UNITED STATE DISTRICT COURT
NORTHERN DISTRICT NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

10-CV-457 (GLS)

Plaintiff,

- against –

McGINN SMITH & CO., INC., et al,

Defendants.

DEFENDANT SMITH'S MEMORANDUM OF LAW IN RESPONSE AND OPPOSITION TO PLAINTIFF'S REQUEST FOR DISGORGEMENT

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Date: March 16, 2015

INTRODUCTION

By memorandum decision dated February 17, 2015, the court directed plaintiff to propose a reasonable approximation of McGinn and Smith's profits causally connected to the violations, if it wishes to pursue its request for disgorgement. (Memorandum Decision and Order (hereinafter MDO) pg. 45 and 46) The court defined "disgorgement" and distinguished it from restitution, stating that "disgorgement aims to deprive the wrongdoer of ill-gotten gains." (MDO at pg. 44, citations omitted).

In response thereto, the plaintiff has submitted a proposal for disgorgement in the amount of $87,433,218.00 and proposes an additional sum of prejudgment interest in the amount of $11,668,132.00 for combined disgorgement of $99,101,350.00. Plaintiff has proposed this amount by starting with the total amount raised among the four funds and trust offerings ($126,000,932.00) reducing that amount by principal payments of $3,904,400.00 and additional payments of $6,422,070.00 in principal and interest and preferred payments and total interest paid of $29,172,312.00 for a total of $39,498,782.00. Plaintiff proposes that the difference between the money raised, $126,932,000.00, and the total amount distributed, $39,498,782.00, results in a claim of disgorgement in the amount of $87,433,218.00. Prejudgment interest is calculated at $11,668,132.00 to arrive at the total claim for disgorgement of $99,101,350.00.

Smith asserts that this methodology is flawed in that the proposal does not comply with the Court's order and fails to establish the requisite nexus between wrongdoing and profit.

ARGUMENT

I. THE METHODOLOGY OF THE PLAINTIFF IS FLAWED AND FAILS TO MEET THE STANDARD FOR DISGORGEMENT AS DEFINED BY THE DISTRICT COURT IN ITS MEMORANDUM DECISION AND ORDER.

Defendant Smith acknowledges that the court has rejected his claim in his initial response to the motion for summary judgment that disgorgement should be limited to the amount of restitution in the criminal case ($5.7 million dollars; see criminal docket 785). While defendant Smith has not been invited to renew his arguments herein, his objection to the current methodology of the plaintiff is based upon his original arguments that the plaintiff' fails to "causally link" the total disgorgement amount proposed to wrongdoing. Other than its reliance upon the doctrine of "collateral estoppel" and the "conspiracy" finding by the criminal trial jury related to investments (MSTF and Trusts) which are not the same investments as in the civil case, the plaintiff made no attempt to produce evidence of any kind supporting its claim that the total amount sought in disgorgement related to Four Funds investments constituted illicit gain or profit.

I. THE COURT'S MEMORANDUM DECISION AND ORDER

There are five (5) findings in the Court's decision which guide Plaintiff's new proposal. The Court stated as follows:

A. As to the Four Funds/Collateral Estoppel:

> 1. Here, contrary to Smith's assertions, the issues in the civil case and in his criminal case are identical. A comparison of the second amended complaint and the superseding indictment demonstrates that both instruments concern the same defendants. McGinn and Smith allege the same scheme to defraud in connection with the same offerings – the four Funds, Trust offerings and MSTF and describe substantially the same conduct (MDO pp. 28-29).

B. As to the separate proof in the civil case concerning the Four Funds:

1. For example with respect to the Four Funds, the SEC has

> demonstrated that, beginning with the first issuance in 2003, investor proceeds were used to redeem or pay interest to investors of pre-2003 MS & Co. offerings and to make loans to entities controlled by McGinn and Smith. This was not disclosed in the PPMs, and operated to the great detriment of Four Funds investors. (MDO pp. 33-34)

C. As to Disgorgement Definition and Standards:

> 1. "In determining the amount of disgorgement to be ordered, a court must focus on the extent to which a defendant has profited from his [violation]." (MDO p. 38 *citations omitted*).
>
> 2. "[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." (MDO pp. 38-39 *citations omitted*).
>
> 3. "the court further agrees with the SEC that the proper metric for calculating disgorgement in actions such as this is subtracting the amount returned to investors from the total amount raised through the fraudulent offerings." (MDO p. 41).

As a result of the court's apparent guidance in the C 3. above, plaintiff's proposal seeks not only to use the criminal conviction for collateral estoppel purposes but also to use it as a catchall to capture profits from the Four Funds that cannot be said to be "causally linked" to wrongdoing.

This issue was addressed at the sentencing stage of the criminal case itself. In its sentencing memorandum, the prosecution, in describing losses that are attributable to all the convictions, including the conspiracy relied upon here, stated that "the loss amount is $30,921,232.00" (Government's sentencing memorandum pg. 3, dated July 24, 2013 attached hereto as **Exhibit 1**; criminal docket number 1:12-cr-28). This was a greater amount proved at trial as the government so acknowledged when it stated in the same paragraph that the Probation Department's lower loss amount - $6,336,440.00... relies solely upon evidence presented at trial...) The theory of the Government, as it stated on pg. 4 of its sentencing memorandum was as follows:

> Applying those principals here, there is plainly sufficient (sic) to include the lost investor principal, that is the amount of principal lost

> as of the date that the search warrants were executed by victims on the restitution list who had invested in the seventeen (17) trusts and MSTF.

Victims on the restitution list were defined in the footnote as those investors in the trusts, MSTF and three of the four (4) funds, minus certain persons defined. The point is that the government conceded that the loss it was seeking was related to the seventeen (17) trusts and MSTF, and that the so called $30,000,000.00 loss that it advanced to the Court was greater than the $6,000,000.00 proved at trial. Notwithstanding its proposal, the Court adopted the lower loss amount based upon the actual proof at trial, and made its loss finding based upon preponderance of the evidence.

As the criminal case dealt almost exclusively with the Trust and MSTF (McGinn Smith Transaction Funding) it seems logical that plaintiff would seek an order of disgorgement more closely related to the loss attributed to the trusts and MSTF in the criminal case. In the Palen Affidavit (Plaintiff's Exhibit 3, pg. 13) Palen states that the total amount raised in the Trusts and MSTF is $40,972,000.00. But instead of stopping there, plaintiff seeks disgorgement with respect to the Four Funds.

Although the court has included the Four Funds within its "collateral estoppel" finding, defendant Smith asserts that the plaintiff's methodology does not and should not take the place of proof that should be presented at a civil trial because the criminal convictions upon which estoppel is based did not encompass the four Funds with respect to loss calculations.

As to the court's finding that the SEC is entitled to summary judgment with respect to the Four Funds based upon proof in the civil case, the defense's position is that the formula of the SEC and its proof does not identify ill- gotten gains. By now it should be apparent that the receiver took control of legitimate business or investments which realized substantial returns since 2011. The

receiver's job was to liquidate the investments and not to manage the investments for maximum returns. Thus, the standard formula of "money in" less "money returned" does not adequately identify ill-gotten gains from wrongdoing. Also, the court's finding that some monies from the Four Funds were used to pay interest not contemplated by the PPMs should not be deemed sufficient to allow for the metric of proving money in (from investors) less money returned (to investors).

The methodology is flawed because it relies on extrapolation to capture the Four Funds within a criminal conspiracy when the Government itself conceded that the proof at trial was limited to the trusts and MSTF; and upon a formula that does not identify "ill-gotten gains" in any way or causally link the amounts sought to wrongdoing. This would be the SEC's burden at trial. While there may be an argument that the conspiracy captured such losses, the Plaintiff has not identified the wrongdoing that would entitle it to judgment here. Instead, the Plaintiff asks the Court to infer unknown data (ill-gotten gains in the funds) from known data (a criminal conspiracy involving MSTF and the trusts), and the court's finding that some proceeds in the Four Funds were improperly used.

CONCLUSION

For the foregoing reasons Defendant Smith request that the Court reject the proposal and order a trial on the amount of proposed disgorgement.

EXHIBIT 1

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

****

UNITED STATES OF AMERICA

v.

TIMOTHY M. MCGINN,
DAVID L. SMITH

Defendants.

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Case No. 12-CR-28 (DNH)

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by and through its counsel of record, the United States Attorney for the Northern District of New York, hereby files its sentencing memorandum.

I. INTRODUCTION

On February 6, 2013, the jury convicted both defendants of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349, (count 1); mail fraud, in violation of 18 U.S.C. §1341, (counts 8, 9, 10); wire fraud, in violation of 18 U.S.C. § 1343, (counts 14 and 17); securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. §10b-5, (counts 21-26), and filing false tax returns, in violation of 26 U.S.C. § 7206(1) (counts 27-29 for McGinn and counts 30-32 for Smith). Dkt. No. 104. McGinn was also convicted of additional mail and wire fraud counts (mail fraud: counts 4, 5, 6, and 7) (wire fraud: counts 11, 12, 13, 15, 16, 18, 19, and 20); Smith was acquitted on those counts. The defendants are scheduled to be sentenced on August 7, 2013.

II. APPLICABLE STATUTORY AND GUIDELINES PROVISIONS

A. Statutory Maximum Sentences

The maximum term of imprisonment for defendants' convictions for conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343; and securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R.

§ 10b-5, is 20 years for each count of conviction. The maximum term of imprisonment for their convictions for filing false tax returns is 3 years for each count of conviction.

Defendants also face a three-year maximum term of supervised release. 18 U.S.C. § 3583(b)(2). The maximum fines are: $250,000 for the conspiracy to commit mail and wire fraud and mail and wire fraud convictions, 18 U.S.C. § 3571(b); $5,000,0000 for the securities fraud convictions, 15 U.S.C. § 78ff(a); and $100,000 for the filing of false tax return convictions, 18 U.S.C. § 3571(b).

Forfeiture is also applicable here. 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7), and 1961(a) and 28 U.S.C. § 2461(c). Restitution is required pursuant to 18 U.S.C. § 3663A.

B. Guidelines Provisions

1. The Offense Level Calculation

The convictions here are grouped. U.S.S.G. §3D1.2(d); *United States v. Gordon*, 291 F.3d 181 (2d Cir. 2002) (fraud and tax offenses should be grouped under U.S.S.G. §3D1.2(d)). The calculation should be:

Base offense level, U.S.S.G. §2B1.1(a)(1)	7
Loss amount more than $30 million, U.S.S.G. §2B1.1(b)(1)(L)	22
Sophisticated means, U.S.S.G. §2B1.1(b)(10)(C)	2
Financial security of 100 or more victims, U.S.S.G. §2B1.1(b)(15)(J)	4
Securities law violation by person associated with a broker-dealer, U.S.S.G. §2B1.1(b)(18)(A)(ii)	4
250 or more victims, U.S.S.G. §2B1.1(b)(2)(C)	6
Obstruction of justice, U.S.S.G. §3C1.1	2
Adjusted Offense Level	47

Because the total offense level is more than 43, the offense level is treated as a level 43. U.S.S.G. Sentencing Table, comment. (n. 2).

This calculation is not consistent with the calculations in the presentence report because this

calculation includes (1) a loss amount of more than $30 million, while the presentence report has a loss of more than $2.5 million, resulting in a 4-level difference, and (2) harm to the financial security of 100 or more victims, resulting in a 4-level difference.

The base offense level is 7. U.S.S.G. § 2B1.1. In addition, the following Chapter Two specific offense characteristics apply:

(a) The loss amount is more than $30 million.

The loss amount is $30,921,232, resulting in a 22-level increase. U.S.S.G. § 2B1.1(b)(1)(L). As described in further detail below and in the presentence report, McGinn PSR ¶160; Smith PSR ¶161, this figure consists of three components: (1) $29,229.792.98 of lost investor principal; (2) $1,003,722 of payroll and preferred investor diversions; and (3) $587,718 of tax losses. The probation department's lower loss amount—$6,336,440 resulting in an 18-level increase, U.S.S.G. § 2B1.1(b)(1)(J)— relies solely on evidence presented at trial and includes, among other amounts, the second and third components of the government's calculation. Defendants object to both loss calculations.

The Sentencing Guidelines require that the offense level be calculated on the basis of "all acts . . . committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant . . . that occurred during the commission of the offense of conviction." U.S.S.G. § 1B1.3(a)(1). It is well-settled this Court "need only make a reasonable estimate of the loss, given the available information, and the calculation of loss amount is made under the preponderance of the evidence standard." *United States. v. Nachamie,* 28 Fed. Appx. 13 (2d Cir. 2001) (internal quotations/citations omitted). In addition, "acquitted conduct can be taken into account in sentencing." *United States. v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004). As a result, the loss amount

is not limited to the proof at trial.

Applying those principles here, there is plainly sufficient to include the lost investor principal, that is the amount of principal lost, as of the date that the search warrants were executed, by victims on the restitution list[1] who had invested in the 17 Trusts and MSTF. This calculation is the most appropriate measure of the loss to the victims.

Any argument that this is unfair to defendants because the losses were caused by the market misses the mark. The evidence at trial established that defendants repeatedly made false representations and material omissions to convince investors to give their hard-earned money to the defendants. After persuading investors to part with their money, defendants used it as if it were their own. Not only did they secretly skim large percentages of investor funds to line their own pockets, but they did their very best to make sure that the investments would keep coming in by using new investor money to pay old investors. They directed employees to create false accounting entries to hide their fraudulent schemes, and they lied to FINRA to avoid exposing their pervasive fraud. All of these factors—the false representations, material omissions, and Ponzi-like nature of the scheme—support including the lost principal as a fair measure of the loss. This calculation holds defendants accountable for the real loss caused to investors by their fraudulent schemes.

In contrast, considering only evidence presented at trial would result in a windfall to defendants. The law does not require any such cap; the government would otherwise be required to prove loss at trial, and there is no such requirement. This is why even acquitted conduct may be included in a loss calculation.

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[1] The victim list consists of investors in the Trusts, MSTF, and three of the Four Funds, minus the preferred investors, brokers, and family members of the defendants.

(b) Sophisticated means

There is an additional 2-level increase because the offense "involved sophisticated means." U.S.S.G. §2B1.1(b)(10)(C). This adjustment is scored in the presentence report, and defendants have objected.

This adjustment applies to "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. . . . Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." U.S.S.G. §2B1.1(b)(10)(C), comment. (n. 8(B)).

Here, defendants concealed their fraud by directing the creation of false accounting entries. They also directed the movement of money in a circuitous manner to cover their tracks. For example, the payroll diversions involved the transfer of money from three of the Four Funds through MSTF and then to the broker-dealer's account. This indirect route concealed that money from the Four Funds was being used, improperly and without the knowledge of investors, to cover payroll expenses for the broker-dealer. It also avoided net-capital issues with the transaction.

Relying on their view of the evidence, which the jury rejected, defendants contend that this adjustment should not apply because the transfers among entities and accounting were "transparent," and the only errors were caused by the incompetence of their accounting staff. In reality, the Ponzi-like transfers and the false accounting entries created to conceal them were the polar opposite of transparent and were plainly designed to create a false, intricate layer of confusion to allow the scheme to continue indefinitely. As for the post-bankruptcy sales transactions, there was ample evidence that they were not an accident, such as Phil Rabinovich's testimony, and the many

electronic mail messages sent to McGinn and Smith about the sales. Although Smith was acquitted on the post-bankruptcy sales, the Court is not precluded from considering his conduct.

(c) Substantial endangerment of the financial security of 100 or more victims

There is a 4-level increase because the offense substantially endangered the solvency or financial security of 100 or more victims. U.S.S.G. § 2B1.1(b)(15)(B)(iii). This adjustment is not scored in the presentence report, and the government objected. Addendum to PSR at 52.

Based on victim impact statements submitted and victim interviews documented in questionnaires provided to the probation department, at least 101 victims have reported that their financial security was substantially endangered by the defendants. Addendum to PSR at 52. The probation department considered only the victim impact statements and not the victim interviews. The Court should consider the victim interviews and apply this adjustment.

(d) Violation of securities laws by defendants associated with a broker-dealer

There is a 4-level increase because the offense involved a violation of securities law and, at the time of the offense, the defendants were associated with a broker or dealer. U.S.S.G. §2B1.1(b)(18)(A)(ii). Defendants have not objected to this increase.

(e) More than 250 Victims

There is a 6-level increase because the offense involved 250 or more victims, specifically, 841 victims. U.S.S.G. § 2B1.1(b)(2)(C). The victim list consists of investors in the Trusts, MSTF, and three of the Four Funds, minus the preferred investors, brokers, and family members of the defendants.

Defendants object because the victim list includes investors in three of the Four Funds, and

they believe that none of the counts of conviction are directly related to the Four Funds. Setting aside the flaws in their argument, even if those investors were removed, there would still be more than 250 victims.

(f) Obstruction of Justice

There is also a 2-level increase because the defendants committed perjury when they testified at trial. U.S.S.G. § 3C1.1. Although the defendants had a constitutional right to testify on their own behalf, they repeatedly and intentionally made false statements under oath in an effort to deceive the jury. Their false statements cannot fairly be considered "inaccurate testimony" resulting "from confusion, mistake, or faulty memory." U.S.S.G. §3C1.1, comment. (n. 2). They instead gave lengthy, detailed testimony which was plainly false when measured against the testimony of other witnesses and the documents.

2. Criminal History Category

According to the presentence report, both defendants have a criminal history category of I. The government agrees with the Probation Office's determination of the defendant's criminal history category.

3. Guidelines Range and Sentence

As described above, the combined offense level is 43 and the criminal history category is I. As a result of the above-described calculations, absent any departures, the federal sentencing guidelines advise that the defendants should receive a sentence of life imprisonment; a fine of $25,000 to $30,000,000, U.S.S.G. §5E1.2(c)(3); a supervised release term of 1 to 3 years for all of the fraud convictions, U.S.S.G. §5D1.2(a)(2); and a term of 1 year for the tax convictions, U.S.S.G. §5D1.2(a)(3).

Where, as here, the guidelines range exceeds the statutory maximum, U.S.S.G. § 5G1.2(d) requires imposition of consecutive sentences on each count of conviction up to the guideline range. Following *United States v. Booker*, 543 U.S. 220 (2005), this provision, like the rest of the guidelines, is advisory. *United States v. Kurti*, 427 F.3d 159, 164 (2d Cir. 2005). Thus, this Court possesses discretion to determine, after application of the § 3553(a) factors, whether to impose consecutive or concurrent sentences.

III. THE SIGNIFICANT GUIDELINES RANGE REFLECTS THE EGREGIOUS NATURE OF THIS FRAUD.

The extremely high guidelines range here reflects the truly egregious nature of this fraud, which has cost more than 800 victims nearly $30 million. Analysis of the factors articulated in 18 U.S.C. § 3553(a)(2) leads to the same conclusion: that a very substantial period of incarceration is appropriate here.

A. The Nature and Circumstances of the Offense

The facts of this massive fraud are particularly egregious. Defendants breached the trust that investors placed in them by breaking their promises to investors and failing to disclose important information to investors. All told, the defendants pocketed more than $4 million above and beyond the fees disclosed in the PPMs, including more than $100,000 transferred to both of them directly from the Trusts; $230,000 transferred to McGinn from MSTF, and $3.8 million transferred to both of them and Rogers from the LLCs. For one of the raises—NEI Capital LLC— the defendants took, without justification, nearly one-third of the money raised from investors, on top of the fees disclosed in the PPM. After stealing this money, the defendants decided that they should also avoid paying taxes on it, so they directed accountants to create false accounting entries characterizing these transactions as "loans." There were no promissory notes for these loans, and neither defendant

included these loans as liabilities on any summaries of their net worth including their personal financial statements and McGinn's mortgage application. When FINRA began asking questions about this issue, the defendants directed their employees to create backdated promissory notes in an effort to conceal the true nature of the transactions.

This was, of course, not their only cover up. When FINRA asked for accounting records, the defendants directed that their accountants make false accounting entries which were then submitted to FINRA. They hoped that the false accounting entries would hide the preferred investor payments and the payroll diversions by making it appear, untruthfully, that MSA and MSCH had been involved in the transactions. Smith also directed the creation of false accounting entries to conceal that McGinn had taken $230,000 from MSTF. Incredibly, the defendants submitted all of these newly-created false accounting entries after their attorney told them that they should not cook the books because it would look like a cover up.

In connection with the Firstline trusts, the defendants also directed that lulling payments be made to investors for more than 21 months after Firstline Security, Inc. filed for bankruptcy. Every month, McGinn had to scrounge up the money to pay the Firstline investors, and he directed diversions of money from other investments to pay the Firstline investors. Although Smith maintains that he did not know about the bankruptcy for some time, he must have known by the time he executed the agreement between MSTF and the Firstline trusts. GB52. It is unclear precisely when Smith signed this agreement because it is dated May 15, 2008, GB52, while the computer showed a creation date of June 2, 2009, GB52A, but it is clear that he learned of the bankruptcy before the payments to Firstline investors stopped. Neither the Firstline investors nor the other investors knew about these improper diversions, which caused some investors to effectively pay

themselves.

In addition, the defendants allowed $600,000 of post-bankruptcy sales to occur without any notice to the new investors that Firstline had filed for bankruptcy. Finally, although the jury acquitted on these charges, there was also ample evidence that the defendants did not disclose the potential ADT litigation to Firstline investors in the fall of 2007.

This was not a victimless case. As a result of the defendants' greed and arrogance, more than 800 investors lost nearly $30 million. Every single one of the victims—from the very sophisticated commodities brokers to the less sophisticated investors like the retirees who testified at trial—trusted the defendants to invest their money in specific investments, as promised. That trust was betrayed by the defendants, and each victim has a story to tell about the consequences of that betrayal, as scores of them have tried to do in victim impact statements submitted to the Court and by testifying during the trial. Some of the victims are planning to attend the sentencing hearings, and a few will ask to address the Court directly.

Indeed, for a significant number of investors—including many elderly couples—the consequences of the fraud have been simply devastating. One victim, a cancer patient, states that "[a]ll our hopes and dreams collapsed. I wake up in the middle of the night worried and uncertain where to get money for my ongoing chemotherapy." Another couple, forced to liquidate their house and come out of retirement, states "[o]ur world fell apart when we realized we would not be receiving our monies from McGinn and Smith. When we think about what McGinn and Smith have done to our lives, we literally cry. Nightmares and panic attacks have become a part of our lives. We were forced into a Reverse Mortgage in order to remain in our retirement home; had to sell our home in NJ. My husband returned to work at 71 years of age."

A husband, concerned about his disabled wife, who lost his life savings due to the fraud, explains that "[l]iving on Social Security is not easy to do. . . . If I go before my disabled wife how will she live? She needs my support and care. My heart breaks each day that I wake." Another victim, caring for her sick husband, explains the humiliation of having to seek support from her children: "[w]e have no money for the non-covered hospital bills, treatments and medicines my husband needs; we've gone into tremendous debt because of this. My children were filled with fear as to our money situation and donated their hard earned money so we could eat and maintain our home. We may have to sell our dream home . . . and move to a trailer, or worse, burden our children by moving in with them. I volunteer for a food pantry; my biggest fear is I may become one of their clients."

Dozens of other victims reported life shattering events as a result of the fraud, including postponing retirement, returning to work, selling homes, borrowing money from family, reneging on plans to pay children's college tuition, and foregoing care for relatives and loved ones. The money these victims depended on was squandered by defendants, whose illegal use of investor money resulted in the loss of tens of millions of dollars of investor funds.

B. The History and Characteristics of Defendants

As for the history and characteristics of defendants, they are well-educated men who could have earned a comfortable salary without resorting to crime. They had worked in the securities industry virtually their whole careers, and they were intimately familiar with their obligations to investors. Blessed with education, intelligence, and money, they instead chose to mislead investors, FINRA, and the IRS while using their personalities to convince other professionals to participate in their fraud. Far from weighing in favor of a more lenient sentence, their privileged backgrounds

are a reason to hold them accountable for stealing from their clients, all to support a grand lifestyle they could not achieve honestly.

C. Additional Factors

The sentence imposed should also reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, and afford adequate deterrence to criminal conduct. Congress has repeatedly passed laws to protect investors from people like defendants because investors have the right to know how their money is being used so that they can make informed decisions. Similarly, our society does not tolerate people who shirk their obligation to pay their fair share of taxes. This Court's sentence should make plain to the community that pervasive and lengthy fraudulent schemes causing more than $30 million of loss to more than 800 victims, like those created by defendants, will result in very substantial periods of incarceration.[2]

D. Restitution and Forfeiture

The imposition of an order requiring payment of restitution in full, according to a schedule set by the Court, is mandatory pursuant to 18 U.S.C. §§ 3663A(c)(1)(A) and 3664(f). The restitution amount is $30,233,514.98. PSR ¶ 218. The victims have priority over the IRS. 18 U.S.C. § 3664(i) ("In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."). The government has also

[2] The government reserves the right to respond to defense arguments raised for the first time after this memorandum is filed. Similarly, if the Court is considering a *sua sponte* departure from the applicable sentencing guidelines range on a ground not previously identified by the parties or in the Presentence Investigation Report, the parties are entitled to notice and an opportunity to respond. See Fed. R. Crim. P. 32(i)(1)(c), 32(h). In addition, the government respectfully requests that the Court provide the parties with any *ex parte* communications received by the Court in connection with sentencing, with the exception of the confidential sentencing recommendations submitted by the United State Probation Office.

filed a separate motion seeking the imposition of a money judgment. Dkt. No. 190.

E. The Government's Motion for Remand

The United States respectfully moves that the defendants be remanded immediately after sentence. *See* 18 U.S.C. § 3143(b). The defendants have long been aware of the impending sentencing and face a significant term of imprisonment under the applicable guidelines. Moreover, their attorneys have not identified any substantial question of law or fact likely to form a viable basis for an appeal. They should begin serving their sentences immediately.

Dated: July 24, 2012

Respectfully submitted,

RICHARD S. HARTUNIAN
United States Attorney

By: /s/ Elizabeth C. Coombe
Elizabeth C. Coombe
Richard D. Belliss
Wayne A. Myers
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