. *See also* Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L. Rev. 1611, 1648-49 (2007) (factors such as sophisticated means and large number of victims "double-count because they are captured by other enhancements or by the loss calculation."); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011) ("the loss table often overstates the actual harm suffered by the victim," and "[m]ultiple, overlapping enhancements also have the effect of 'double counting' in some cases," while "the guidelines fail to take into account important mitigating offense and offender characteristics.").

The Commission has recognized this problem of "factor creep," in which as "more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness." *Fifteen Year Report* at 137. In 1999, Justice Breyer warned that "[t]here is little, if anything, to be gained in terms of punishment's classical objectives by trying to use highly detailed offense characteristics to distinguish finely among similar offenders. And there is much to be lost, both in terms of Guideline workability and even in terms of fairness (recall the Guidelines' logarithmic numerical scales). . . . The precision is false." *See, e.g.*, Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *11 (1999).

Since the Commission has not corrected the problem of multiple overlapping enhancements, many courts have recognized that a departure or variance is warranted to avoid it.

See, e.g., *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of "substantially overlapping enhancements" at the high end of the fraud sentencing table); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (guidelines in security fraud cases "are patently absurd on their face" due to the "piling on of points" under § 2B1.1); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (guidelines in fraud cases have "so run amok that they are patently absurd on their face," and describing enhancement for "250 victims or more," along with others, as "represent[ing], instead, the kind of 'piling-on' of points for which the guidelines have frequently been criticized").

E. Mr. Client Could Have Committed a Much More Serious Crime in Order to Receive the Same or a Lower Guideline Range.

Mr. Client's guideline range is 151-188 months. The guideline range for robbing a bank of any amount over $5 million and discharging a firearm is 135-168 months; for second degree murder is 168-210 months; for voluntary manslaughter is 63-78 months; for a forced sexual act with a child under the age of 16 is 135-168 months; for aircraft piracy is 168-210 months; for distributing 49 kg. of cocaine and possessing a firearm is 135-168 months; and for selling or buying a child for use in production of pornography is 168-210 months.

F. Widespread Disagreement with the Fraud Guideline is Further Evidence that it is Unsound.

In fiscal year 2012, sentences below the guideline range were imposed in 47.5% of all fraud cases; 23.7% were government-sponsored, 23.8% were non-government sponsored. *See* U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl.27. "[I]t is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance," *United States v. Parris*, 573 F. Supp. 2d 744, 751 (EDNY 2008); *see also United*

States v. Watt, 707 F. Supp. 2d 149 (D. Mass. 2010) (The **"**Guidelines were of no help."). "[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008).

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

IV. CONCLUSION

For the foregoing reasons, Mr. Client respectfully submits that a sentence of 35 months' time served followed by six months' home confinement and five years' supervised release is sufficient, but not greater than necessary, to satisfy the purposes of sentencing.

Respectfully submitted,

Attorney for James B. Client

1. *United States v. Milton*, Case No. 3:06-cr-00137, Docket Entry 1216 (D. Conn. Jan. 30, 2009) (Judgment); *United States v. Milton*, No. 3:06-cr-00137, Docket Entry 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution).
2. *United States v. Ferguson*, Case No. 3:06-cr-00137, Docket Entry 1199 (D. Conn. Dec. 31, 2008) (Judgment); *United States v. Ferguson*, No. 3:06-cr-00137 , Docket Entry 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution).
3. *United States v. Correll*, Case No. 1:07-cr-00365, Docket Entry 36 (N.D. Ga. June 9, 2009) (Order Granting Motion for Reduction of Sentence).
4. *United States v. Cole*, 2008 WL 5204441, at *2-3, 9 (N.D. Ohio, Dec. 11, 2008).

6. Neither the Defendant's nor the Government's sentencing memorandum indicated what the Probation Office had found the advisory guideline range to be. Undersigned counsel contacted Marcia Shein, counsel for Mr. Ledee. Ms Shein reported that the PSR had indicated a total offense level of 51, criminal history category II, and an advisory range of life imprisonment. Ms. Shein also reported that the sentencing court disagreed with some of the PSR's calculation and found a lower guideline range of approximately 20 years. The parties had, however, entered a type C agreement, which capped the sentence at 7.5 years. Although this cap was substantially lower than the advisory guideline range, the sentencing court nevertheless varied even further to impose a sentence of just 70 months. *See United States v. Ledee*, Case Nos. 1:04-cr-0623-BBM and 1:05-cr-0015-BBM, Docket Entry 154 (N.D. Ga. May 8, 2007) (Judgment and Commitment).
7. *United States v. Whittier*, Case No. 1:07-cr-0087, Docket Entry 12 (S.D.N.Y. Oct. 18, 2007) (Judgment). *See also, United States v. Whittier*, 1:07-cr-0087, Docket Entry 14 (S.D.N.Y. Nov. 6, 2007) (Transcript of Sentencing Hearing).
8. *United States v. Orlansky*, Case No. 1:03-cr-20951, Docket Entry 1196 (S.D. Fla. Nov. 16, 2007) (Judgment). *See also, United States v. Orlansky*, Case no. 1:03-cr-20951, Docket Entry 1054 (S.D. Fla. July 17, 2007) (Defendant's Sentencing Memorandum).
9. *United States v. Adelson*, 441 F. Supp.2d 506, 514 (S.D.N.Y. 2006), *aff'd* 2008 WL 5155341 (2d Cir. Dec. 9, 2008). *See also United States v. Adelson*, Case No. 1:05-cr-00325, Docket Entry 86 (S.D.N.Y. June 6, 2006) (Judgment).

10. The district court initially imposed a sentence of 292 months (a sentence within the then-mandatory guideline range) after finding an actual loss amount of $105 million. *United States v. Olis*, 429 F.3d 540, 542 (5th Cir. 2005). On appeal, the Fifth Circuit vacated the sentence, finding that the district court's "loss calculation did not take into account the impact of extrinsic factors on Dynegy's stock price decline." *Id.* at 548-49. On remand, the district court concluded that the actual loss to shareholders could not be reasonably calculated. *United States v. Olis*, 2006 WL 2716048, at * 10 (S.D. Tex. Sept. 22, 2006). The court, therefore, relied on the intended loss figure of $79 million. *Id*. The new loss amount changed the guidelines range to 151-181 months. *Id.* The court then went on to grant a variance below this advisory range to arrive at a final sentence of just 72 months. *Id.* at 11-13.

11. *United States v. Shelton*, Case No. 3:02-cr-00264, Docket Entry 1604 (D. Conn. July 13, 2005) (Government's Sentencing Memorandum). *See also United States v. Shelton*, Case No. 3:02-cr-00264, Docket Entry 1635 (D. Conn. Aug. 4, 2005) (Judgment).

12. *See United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006). Ebbers' sentence has been widely viewed as "one of the most severe given to a first-time offender for a crime that did not involve violence or trafficking in illegal narcotics." *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh I*, 37 MCGEORGE L. REV. 757 (2006).

13. In its Sentencing Memorandum, the Government argued for a loss calculation of $2.2 billion and set forth the two possible Guideline calculations. *United States v. Kumar*, Case No. 1:04-cr-00846, Docket Entry 223 (E.D.N.Y. Nov. 2, 2006). *See also United States v. Kumar*, Case No. 1:04-cr-00846, Docket Entry 284 (E.D.N.Y. Nov. 27, 2006) (Amended Judgment).

14. In its Sentencing Memorandum, the Government argued for a loss calculation of $2.2 billion and set forth the two possible Guideline calculations. *United States v. Richards*, Case No. 1:04-cr-00846, Docket Entry 223 (E.D.N.Y. Nov. 2, 2006). *See also United States v. Richards*, Case No. 1:04-cr-00846, Docket Entry 283 (E.D.N.Y. Nov. 22, 2006) (Judgment).

15. In his Sentencing Letter, Mr. Gabayzadeh conceded a total offense level of 48 (an offense level that results in an advisory sentence of life imprisonment regardless of criminal history score). *See United States v. Gabayzadeh*, Case No. 2:03-cr-00162, Docket Entry 180 (E.D.N.Y. Aug. 17, 2006). *See also United States v. Gabayzadeh*, Case No. 2:03-cr-00162, Docket Entry 190 (E.D.N.Y. Nov. 23, 2006) (Judgment).

16. Following their conviction and sentencing, John and Timothy Rigas succeeded in obtaining limited relief on appeal. Specifically, the Second Circuit reversed their convictions on one of the counts, and remanded for an entry of acquittal on that count and for resentencing. *United States v. Rigas*, 490 F.3d 208, 239 (2d Cir. 2007). On remand, the District Court concluded that

the elimination of one count of conviction did not change the guideline range (life imprisonment), but did change the aggregate statutory maximum sentence from 215 months to 185 months. *United States v. Rigas*, Case No. 1:02-cr-01236, Docket Entry 428 (S.D.N.Y. June 24, 2008) (Memorandum and Opinion). Though each defendant had already received a substantial variance below the advisory range at the original sentencing, the district court reduced each of the defendants sentences by another three years. *Id*. Accordingly, John Rigas' sentence was reduced from 180 months to 144 months and Timothy Rigas' sentence was reduced from 240 months to 204 months. *Id*.

17. *See* Endnote 17.

18. *United States v. Jacob Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 164 (E.D.N.Y. Aug. 8, 2007) (Judgment).

19. *United States v. Herman Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Herman Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 158 (E.D.N.Y. Aug. 7, 2007) (Judgment).

20. *United States v. Aaron Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Aaron Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 161 (E.D.N.Y. Aug. 8, 2007) (Judgment).

21. *United States v. Argo*, Case No. 1:07-cr-00683, Docket Entry 14 (S.D.N.Y. Jan. 23, 2008) (Government's Sentencing Memorandum). *See also United States v. Argo*, Case No. 1:07-cr-00683, Docket Entry 16 (S.D.N.Y. Jan. 29, 2008) (Judgment).

22. *See United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008).

23. *Id.*

24. *United States v. Kohler*, Case No. 1:07-cr-20446, Docket Entry 65 (S.D. Fla. Sept. 17, 2007) (Defendant's Objections to Presentence Investigation Report). *See also United States v. Kohler*, Case No. 1:07-cr-20446, Docket Entry 84 (S.D. Fla. Oct. 10, 2007) (Amended Judgment).

25. *United States v. Dreier*, Case No. 1:09-cr-085, Docket Entry 84 (S.D.N.Y. July 17, 2009) (Judgment). *See also United States v. Dreier*, Case No. 1:09-cr-085, Docket Entry 76 (S.D.N.Y. July 8, 2009) (Government's Sentencing Memorandum).