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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Criminal No. 12-CR-028 (DNH)

v.

TIMOTHY M. MCGINN and
DAVID L. SMITH,

Defendants.

SENTENCING MEMORANDUM AND MOTION FOR A NON-GUIDELINES SENTENCE SUBMITTED ON BEHALF OF DAVID L. SMITH

Mr. David L. Smith, by and through his attorneys, respectfully submits this Sentencing Memorandum for his sentencing on August 7, 2013. For the reasons set forth herein, it is respectfully requested that the Court impose a sentence below the advisory guidelines range in consideration of the incalculable loss amount, Mr. Smith's background, and application of the 18 U.S.C. §3555(a) factors. Here, a sentence that is just and sufficient to carry out the purposes of sentencing does not include a lengthy period of incarceration.

PRELIMINARY STATEMENT

After a four-week trial, David Smith was acquitted of 13 counts of the 28 counts in the Superseding Indictment on February 6, 2013. Based on the 15 convictions, the Probation Department has recommended an advisory sentencing guideline range of 262-327 months, which includes an offense level increase of 18 based on a loss amount of $6,336,440, a 2-level

adjustment for use of sophisticated means, and a 2-level adjustment for obstruction of justice based on Mr. Smith's decision to exercise his constitutional right to testify on his own behalf.

The purpose of this Sentencing Memorandum is to urge the Court to: (a) find that Mr. Smith should not be sentenced within the guidelines range; (b) accept the defense position that the loss amount cannot be reasonably calculated; and (c) impose a sentence sufficient but not greater than necessary based on Mr. Smith's history and characteristics and other factors that are present in this highly complex case.

DISCUSSION

David Smith comes from a modest background, having been born in Amsterdam, New York in 1945 to a lower-middle class family. Mr. Smith consistently worked hard to create a comfortable life for his family, having attended Hamilton College on scholarship and graduating with a degree in economics. Mr. Smith served in the United States Air National Guard and worked various jobs, including as an elementary school teacher and a counselor for disadvantaged and troubled youth before becoming a broker and eventually opening up his own brokerage firm, McGinn, Smith & Co., Inc. in 1980. Mr. Smith married his high school sweetheart, Lynn, his wife of 45 years and together they have two children, Geoffrey and Lauren. People familiar with David Smith widely consider him to be a "family man", as he always puts the well-being of his wife and children first, being present at every sports event or dance recital when his children were younger, and instilling in them values of right and wrong. David Smith is also thought of as financially conservative, having saved a majority of the wealth he amassed during his working years, carefully investing in stocks and bonds and working with his estate lawyers to ensure that his family would be taken care of when he was no longer able to work.

The criminal trial and civil proceedings have devastated Mr. Smith and his family. Both his personal and professional lives have been destroyed by the current legal matters, and at the age of 68, Mr. Smith will never recover. He is no longer able to provide financially for his wife and children, something he was once proud of. As he faces sentencing, his primary concern remains for his wife Lynn, age 66, and how she will be able to support herself. Despite these hardships, and as the Court can tell from the supporting letters that it has received, Mr. Smith continues to provide strength to his family during this difficult time.

I. FACTORS TO BE CONSIDERED UNDER 18 U.S.C. §3553(a).

While the Court must still consider the sentencing guidelines, the guidelines are "merely one sentencing factor among many, and the calculated guidelines range must be considered in conjunction with other §3553(a) factors." *United States v. Booker*, 543 U.S. 220 (2005). Under 18 U.S.C. § 3553(a), the sentencing judge must consider the following:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed –
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  (B) to afford adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant;
(3) the kinds of sentences available;
(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(5) the need to provide restitution to any victims of the offense.

The federal sentencing statute requires a "sentence sufficient, but not greater than necessary" to meet certain goals, which includes a consideration of both statutory and human factors in determining an appropriate sentence. In consideration of all factors, the defense requests that the Court exercise leniency in sentencing Mr. Smith.

Based on 18 U.S.C. §3553(a), Mr. Smith proposes that the Court adopt the following reasons should it agree that a variance is required:

(1) A guidelines sentence would result in a substantially greater than necessary punitive result in discord with the mandate of §3553(a);

(2) the nature and circumstances of the offenses do not warrant a guidelines sentence, as the offenses related to Mr. Smith's conviction do not reach the magnitude of other cases that resulted in similar or lesser sentences;

(3) the history and characteristics of Mr. Smith reflect a man that has positively contributed towards society both publicly and privately;

(4) a non-guidelines sentence would similarly serve to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;

(5) the current circumstances, non-violent convictions, and lack of any prior criminal history prove that Mr. Smith does not require deterrence to criminal conduct nor does the public need to be protected from future crimes;

(6) a guideline sentence would result in a significant disparity among defendants who have been convicted of similar crimes—notably defendants who have been convicted of considerably more egregious crimes have been sentences significantly below the guidelines calculation here; and

(7) a reasonable loss calculation cannot be made with respect to 2B1.1(b)(1) as there a too many factors to consider in light of the Receiver's inability to calculate loss amount for the investors himself, Mr. Smith's acquittals, the unknown reason for the conspiracy conviction, limits within the Superseding Indictment, and the rampant accounting errors within the broker-dealer's books and records.

A. CONSIDERATION OF SENTENCING FACTORS AS APPLIED TO DAVID SMITH.

1. The Nature and Circumstances of the Offenses: 18 U.S.C. §3553(a)(1).

It is not the intention of the defense to impeach the verdict of the jury in arguing for a just sentence. Notwithstanding Mr. Smith's assertion of innocence, he understands that sentencing proceeds upon the convictions of found against him. However, within the context of the facts before the jury, it is submitted that the multitude of entities involved, rampant accounting errors, and prosecutorial unfamiliarity of investment banking principles, have made this case highly

technical, complicated, and arguably misunderstood by many. Over the course of the four week trial, the core issue involved the concept of disclosure related to the investments the defendant-owned companies were required to provide. The key documents in this case were the private placement memoranda ("PPMs") for each of the entities, which provided irrefutable evidence that proper disclosure of material facts was made to each and every investor.

As Mr. Smith testified and several other witnesses confirmed, Mr. Smith was primarily involved in the mezzanine debt lending side of the broker-dealer, only tangentially familiar with the subject trusts. Both outside and in-house counsel assisted with the FINRA investigation of the broker-dealer, as well as concerns over the accounting entries related to MSTF. Likewise, CPAs for the firm handled Mr. Smith's personal tax returns as well as the returns for the entities. At no point in time did Mr. Smith believe he was doing anything illegal and sought professional opinions to ensure all checkpoints were made.

Mr. Smith's lack of intent to harm investors, and furthermore, lack of complete knowledge of the ongoing conditions of the trust entities, is made evident by the fact that his family members were investors in a number of the trusts, including the Firstline trusts. His son, Geoffrey Smith, a former broker for McGinn, Smith & Co., Inc., made secondary sales of the November 2007 Firstline trust to his clients post-bankruptcy filing of Firstline Security, Inc. Mr. Smith would never have permitted any broker, let alone his own son, to sell notes of a company that had filed for bankruptcy had he been aware of the financial condition of asset-based borrower. Mr. Smith has maintained and testified that these post-bankruptcy sales should have never been made, that there was no benefit to the broker-dealer in making post-bankruptcy sales, and that it was a very serious mistake which should not have occurred.

It is undisputed that all of the subject entities were legitimate and well-intended businesses and investments created by the broker-dealer and/or the defendants. Each one of the deals was created with careful analysis, lengthy negotiations with representatives from the ultimate asset-based borrower, and both Mr. Smith and Mr. McGinn worked tirelessly to prevent the deals from collapsing when difficult times for both the economy and the broker-dealer hit. A prime example of this is the Firstline Rescue Mission where the defendants put together a new deal to save the asset by purchasing the alarm contracts out of bankruptcy court so that every investor would get their principal returned, plus interest. Lynn Smith even contributed $300,000 towards the Rescue Mission in order to make the deal succeed. Similarly, when the TDM Luxury Cruise asset ran into difficulty, the asset was saved by Mr. McGinn when he revamped the end business by organizing the accounting and hiring new staff. There is no question that the broker-dealer encountered difficulties during the time period in question, experiencing payroll and operating difficulties, as did thousands of other American businesses. Despite this, Mr. Smith infused the broker-dealer with his personal assets, the assets of his family, and withheld payroll to himself and Mr. McGinn.

The intervention of the SEC has prevented investors from receiving any interest or principal payments since April 2010. The court-appointed Receiver has not issued any payments and it is unclear as to when he intends to do so. The obvious frustrations and financial impact this has had on investors is unquestionable. These unfortunate circumstances have failed to reflect the true nature of the work Mr. Smith and Mr. McGinn have done to try to save the broker-dealer, save the investments from failing when they ran into difficulties, and protect investors. At no time did either Mr. Smith or Mr. McGinn intend to harm anyone.

One aspect of the Receiver's work is important to summarize. The Receiver has collected millions of dollars from investment vehicles set up by Mr. Smith and Mr. McGinn. It defies logic that a plan to invest investors' money in legitimate business entities with fixed rates of return was "a fraudulent scheme" especially in consideration of Geoffrey Smith's testimony that investor payments were substantially on course at the time of the SEC intervention.

The nature and circumstances of the offenses reflect a greatly overlooked and misunderstood set of facts. With respect to the overarching issue of disclosure related to the convictions, Mr. Smith respectfully invites the Court to review the trial testimony of Richard Engel, Esq. and Geoffrey Smith, CFA. In summary, their unrebutted testimony establishes that the PPMs contained all relevant disclosures, disclosures with respect to the LLC operating companies were not required (the use of proceeds section of the PPM "is restricted to the issuer . . . there are activities of downstream LLCs that do not need to be disclosed in a private placement memorandum and might be unrelated to the use of proceeds provision in a private placement memorandum." Engel Trial Tr., p. 45), and the business model used by the broker-dealer was commonly used in the industry. In addition, investor after investor testified that he or she did not read the PPMs but rather relied on their brokers' advice. The prosecutors repeatedly asking investors whether "it would be important to know" a fact advanced by the prosecution to be important, was an inapposite tactic and designed solely to aggravate the jury.

With respect to the tax convictions, Mr. Smith respectfully invites the Court to review the trial testimony of Joseph Carr, Esq., Ronald Simons, CPA, Gerald DeAngelus, CPA, and John D'Aleo, CPA. In summary, their testimony establishes that the promissory notes sent to FINRA were not backdated, but rather, the date was omitted due to an oversight by Mr. Carr and there was "no intent to defraud anyone". In recording the money received as loans on Mr. and Mrs.

Smith's tax returns, at trial Mr. Simons was unable to articulate anything that he did wrong with respect to not reporting those amounts as income to the IRS. As Mr. Smith's tax professional, he did not require a promissory note, term of repayment, etc. and thus, Mr. Smith relied on Mr. Simons' opinion. Furthermore, a promissory note is not required to legitimize a loan, but the individual's intent to repay is the most significant factor in one's determination of a true loan. Under the business model, the profit to be realized directly to the defendant-owned LLCs was the basis for the issuance of the loans to the principals. As demonstrated at trial, the deals were structured to continue to generate income streams beyond the date of deal maturity and all principal and interest was paid to investors under the terms specified in the PPMs. Moreover, Mr. Smith's family had the resources to repay the amount in loans he had received.

The nature and circumstances of the offenses reflect legitimate investments and investment decisions and the reliance on other professionals in tax filings. They do not reflect illegal conduct or malfeasance on Mr. Smith's part. If anything, the nature and circumstances of the offenses were a result of mistakes and poor business choices. To this extent, counsel was employed to assist the broker-dealer and seek a resolution. Mr. Smith's letter to Jay Kaplowitz, Esq. exemplifies the inadvertent nature of the MSTF-related convictions and his pursuit of legal assistance with the matter ("we have sought your counsel on how to rectify this mistake . . . why we booked [advisory] fees that are clearly owed by the FUNDS to MSCH and MSA and ran them through the books of MSTF is absolutely inexplicable and incredibly stupid . . . having discovered this mistake and realizing the appearance of impropriety or worse, I seek a solution that calls for immediate restitution . . . ."

Based on the foregoing, the Court should find that the nature and circumstances of the offenses call for a sentence outside of the guidelines in accordance with 18 U.S.C. §3553(a).

2. The History and Characteristics of David Smith: 18 U.S.C. §3553(a)(1).

In addition to Mr. Smith's background, the history and characteristics of David Smith are best summarized by the supporting letters written by his friends, relatives, and acquaintances. Individuals from all walks of life wrote in support of Mr. Smith. Excerpts from a handful of the many submitted letters that have been sent in are included below:

Michael Andolina, Ph.D: *[David] is a solid citizen, a devoted husband and father of two highly successful children, and a man of character.* See Dkt. No. 126.

Kathy Childs, R.N., Niece of David Smith: *When it became evident to my family in 1993 that alcohol had become a serious problem for me, Dave was the first person to step up. I remember him coming over to see me as if was yesterday. He spent several hours listening to me, drawing me out and helping me say out loud the words I have been hiding from, 'I am an alcoholic.' Facing that twenty years ago was devastating but my Uncle David had a plan. He helped get me into a Rehab program and even went there with me. He was an ever present support to me as I worked through my Recovery. I share this with you not for sympathy. It is shared with the hope that you can see the loving person, my Uncle, who stood by me at the lowest time of my life. I drew from Dave's strength and support of me, and from the fact that he never showed shame or disappointment only the confidence that I could recover.*

Arnold J. Eckelman: *I witnessed Dave start and grow a very successful business. He built that business with hard work, long hours and a lot of sweat and equity. . . . I do not know what happened in the case. He may have made some business mistakes but it is incomprehensible to me that Dave would 'knowingly' do anything to put him, his family or his kids in this situation.* See Dkt. No. 132.

Kristy Golden Urgo: *In all the years I have known him he has never put himself before anyone. He is a family man. Dave is the most genuine, honest person I know.* See Dkt. No. 125.

David Gould: *What I realized after all this time is that David is a person whose sense of humor, acceptance of all sorts of folks, and easy going nature created a personality that, above all, wanted to help others. That characteristic, combined with his sense of integrity and fair play has generated a life that, over the past 5 decades has been exemplary. That he was so successful a businessman is no surprise. And that he was a person who raised a fine family and became a stalwart in his community is gratifying. I describe this background and David's qualities to make but one point: I simply find it hard to understand why one would think David was capable of the various frauds attributed to him. I understand his firm caused significant monetary losses to his investors, but I cannot even begin to believe that David was deliberately duplicitous in creating those investments.* See Dkt. No. 174.

Eileen Guarino: *He is a generous, patient, intelligent man that has given financial support to various organizations along with his personal time. I have always looked up to Dave as an intelligent and honest businessman.*

Robert Halderman: *I can affirm that in David's work with our company, he had a constant focus on making each investment he funded profitable for his investors. Where we faced early development issues including permitting issues, sales and marketing, and financing. David remained steadfast in his efforts to make transactions work for the benefit of his investors. While it appears that some of those efforts in recent years reflected a certain level of desperation as David juggled to keep investments alive, it is hard for me to imagine that David's primary intent was anything than making the transactions work for the benefit of his investors.* See Dkt. No. 164.

Sandy Kolojah wrote: *I do know that during the financial crisis Dave tried his hardest to keep the business afloat and care for the people who invested with him. There are just some things you know from the bottom of your heart and I know—no matter what transpired at trial—that Dave Smith is a good and honorable man and does not deserve to spend the end of his life in prison.*

Perhaps the most compelling letter submitted was by his wife, Lynn Smith, which included a letter written by Mr. Smith to his son Geoffrey before he went off to college. At the time it was written, Mr. Smith was providing advice and guidance to his son before he embarked on a new journey in his life. The private letter to his son reflects the values Mr. Smith followed and the values he instilled in his family. The letter provides the following advice:

[O]ur last bit of advice involves values and character. We believe that we have tried to teach by example the importance of moral values and strength of character. Honesty is number one. Be honest with yourself, your professors, and your peers. While Lehigh doesn't have an honor system, pretend that they do. Always do your own work. You will be amazed at how easily a professor can tell if the work you submitted is your own. The stigma and consequences of dishonest work are enormous. Most colleges will at a minimum fail a student found to be cheating, while dismissal from the college is highly probable. The embarrassment to yourself, your family, and your friends is a very high price to pay . . . We know that you will continue to make us proud, and that the next four years of your life will be fulfilling and productive. Go forward with the comfort that your family loves you and stands ready to support your every need. Thank you for being the wonderful son that you are and remember our thoughts, prayers, and love are always with you. Love, Dad

These letters and the many more that were submitted are evidence of Mr. Smith's gentle, compassionate, and caring nature. The reoccurring theme in the letters reflects the importance

Mr. Smith places on family, work ethic, and honesty. Many of the letters came from individuals with whom Mr. Smith has maintained relationships over the course of decades, including former business acquaintances, a former longer time McGinn, Smith, & Co., Inc. employee, friends, old neighbors, and many people that the Smiths have treated and welcomed as members of their own family.

Mr. Smith's generous nature is also seen through his contributions to various charities and volunteer organizations, in giving both financially and with his time. He has served numerous civic boards of directors, including as chairman of the Child's Hospital Foundation Board in Albany and the Empire State College Foundation Board. Mr. Smith has also assisted with the Robert Leathers Group in organizing and managing a playground project in Clifton Park, New York as well as supporting numerous other charities such as the Addictions Care Center of Albany and The American Cancer Society. Additionally, Mr. Smith and his business also assisted in the successes of the Saratoga City Center, the Randall's Island project, which have promoted economic growth and development within New York State. Moreover, the numerous letters sent in support of Mr. Smith reflect his contributions of time and energy for friends and family in need.

Mr. Smith has always sought to assist others and make positive contributions to society. Before he became involved in the financial industry, he taught elementary school in his hometown of Amsterdam, New York and was a senior counselor at Vanderhayden Hall in Albany, New York, where he provided assistance to youth that had been abused, neglected, or abandoned, many of which had been diagnosed with emotional or behavioral issues. Additionally, Mr. Smith served the military in the United States Air National Guard between 1968 and 1972. He was honorably discharged at the rank of Airman First Class.

The history and characteristics of Mr. Smith exemplify his honorable, caring, and generous nature. Widely considered by those familiar with him to be a man of integrity, it is respectfully submitted that the Court place great consideration on this factor and find in favor of granting Mr. Smith a variance from the guidelines.

3. The Need for the Sentence Imposed: 18 U.S.C. §3553(a)(2).

a. To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense.

A sentence with minimal prison time and well below the suggested guidelines range in this case would reflect the seriousness of the offenses, promote respect for the law, and provide just punishment for the offenses. Mr. Smith is 68 years old. He has lost his business that he built over the course of thirty years. He will never be able to work in the financial industry again. He no longer has the ability to provide for his family. Both his personal and professional reputation have been irreparably damaged. Although a man with dignity, Mr. Smith will never fully recover from his criminal conviction. In light of Mr. Smith's age and the events of the past three years, a sentence of minimal prison time will sufficiently carry out the purposes of sentencing.

It should also be noted that each of the related defendants were sentenced to periods of probation and fines for their role in the offenses, including Matthew Rogers, who served as a third partner of entities in question. See *U.S. v. Shea*, 1:12CR00370-001 (sentenced to 2 years probation, $5,000 fine, 100 hours of community service); *U.S. v. Rogers*, 1:11CR00545-001 (sentenced to 1 year probation, $10,000 fine); *U.S. v. Simons*, 1:11CR00525-001 (sentenced to 1 year probation, $5,000 fine). To sentence Mr. Smith to an exponentially severe period of incarceration would be unduly harsh, especially in comparison to the sentences issued to the defendants in related cases.

Probation's guidelines calculation of a level 39 (262-327 months) will result in a life sentence for Mr. Smith and is unreasonably excessive. A sentence within the guidelines is unduly oppressive and neither promotes respect for the law nor just punishment for the offense. Furthermore, the government's promotion of an additional 8-level increase would result in excess of an offense level 43 where the corresponding guideline range is life, or alternatively, 2,988 months. This is simply egregious. The government's position only serves to reflect the incredibly unworkable nature of the sentencing guidelines and the oppressiveness of the government.

b. To Afford Adequate Deterrence to Criminal Conduct.

With respect to Mr. Smith, a sentence within the guidelines would exceed the purpose of affording adequate deterrence to criminal conduct. Under the circumstances of Mr. Smith's case, legitimate investments were made. Due diligence was performed. Mr. Smith and Mr. McGinn engaged the expertise of tax and legal professionals to assist them in the transactions. They relied on the people that performed work for them to handle the business of the company accurately. When the economy collapsed, they tried to save their businesses, investing their personal money and time to protect investors. This case cannot be compared to other financial fraud cases where a guidelines sentence may be proper to afford adequate deterrence to intentional and prevalent criminal conduct. This case involved mistakes and poor judgments as the ship began to sink, that in no way necessitate the imposition of a lengthy guideline sentence to deter future criminal conduct.

c. To Protect the Public from Future Crimes by Mr. Smith.

A guidelines sentence would serve no purpose to protect the public from future crimes by Mr. Smith. Mr. Smith has no criminal history and presents no risk of recidivism. He is a

gentleman in his late sixties and no longer holds the financial licenses to act as a broker in the financial industry. Because his legal proceedings have been sensationalized by the media, it is unlikely that he would be able to renew a career in the financial world. As such, a guidelines sentence would be wholly unnecessary.

4. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records who Have Been Found Guilty of Similar Conduct: 18 U.S.C. §3553(a)(6).

A guidelines sentence would result in an unwarranted sentence disparity among similarly situated defendants. While Mr. Smith respects the jury's verdict and acknowledges the serious nature of his convictions, Mr. Smith has no criminal record and respectfully asks that the Court consider the following cases for comparison and contrast:

The *United States v. Parris* case involved a similar guidelines result due to the oppressive nature of the guidelines for white collar offenses. See 573 F.Supp.2d 744 (E.D.N.Y. 2008). The defendants in *Parris* were convicted of securities fraud and witness tampering after trial. Under the guidelines, the Parris defendants faced a 360 month to life sentence after an offense level 42 was assessed (based on a series of enhancements including sophisticated means and obstruction of justice). At sentencing, Hon. Frederick Block rejected the guidelines sentence as "**draconian**" and "**absurd**" and stated that imposing a guideline sentence in white collar cases should not be "**a black stain on common sense**." See *id.* (emphasis added). Judge Block instead took a more realistic approach to sentencing, finding that the defendants' crimes "were not of the same character and magnitude as the securities fraud prosecutions of those who have wreaked unimaginable losses on major corporations and, in particular, on their companies' employees and stockholders, many of whom lost their pensions and were financially ruined", sentencing both defendants to 60 months imprisonment. *Id.* at 745.

Notably, the government undertook a collaborative effort with the court, analyzing the sentences in a compendium of securities from cases since 2001 and found that a correlation existed where enormous losses in excess of $100 million resulted in double digit year sentences whereas in cases **where losses were less than $100 million resulted in single digit year imprisonment terms**. See *id.* at 753 (emphasis added). Judge Block held that a guidelines sentence would be "**unreasonable as a matter of law**" and that the nature of offense and defendants "were simply not in the same league as the Enron, Worldcom, and Computer Associates defendants". *Id.* at 754 (emphasis added).

In stark contrast to Mr. Smith's conviction and his position as owner and president of the Albany, New York-based McGinn, Smith & Co., Inc., the convictions related to the Enron scandal should provide the Court with a more realistic perspective with respect to Mr. Smith's convictions. Enron was once one of the nation's largest Fortune 500 companies with a market value in excess of $68 billion. At the time of its collapse, over 5,000 jobs and $800 million in pensions were lost when the company filed for bankruptcy in 2001, the second-largest bankruptcy in United States history. Some of the sentences related to the convictions in the case include the following: David Delainey, former Enron CEO, sentenced to two and a half years after selling over $4 million in Enron stock; Andrew Fastow, former Enron CFO, sentenced to 72 months; and Daniel Bayly and James Brown, former Merrill Lynch & Co. executives were sentenced to 30 months and 46 months, respectively, related to the disguise of a $7 million loan to Enron.

The sentences related to the Enron convictions pale in comparison to the 262-239 month guidelines ranged assessed to Mr. Smith. Furthermore, the guidelines range for former CEOs Jeffrey Skilling and Kenneth Lay fell within a similar level as the level assessed to Mr. Smith

under the guidelines. This defies logic and highlights the failures of the post Sarbanes-Oxley sentencing guideline regime. No other conclusion can be made other than that the imposition of a guidelines sentence would be absurd and instead a variance must be granted.

5. The Need for Restitution: 18 U.S.C. §3553(a)(7).

Mr. Smith acknowledges and regrets that the investors have been financially affected by the circumstances of the legal proceedings of the past three years. Should Mr. Smith be sentenced to a lengthy period of incarceration, he will never be able to obtain alternative employment and be afforded the opportunity to make any sort of restitution to the investors. Thus, a minimal period of incarceration would serve to permit Mr. Smith to reenter the workforce and make a contribution to a restitution amount.

B. THE LOSS AMOUNT ADVOCATED BY PROBATION AND THE GOVERNMENT IS UNREASONABLE.

A reasonable estimation of loss with respect to §2B1.1(b)(1) cannot be made under the facts of this case. Application Note 3(C) of §2B1.1(b)(1) states that "[t]he court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence." A reasonable estimation of loss cannot be made for the following reasons: (1) the Receiver, who is still presently collecting money himself, is unable to make a reasonable loss calculation or value to the investments and entities and thus the Court should refrain from doing so; (2) the value of the investments have been affected by forces outside of Mr. Smith's control, including market conditions and the Receiver's management of assets; (3) Mr. Smith was acquitted of 13 charges and because the jury was instructed to read the conspiracy jury instruction as to defraud FINRA "or" investors, Mr. Smith might have been convicted of only a conspiracy to defraud FINRA and thus any loss amounts attributed to co-conspirators should not be considered; (4) the Superseding Indictment

only alleged an amount of $1,567,000 in improper diversions attributed to Mr. Smith, which again is reduced by the acquittals; and (5) the books and records maintained by the broker-dealer are riddled with inaccuracies and cannot be relied upon; and a loss amount cannot be reasonably calculated because the investors will receive distributions related to their investments as determined by the Receiver. Due to the existence of each of these factors, one cannot make a reasonable loss calculation and thus, a non-guidelines sentence must be imposed.

1. The Court-Appointed Receiver is Unable to Calculate Loss.

The Receiver in control of all of the entities in question is unable to calculate a loss amount and therefore, neither Probation nor the government is in a position to make any estimation as to loss. Counsel for Mr. Smith has made numerous attempts to acquire specific data from the Receiver concerning the value of the assets, including what is presently outstanding to investors, cash flow recoveries, among many other inquires in order to make a reasonable loss calculation. However, the Receiver has either been unable to provide relevant information responsive to the request or has not been in a position to evaluate or render an opinion as to the values of the entities for various reasons. The financial information the Receiver has provided to counsel has made it impossible to perform an actual analysis with respect to the trust entities and the Four Funds because the assets are not marked to the market and in many cases, although difficult to tell, many of the investments appear to have been stagnant since April 2010 with no activity under the Receiver's control.

The information that the Receiver has provided regarding asset sources reflects recoveries and income generated in the amounts of $11,745,960 (alarm contract/triple play), $202,500 (Verifier GPU payments), $483,576 (dividends), $308,773 (interest), $3,798,339 (sale alarm contracts, triple play, travel), $1,545.431 (recovery of assets related to the Integrated

Excellence Note, Fortress Note, among others), $358,982 (other), although the a further breakdown of the allocation of these sources to specific entities have not been provided. Data regarding recoveries for some of the other investments, including TDM Benchmark and additional Verifier GPUs have not yet been realized. Although the responses to our data requests did not allow for valuation analysis, the recoveries and income received from the entities reflect not only the legitimacy of the investments but also successful structuring of the investments. This is based on the fact that the Receiver has been able to recover significant sums of money despite lacking any experience or knowledge of investment banking principles.

The government's proposed loss amount of $30,233,514.98 fails to factor in the above-referenced issues and blatantly neglects to account for the millions of dollars in interest that was paid to investors. Its theory of calculating the loss amount based on principal owed to investors has no basis in law. Based upon the limited supporting data for the outrageous figure, it appears that the government has reached the $30,233,514.98 amount by valuing each of the investments at $0.00, a proposition that has no place in investment banking nor any reasonable loss analysis. For this reason and the reasons stated in Mr. Smith's Presentence Report (See Dkt. No. 187, p. 51), the government's theory to extend a loss amount beyond any proof submitted to the jury far exceeds any concept of a "reasonable estimation" and should be rejected outright.

Furthermore, if the Court does attempt to engage in a loss calculation, the principal and interest paid to investors should be included. Neither the government's nor Probation's calculation consider this very important point. Based upon Geoffrey Smith's testimony and his forensic analysis of the bank records and books and records, as of April 1, 2010, the total principal paid to trust investors was $2,203,594.37 and the total interest paid to trust investors was $4,856,917.71, for a total amount paid to investors of $7,060,512.08. See Defense Exhibit

207. Additionally, it is averred that any losses in value to the assets or lack of interest generated post-April 20, 2010 cannot be attributed to Mr. Smith or Mr. McGinn as they were no longer in control of managing those entities.

In addition to the fact that the individual charged with managing the entities is unable to provide specific information relative valuation and loss amounts, Mr. Smith's acquittals, the inability to determine what related trust transactions, if any at all, resulted in Mr. Smith's conspiracy conviction, the limited figure associated with "diversions" to Mr. Smith, and the inaccuracies of the books and records as of April 20, 2010, all make a prudent and reasonable loss calculation to be impossible. Thus, the loss amounts advocated by the government and probation's calculation of $6,336,440 are implausible and must be rejected.

2. David Smith's Motion to Pay Taxes Due & Owing Demonstrates his Efforts to Pay the Tax Loss to the IRS.

The Court should consider David Smith's good faith efforts to pay the taxes due and owing as a result of his tax convictions. Through counsel, he received Revenue Agent Reports prepared by the IRS concerning the taxes and penalties for tax years ending in 2006 through 2009, creating an outstanding tax lien on Mr. and Mrs. Smith's assets. On June 17, 2013, Mr. Smith and Mrs. Smith jointly moved before Hon. Christian F. Hummel to pay the outstanding tax amount out of Mrs. Smith's frozen assets. See 1:10-CV-457, Dkt. No. 576. Although this motion is presently pending, Mr. Smith submits that the Court should consider his efforts to pay the IRS when considering a loss amount for sentencing purposes and under the §3553(a) factors.

C. THE COURT MUST REJECT THE ADJUSTMENTS PROPOSED BY PROBATION AND THE GOVERNMENT.

1. The Victim Count Improperly Includes Investors in Three of the Four Funds.

Probation's victim count of 841 mistakenly relies on an improper number advanced by the government as it includes investors in three of the Four Funds. Investors in three of the Four Funds should not be included in this figure because the Four Funds were only tangentially involved in the subject transactions. The government seeks to include these investors based on the use of the advisory fees generated by the Funds that were pledged to other investments. The allocation of the advisory fees to other investments is evident from the fact that millions of dollars in fees had accrued to McGinn, Smith Advisors, but they were not taken by Mr. Smith or Mr. McGinn. Additionally, the $525,000 accounting entry that was corrected to reflect the purchase of McGinn, Smith preferred stock was within the mandate of MSTF's PPM.

Mr. Smith submits that a victim count should be limited to investors in the trust entities as the inclusion of the Four Funds is too attenuated to the convictions to be considered by the Court. It is also unknown whether the jury convicted Mr. Smith of conspiracy based on the allegations related to the Four Funds, MSTF alone, or the FINRA investigation. See Dkt. No. 187, p. 50. Although Mr. Smith does not have access to the investor lists for each of the trusts, it is believed to be below 50 investors, with many of these individuals being repeat investors in many of the trusts. As such, the 6-level adjustment should not be applied.

2. The Adjustment for Obstruction of Justice Must be Rejected.

As outlined in Mr. Smith's objections to the Presentence Report, the adjustment for obstruction of justice should be rejected by the Court. As stated in Mr. Smith's objections to the Presentence Report, it is improper for Probation to make any determination regarding the truthfulness of Mr. Smith's testimony. See Dkt. No. 187, p. 50. Probation is not in a position to opine that Mr. Smith suborned perjury and to add a 2-level increase simply because it results in penalizing a criminal defendant for testifying on his own behalf, thereby infringing on his

constitutional rights. For these reasons and the reasons stated in Mr. Smith's Presentence Report, the 2-level adjustment for obstruction of justice must be rejected.

3. The Adjustment for Sophisticated Means Must be Rejected.

Mr. Smith also directs the Court's attention to Dkt No. 187, pp. 50-51 in rejecting Probation's sophisticated means enhancement. The myriad of accounting errors should not be considered in determining whether sophisticated means were used. Mr. Smith was also acquitted of all but one of the charges related to the Firstline Series B transactions. As such, a 2-level adjustment for sophisticated means must not be applied.

4. The Government's Proposal of a Financial Solvency Adjustment Must be Rejected.

It anticipated that the government will seek a 4-level adjustment pursuant to U.S.S.G. §2B.1.1(b)(15)(B)(iii), however this enhancement is not applicable. As the investments in question involved private placements, each investor completed an investor questionnaire and signed a subscription agreement that they either (1) had an individual net worth or a joint net worth with their spouse in excess of $1 million, excluding the value of the primary residence of such person or (2) had an individual income in excess of $200,000 in each of the two most reason years or a joint income with a spouse in excess of $300,000 for those years and a reasonable expectation of the same income level in the current year. The investors that subscribed to these deals were considered "sophisticated" and "accredited" in both their financial means and in their understanding of securities. Furthermore, to the extent any investors were placed in a deal that was beyond their means, this oversight would fall to the brokers who dealt directly with the investors, not Mr. Smith or Mr. McGinn. Under Regulation D, a maximum of 35 non-accredited investors were permitted to subscribe to each deal. To the extent that a maximum of 35 non-accredited investors were permitted in each deal, these investors were still

considered "sophisticated" with respect to their understanding of the risks associated with the investments. Considering that the total number of investors in the all trusts was below 100 and moreover, there was an even more limited number of unaccredited investors permitted in each deal, it is unlikely that over 100 investors have been severely impacted. As stated above, Mr. Smith deeply regrets that investors have not received any principal or interest payments since April 2010, however, the enhancement is applicable only when the solvency or financial security of 100 or more victims is substantially endangered. The government seeks to apply this adjustment to encompass investors who likely do not meet this definition. As such, an argument by the government that this enhancement is applicable should be rejected.

D. A DOWNWARD DEPARTURE FOR ABERRANT BEHAVIOR SHOULD BE APPLIED.

Mr. Smith meets the criteria under U.S.S.G. §5K.2.20 for aberrant behavior and a downward departure should be issued accordingly. Mr. Smith's convictions do not fall within any of the prohibitions of the departure as the offenses did not involve serious bodily harm or death; discharge of a firearm, a serious drug trafficking offense, and Mr. Smith has no criminal history. The conduct of which Mr. Smith was convicted represents an aberrant and atypical behavior on his otherwise unblemished 68 years of life and 30 years as an owner and principal of McGinn, Smith & Co., Inc. Therefore, Mr. Smith respectfully requests that should the Court apply a guidelines sentence, that it apply a considerable downward departure for aberrant behavior.

E. THE COURT MUST GRANT A VARIANCE AND SENTENCE DAVID SMITH TO A NON-GUIDELINES SENTENCE.

A guidelines sentence would be an unconscionable result and would violate 18 U.S.C. §3553(a) which requires a just and sufficient sentence of a criminal defendant. In determining a

reasonable sentence, "[t]he Sentencing Court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply" *Rita v. United States*, 551 U.S. 338, 350 (2007) (internal citations omitted). Instead, a Sentencing Court should start its sentencing determination with the guidelines calculation; listen to the argument of the parties as to the appropriate sentence; consider the sentencing factors listed in 18 U.S.C. §3553(a); make an individualized assessment of the facts; and explain the sentencing decision in a way that supports either a Guidelines or non-Guidelines sentence. *See Gall v. United States*, 552 U.S. 38, 39 (2007). A defendant may argue at sentencing that the Court may impose a non-guidelines sentence because the recommended guidelines sentence fails to reflect 18 U.S.C. §3553(a) considerations or because the case warrants a non-guidelines sentence. *See Rita*, 551 U.S. at 351. It is submitted that both situations are present in the instant case.

The recommended guidelines sentence of 262-327 months fails to reflect §3553(a) factors, specifically because the guidelines would call for a "one size fits all" approach resulting in similar sentences among starkly different cases and defendants. As stated by Judge Rakoff, the guidelines represent "**the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guidelines calculations can visit on human beings if not cabined by common sense.**" *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006) (emphasis added). Because an outrageous result would occur should the guidelines be blindly imposed, the Court must grant a variance in sentencing Mr. Smith. For this reason and the reasons stated in the above paragraphs, the nature and circumstances warrant a non-guidelines sentence.

In consideration of the above, Mr. Smith implores that the Court consider the findings both Judge Block and Judge Rakoff have made with respect to the sentencing guidelines as

applied to white collar cases such as the instant case and find that a guidelines sentence does not comport with common sense and a non-guidelines sentence can achieve a sufficient and just result. Particularly, Mr. Smith requests that the Court adopt Judge Block's finding that in similar cases where loss amount was below $100 million, a single digit year sentence is commonly imposed.

CONCLUSION

Therefore, based upon consideration of the factors set forth in 18 U.S.C. §3553(a) and its statutory directive that mandates the Court to "impose a sentence, sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. §3553(a)(2)]", the defense respectfully requests that this Court impose a minimal jail sentence on David L. Smith.

Dated: July 24, 2013
Albany, New York

Respectfully submitted,

DREYER BOYAJIAN LLP

/s/ William J. Dreyer
William J. Dreyer, Esq.
Bar Roll No. 101539
Lauren S. Owens, Esq.
Bar Roll No. 517391
Attorneys for Defendant
David L. Smith
75 Columbia Street
Albany, New York 12210
Phone: (518) 463-7784

cc: United States Attorney's Office
Elizabeth C. Coombe, Esq.
Richard D. Belliss, Esq.
Wayne C. Myers, Esq.
445 Broadway, Room 218
Albany, New York 12207

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. Criminal No. 12-CR-028 (DNH)

TIMOTHY M. MCGINN and
DAVID L. SMITH,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Sentencing Memorandum was served upon:

ELIZABETH C. COOMBE, ESQ.
elizabeth.c.coombe@usdoj.gov
RICHARD D. BELLISS, ESQ.
richard.belliss@usdoj.gov
WAYNE A. MYERS, ESQ.
wayne.myers@usdoj.gov
Assistant United States Attorney
United States Attorney's Office
445 Broadway
Albany, New York 12207

By e-mailing a copy of same.

This 24th day of July, 2013.

/s/ Leslie A. Baldwin
Leslie A. Baldwin