198

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. 1:12-CR-028 (DNH)

TIMOTHY M. McGINN and
DAVID L. SMITH,

Defendants.

SENTENCING MEMORANDUM

E. STEWART JONES, PLLC
E. Stewart Jones, Jr., Esq.
Bar Roll No. 103064
Attorney for Defendant
TIMOTHY M. McGINN
28 Second Street
Troy, New York 12180
(518) 274-5820

I. PRELIMINARY STATEMENT

The sentencing process is required to account for a variety of factors and considerations in determining what a just sentence should be individualized to the citizen accused who stands before the court awaiting sentencing and the individual case. *See* 18 U.S.C. §3553(a); Part IV, *infra.* *See also Ewing v. California,* 538 U.S.11, 34035 (2003) (Stevens, J., dissenting) ("[B]efore Guidelines sentencing became so prevalent[,]. . . .sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment-namely, deterrence, incapacitation, retribution, and rehabilitation.").

The guidelines developed by the United States Sentencing Commission are to be used as a starting point only. *Gall v. United States*, 522 U.S.38, 50 (2007).

In addition to consulting the guidelines, an "individualized assessment" of the situation at-hand "based on the facts presented" is *Gall*, 522 U.S. at 50. That analysis is guided by "[r]easonableness" and an "*individualized* application of the statutory sentencing factors." *United States v. Dorvee,* 616 F.3d 174, 184 (2d Cir. 2010) (citing *Gall*, 522 U.S. at 46-47).

In this case the extraordinarily draconian advisory sentencing Guidelines range is 262 to 327 months based on a calculated score of 39, which includes and is unfairly and dramatically influenced by an offense level increase of 18 based upon the claimed loss amount.

This Sentencing Memorandum is submitted in support of TIMOTHY McGINN'S request for a fair and reasonable sentence, and one that is "sufficient but not greater than necessary" to accomplish the goals of sentencing, consistent with the factors in 18 U.S.C. 3553(a), and the flexibility and individualization of the sentence required by *Kimbrough, Gall, Rita and Booker*.

It is respectfully submitted that a non-guidelines sentence is sufficient but not greater than necessary for TIMOTHY McGINN.

The Advisory Guidelines Range Significantly Overstates the Seriousness of Mr. McGinn's and Mr. Smith's Offense

Assuming for the sake of argument that the court were to adopt the Probation Department's Guidelines calculation of 39, that offense level for a citizen in a criminal history category of I corresponds to a sentencing range of 262 to 327 months. This range is cruel and unreasonably punitive in the full light of the nature and circumstances of the offense, as well as the individual defendant's respective histories and characteristics.

The excessive nature of this punishment range is strikingly evident when it is compared to other offenses proximate to level 39.

Illustratively:

First degree murder	43
Attempted murder for hire where the object of the offense would have constituted first degree murder, the victim sustained permanent or life threatening bodily injury	41
Criminal sexual abuse of a child under 12 years old by force, threat of death, or rendering the victim unconscious by force or drugs	42
Kidnaping where the victim was both sexually exploited and sustained a permanent or life-threatening injury	42
Aircraft piracy resulting in death	43
Aircraft piracy not resulting in death	38
Wire fraud causing a loss of an unlimited amount of money in excess of $400,000,000 without other aggravating characteristics	37
Robbery with discharge of firearm causing permanent or life-threatening injury and a loss of more than $5,000,000	40
Counterfeiting more than $400,000,000 of United States currency	39

Distribution of an unlimited amount of every type of unlawful drug	38
Sex trafficking of children under the age of twelve by means of force	42
Production of sadistic and masochistic pornography involving children under the age of twelve	40
Selling or buying children for use in the production of pornography	38
Distribution of an unlimited number of every type of unlawful firearm	34
Treason tantamount to waging war against the United States	43
Gathering and transmitting top secret national defense information to aid a foreign government	42
Unlawful activity involving nuclear weapons and biological or chemical weapons of mass destruction with intent either to injure the United States or to aid a foreign terrorist organization	42
Continuous tampering with a public water system causing permanent or life-threatening injury to an unlimited number of people	37
Willful evasion of more than $400,000,000 of income tax	36

It would be preposterous to compare the conduct here with crimes such as murder, sexual predation, providing nuclear and biological weapons of mass destruction, distributing unlimited amounts of illegal drugs and/or guns, or other economic crimes where the financial harm is in excess of $400,000,000.

Moreover, the appropriate reduction of the upper adjustment calculations contained within the Guidelines level of 39 (those upward adjustments objected to by the defense - i.e., obstruction of justice and sophisticated means) would still leave the Guidelines calculations at a level that significantly overstates the seriousness of the conduct here when comparing it to other offenses considered serious enough by the Commission to justify offense levels at the reduced range of 35.

Illustratively:

Voluntary manslaughter	29
Conspiracy or solicitation to commit murder	33
Assault with intent to commit murder; attempted murder where the object of the offense would have constituted first degree murder	33
Aggravated assault involving more than minimal planning, discharge of a firearm, permanent or life-threatening bodily injury motivated by a payment of money in violation of a court protection order	30
Criminal sexual abuse of a child under 12 years old	34
Kidnaping	32
Interference with a flight crew member intentionally endangering the safety of an airport or aircraft while brandishing a dangerous weapon	33
Wire fraud causing a loss between $100,000,000 and $200,000,000 without other aggravating role or specific offense characteristics	33
Robbery involving the discharge of a firearm causing permanent or life-threatening bodily injury and loss of between $50,000 and $250,000	33
Extortion by force involving the discharge of a firearm causing permanent or life-threatening bodily injury and abduction to facilitate escape	33
Bribery of a bank officer with improper benefit between $20,000,000 and $50,000,000 that substantially jeopardized the safety and soundness of a financial institution	34
Bribery of a public official to receive improper benefit between $7,000,000 and $20,000,000	34
Use of interstate commerce facilities in the commission of murder-for-hire	32

Sex trafficking of children or by force, fraud or coercion	34
Holding a person in a condition of involuntary servitude for more than a year where a dangerous weapon was used and victim sustained permanent or life-threatening injury	33
Trafficking in an unlimited number of semi-automatic firearms capable of accepting large capacity magazines	34
Smuggling an unlimited number of inadmissible aliens into the United States	34
Destruction of war material with intent to injure the United States or aid a foreign nation	32
Unauthorized disclosure to a foreign government of classified top secret information by a public employee	29
Providing firearms and explosives to a foreign terrorist organization with the intent that they be used to commit a violent act	28
Unauthorized acquisition of and threat to use nuclear and biological weapons and other weapons of mass destruction	30
Tampering with consumer products causing permanent or life-threatening injury to an unlimited number of victims	29
Tampering with a public water system causing permanent or life-threatening injury to multiple victims	30
Antitrust violations involving an unlimited amount of commerce	28
Willful evasion of between $100,000,000 and $200,000,000 of personal income tax	32

There is absolutely nothing about or in this case justifying treatment of it equivalent to that associated with offenses such as conspiracy to commit murder, sexual battery of young children, kidnaping, large scale arms trafficking, espionage, stealing and/or threatening to use an atomic bomb, or any of the other offenses listed above.

The Advisory Guidelines Range Overstates the Seriousness of the Offense Because of its Unfair and Undue Reliance on Loss and Cumulative Specific Offense Characteristics

Numerous courts have recognized that economic loss in an alleged fraud case, like quantity in a drug case, is often an inappropriate measure for punishment or proxy for culpability. Loss alone, as well as in combination with various cumulative specific offense characteristics, yields Guidelines ranges that are clearly disproportionate to the offense and significantly overstate a fair measure of a citizen defendant's culpability and a just assessment of appropriate punishment. Prior to his appointment to the Second Circuit, Judge Gerard Lynch, in the *Emmenegger* case, said:

> "The guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting – no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes – to assign precise weights to the theft of different dollar amounts. In many cases . . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence."

United States v. Emmenegger, 329 F.Supp.2d 416 (S.D.N.Y. 2004).

The guidelines, over their history, have dramatically increased the weight given to loss, in each instance without an empirical basis (See, e.g., Allan, Ellis, John Steer & Mark Allenbaugh, *Federal Sentencing for Economic Offenses*, 25:4 CRIM. JUST. 34 (2011); James E. Felman, *the Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23:2 FED. SENT. RPTR. 138 (2010)).

The present guidelines range reflects a relentless upward ratchet that began with the first set of guidelines in 1987. Whereas, the initial Commission had matched the penalties for most offenses with pre-guidelines practice, it specifically did not do so for economic crimes, and increased their penalties over the pre-guidelines practices of the judiciary. U.S.S.G. ch. 1 pt. A. While citing no data demonstrating that these initial increased penalties were inadequate, the Commission again raised the

penalties for economic crimes through a new loss table in 1989. U.S.S.G. app. C, amends. 99, 154 (1989). The Commission added numerous aggravating specific offense characteristics related to economic crimes from 1989 to 2001, U.S.S.G. app. C, amend. 317 (1990); amend. 551 (1997); amend. 576 (1997); amend. 596 (2000), when it again adopted wholesale increases through yet another new loss table. U.S.S.G. app. C, amend, 617 (2001). These increases were then followed by the politically charged Sarbannes-Oxley Act, which led the Commission to increase the penalties for economic crimes yet again in 2003. U.S.S.G. app. C, amends. 647, 654 (2003). As exemplified by Mr. McGinn's case, the impact of these repeated changes is extreme. In the initial 1987 guidelines, the amount of the loss could result in no more than a five-fold increase in the range of imprisonment. Under the current guidelines the loss can increase the range by multiples of that.

In *United States v. Adelson*, 441 F.Supp.2d 506, 507 (S.D.N.Y. 2006), Judge Rakoff was confronted with a defendant convicted of joining a conspiracy to materially overstate a public company's financial results and thereby artificially inflate the price of its stock. Adelson's Guidelines score was level 46 – three levels "off the chart" – and called for a sentence of life imprisonment. Even the government "blinked at this barbarity", but was unable to make a specific sentencing recommendation. *Id.* At 511-13. For Judge Rakoff, the circumstances exposed "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." *Id.* At 512. Given that Adelson had not originated the fraud, presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate, and coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders", the court sentenced Adelson to three-and-a-half years imprisonment and ordered restitution in the amount of $50 million. *Id.* At 514-15. Judge Rakoff explained that he had jettisoned the advisory Guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face." *Id.* at 515.

In *United States v. Parris*, 573 F.Supp.2d 744, 745 (E.D.N.Y. 2008), Judge Block sentenced two defendants to five years imprisonment "in the face of an advisory Guidelines range of 360 to life". The

offense – a "pump and dump" stock manipulation scheme – scored an offense level 42 based on upward adjustments for more than $2.5 million of loss, more than 250 victims, sophisticated means, officer/director status, role in the offense, and obstruction of justice. *Id.* at 745 (quoting Adelson, 441 F.Supp.2d at 510). The court noted that there were no valid grounds for downward departure from the guidelines and thus, for their advisory status, it "would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence." *Id.* at 750-51. Even the government agreed that "many reasonable sentences would fall outside" the advisory Guidelines range. *Id.* at 751. In fashioning a reasonable sentence, the court stated that it "would have much preferred a sensible Guidelines range to give me some semblance of real guidance". The court found no such help in the present guidelines, observing that "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a Guidelines calculation either calling for or approaching lifetime imprisonment.". Instead of being guided by the guidelines, the court instead assembled a lengthy compendium based on submissions from the parties listing sentences in other high-loss cases. *Id.* at 756-63. The compendium includes 34 cases with loss amounts ranging from $6 million to $14 billion and sentences ranging from probation to 25 years imprisonment. After a lengthy discussion of what is essentially an emerging common law of high-loss economic crime sentences, the court concluded that a sentence of five years imprisonment was sufficient to achieve the purpose of sentencing. *Id.*

A number of similar cases did not result in published decisions. In *United States v. Ovid*, Case No. 09-CR-216 (JG), 2010 WL 390724 9 (E.D.N.Y. 2010), the defendant faced an advisory Guidelines range of 210 to 262 months, but the District Court imposed a sentence of 60 months (with the agreement of the government). In *United States v. Ferguson*, No. 3:06-CR-00137-CFD (D. Conn. 2009), sentences ranging from one year and one day to four years were imposed on five defendants whose Guidelines ranges included the possibility of life imprisonment and who were convicted of fraud leading to over $500 million in loss. A defendant who caused approximately $25 million in losses was sentenced to one year and one day in *United States v. Turkan*, No. 4:08-CR-428 DJS (E.D. Mo. 2009). In each of these

cases the courts rejected the Guidelines range finding that the range significantly overstated the seriousness of the offense and did not adequately consider the individualized circumstances of the case.

II. FORMULATING A FAIR SENTENCE

The "sufficient, but not greater than necessary" requirement of sentencing has been referred to as the "overarching instruction" of 18 U.S.C. § 3553(a). *United States v. Olhovsky*, 562 F. Ed 530, 548, 552 (3d Cir. 2009), *citing Kimbrough*, 128 S. Ct. at 563; *see generally United States v. McCaa*, 2009 WL 1867937 (2d Cir., 2009); *United States v. Tann*, 2009 WL 1605124 (2d Cir., 2009); *United States v. Williams*, 475 F. 3d 468, 476-78 (2d Cir. 2007); *United States v. Ministro-Tapia*, 470 F. 3d 137, 138, 140-42 (2d Cir. 2006).

The provision is not simply another "factor" that Sentencing Courts must consider, but, rather, creates an independent limit on the sentence a court may impose. *United States v. Denardi*, 892 F. 2d 269, 276-77 (3d Cir, 1989) (Becker, J., concurring in part, dissenting in part); *see also United States v. Rodriquez*, 527 F.3d 221, 227-28 (1st Cir. 2008) (describing § 3553(a) as a "tapestry of factors; through which runs the threat of an overarching . . . parsimony principle" that "instructs district courts to impose a sentence sufficient, but not greater than necessary to accomplish the goals sentencing.") (internal quotation marks and citation omitted)).

"Many of the very factors that used to be grounds for departure under the guidelines are now considered by the district court – *with greater latitude* – under § 3553(a)." *United States v. McBride,* 434 F.3d 470, 476 (6th Cir. 2006)" (emphasis added). Similarly, the Tenth Circuit recently explained that, in the context of departures, pursuant to Guidelines policy statements, "the District Court has a *freer hand* when it comes to variances and may consider these factors [previously considered departures] as part of the nature and circumstances of the offense and the history and characteristics of the defendant in fashioning a reasonable sentence consistent with the overall objectives of § 3553(a)." *United State v. Tom,* 2009 WL 1705604, 3 (10th Cir. 2009) (emphasis added), *citing United States v. Davis,* 537 F.3d. 611, 616-17 (6th Cir. 2008) ("A sentencing judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime."); *Kimbrough*, 128 S. Ct. at 570 (noting that

the "Government acknowledges that the Guidelines 'are now advisory' and that, as a general matter, courts may vary [from Guidelines ranges] based solely on policy consideration, including disagreements with the Guidelines." (citations omitted)).

In recognizing the authority for the imposition of a non-Guidelines sentence based upon disagreement with a particular policy reflected in the guidelines, the Spears court (*Spears v. United States*, 555 U.S.261, 264 (2009)) (stated that "the point of *Kimbrough*" was to "recogni[ze] [the] District Court's authority to vary from the crack cocaine guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case" (emphasis in original). This authority "is at its greatest when the offense guidelines at issue is not the product of the Commission's empirical analysis and technical expertise." *United States v. Diaz*, No. 11-CR-821, 2013 WL 322243, at *3 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

A. Analysis of the §3553(a) Factors

It is now black letter law that the guidelines are advisory and are simply one consideration among many sentencing factors and that 18 U.S.C. §3353(a) provides the framework and the criteria which the Sentencing Judge must consider.

At the end of the analysis the punishment must be just and fair, and must meet the fundamental dictate for federal sentencing that the sentencing process shall result in:

> "a sentence sufficient but not greater than necessary" to achieve the goals
>
> of a fair, proportionate, balanced and just sentence.

The following criteria are provided by §3353(a):

- the nature and circumstances of the offense, and history and characteristics of the defendant;
- 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 avoid adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant;
- the kinds of sentences available;
- the sentencing guidelines;
- any pertinent policy statements in the guidelines;
- the need to avoid sentencing disparity;

- the need to provide restitution. *See* 18 U.S.C. §3353(a).

1. **The Nature And Circumstances Of The Offense And The Characteristics of MR. McGINN**

By any measure, this case was complex, technical, misunderstood and complicated by thousands of pages of documents that were confusing and conflicting, as was much of the testimony that related to the case, particularly when comparing the direct and cross-examinations.

While it is not my intention to restate the analysis provided to this court in the post-trial motions, *those analyses are incorporated herein by reference* as they are directly relevant to any assessment of the nature and circumstances of the offense and the "never give up", "never say die", and "the blood, sweat and tears" personality of MR. McGINN, demonstrating as they do the extraordinary efforts made by MR. McGINN to make the investments work and rescue the investors during the most turbulent and destructive economic period in this nation since the Great Depression. (*See ¶ 170, pages 37–41 of the Probation Pre-Sentence Report, which is incorporated by reference*). MR. McGINN'S passion and commitment to the investors, and his tireless and unmatched efforts to turn the business around for the investors, is best illustrated by his exhaustive and exhausting commitment to rescue First Line (a rescue plan that ultimately succeeded).

Illustratively, the three witnesses called by the government in connection with the First Line transactions testified under cross-examination as follows:

TREVOR M. KEYES

Q. In 2008, in January of 2008, there were a number of discussions about ways in which to resolve this without either a bankruptcy filing or a receivership appointment, correct?

A. Yes.

Q. In January of 2008, McGinn Smith, through Tim McGinn, was, along with your other creditors, an active participant in those discussions to find a way forward for you without any of this adverse consequences, bankruptcy, reorganization, correct?

A. Yes, absolutely. He was going to bat, trying to save it.

Q. And he took a leadership position in that effort?

A. He did.

Q. In fact, Tim McGinn put together a conference call involving your company and all of your major creditors in which he tried to get everyone to agree to allow McGinn Smith to pay to each and every one of those creditors eighty-five cents on the dollar to satisfy your debt to them and enable you to move forward, correct?

A. Yes. They all should have done it. It was a great deal.

Q. Had the creditors, and more specifically that one creditor, accepted Mr. McGinn's proposal, then First Line could have continued forward with the business and forward with implementing the business model you wanted to implement through 2008 and on, correct?

A. I would still have money.

Q. Okay, and the business would still be flourishing?

A. The business would be okay. The creditors would be happy. They got eight-five cents on the dollar, way better than everybody else in 2008.

Q. With a bankruptcy proceeding, if the lender has not filed a UCC document to protect the lender's interest, what is the consequence to the lender?

A. It is pretty bad.

Q. So if McGinn Smith's lawyer had failed to file the UCC document in connection with any loan transaction with First Line, basically McGinn Smith was up the creek without a paddle?

A. A two million dollar mistake, yes.

Q. And you looked at the possibility of a receivership, you looked at the possibility of a bankruptcy, and you made a decision that the bankruptcy filing was in the best interests of your company, your people, the direction of your company, and your company's investors, correct?

A. Everything lawyer will tell you that bankruptcy is better than a receiver, every lawyer.

Q. And reason for that is, the receiver comes in and has no idea what the company's business is, correct?

A. It is the same thing the receiver is doing on this case. They don't know what is going on. They just spend the money.

STEPHEN BAKER

Q. Is it fair to say, and I will come back to it in more detail, but right now, is it fair to say that in January of 2008, prior to the bankruptcy filing, that Tim McGinn was doing everything that he could to prevent that bankruptcy filing?

A. Yes, sir.

Q. Fair to say that in January of 2008 and prior to that time, working with you, that Tim McGinn was doing everything he could to keep your business alive?

A. Yes, sir.

Q. Doing everything he could to deal with the creditors who were threatening to close down your business?

A. Yes, sir.

Q. I want you to take us to the late December, January period and tell us about the discussions that were going on between you and Mr. McGinn, and Mr. McGinn and your various creditors, ADT, GE, and the list of creditors you described for us?

A. Well, Mr. McGinn hosted several calls, long in duration, some of them two-plus hours, and we were able to get GE Capital or GE Security and Capital, alarm.com, ADT, on the conference call and sit down and try to discuss the reality of trying to, you know, solve these issues and solve these problems.

JOHN ATKINSON

Q. Okay. Now, in January of 2008, there was an effort among the creditors to try to resolve all of these financial issues, enable the company to go forward without receivership and without bankruptcy, correct?

A. Correct.

Q. And McGinn Smith took an active role in that effort to salvage the company?

A. Very much.

Q. Very much. And McGinn and Smith in the person of Tim McGinn was one of the leaders in the effort to keep the company going, keep the investors paid, and to enable the company to enter into a different business era that able to serve the investors better, correct?

A. Yes, yes.

Q. Are you aware that McGinn Smith undertook, as part of their effort to salvage First Line and the investors, to buy First Line assets out of the bankruptcy court?

A. Yes.

Q. And that effort to – again, that was led by Tim McGinn, correct?

A. Correct.

Q. In January and February and March of 2009, the bankruptcy filing on January 25th, did you believe that you and the company could come out of bankruptcy reasonably quickly?

A. You know, the first part of the timeframe, I didn't know. I was just trying to keep things moving on a daily basis. But towards the end, I mean, towards the end I knew we could come out of it. We turned cash flow positive about ninety days after filing. So, yes, I knew it could be done.

Q. So it would be reasonable for someone to talk with you and understood what you were accomplishing with a cash flow positive to believe that, as you did, that this company could come out of bankruptcy?

A. Yes.

Joseph Carr, a principal prosecution witness who ultimately testified in full support of MR. McGINN on the tax, FINRA and First Line issues and confirmed MR. McGINN'S consistent and persistent due diligence, good faith and non-stop herculean efforts in the face of the economic hurricane, also acknowledged that he, and he alone, in failing to file the UCC lien failed to protect and secure the $2.7 million First Line investment, thereby removing McGinn Smith as preferred creditors in the bankruptcy and costing them that investment.

No one, no entity did anything close to as much as TIM McGINN did to keep the business open and find a way to enable the investors to catch up (*See*, e.g., the First Line Rescue Plan). At the time the SEC prevented McGinn Smith from continuing their work on behalf of the investors (April 20, 2010), the proof is that 80.5% of the money due and owing the investors under the trust at that time had been paid. It is significant that the overwhelming majority of the loss that has occurred here occurred within the Four Funds which were created before MR. McGINN returned to the company and for which he had no responsibility and to which he had no connection, and which were not the subject of the indictment.

The legitimacy and the appropriate business use of the PPM's and the business model which they reflected, and the disclosures required and expressed, were confirmed without rebuttal by the testimony of Richard Engel, a Securities Law expert.

The sole issue with respect to the tax counts is whether the monies received were fees or loans. The testimony of prosecution witnesses Carr, Simons and Rogers, as well as the prosecution's IRS expert, Ms. Adelberg, and defense witnesses DeAngelus and D'Aleo, supported MR. McGINN and demonstrated at the very least reason and justification for the good faith belief on the part of MR. McGINN and MR. SMITH that the money in question constituted loans, as was their intention (loans which would have had to have been paid back). (*See* Jones Affirmation in support of Rule 29 and Rule 33, motion pages 1 through 4). Government witness Rogers testified that he had:

> "Consulted with both a tax accountant and tax attorney who advised you that the transactions could be considered loans despite the lack of purpose or paperwork." (pages 21-22 of the transcript of my cross-examination of Mr. Rogers).

There is nothing in the evidence that remotely suggests an intent to harm investors, but rather the evidence is overwhelming that there was an intent to solve the problems, restore losses, and save the business. The intentions and the efforts of MR. McGINN were always full of hope, aspirational and designed to achieve a better outcome than was presently confronting the business and its investors. Clearly, mistakes were made throughout the business operation and poor business choices occurred, but there was never proven to be, and indeed there could not have been proof, that there was ever any corrupt

intent but rather, ultimately, a wrong business model that was destined to fail in an economy that destroyed the housing market, the very market that was essential to the success and survival of these investment vehicles.

TIM McGINN is a self-made man, entrepreneurial, hard-charging, but a big picture guy with lots of ideas and confidence that he could put them in place and make them work and benefit investors. TIM believed until the very end that he could turn this around and eventually as the economy improved catch everybody up and achieve success for the investors and he and David. The SEC denied he and David that opportunity on April 20, 2010. He and David believe deeply that had they been allowed to work with Mr. Brown all investors would be far better off and much further along in recouping their investment today. TIM is a good, decent and caring man who throughout his life has met all of his personal, family and professional responsibilities and cares deeply that so many people have been hurt. His history and biography are well described in the Probation Department report and need not be repeated here. Letters received on his behalf are the equivalent of "eyewitness" testimony as to his character, characteristics and qualities of those who know him best.

It is respectfully submitted that the court should conclude that the nature and circumstances of the offense, as well as those of the offender, require a sentence outside of and in variance from the guidelines.

III. PURPOSES OF SENTENCING

Section 3553(a)(2) lists four purposes of sentencing summarized as 1) just punishment, 2) deterrence, 3) protection of the public, and 4) rehabilitation. *Under the Parsimony principle the sentence should be the minimum necessary to accomplish these purposes.*

A. Just Punishment and Deterrence

A Guidelines sentence is a death sentence. In the context presented MR. McGINN neither deserves to die in prison nor spend a significant percentage of the rest of his life there. A sentence substantially below any Guidelines range here is sufficiently deterrent punishment. (*See* pages 1-9 above). (*See* also sentences of related defendants: *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).

TIM McGINN is 66 years of age with significant health issues–insulin dependent diabetic–cardiovascular disease-heart attack. He is effectively bankrupt, unemployed, presently unemployable, has lost the business that was his life, the reputation and respect he had built over the course of the distinguished and successful professional life, and is a calamitously damaged human being who will never, ever recover what he had personally or professionally.

B. Protection of the Public

There is no risk of recidivism nor any threat to the public safety. MR. McGINN has led an otherwise unblemished life and has no criminal history. He had been a good citizen, good provider and an accomplished businessman. The offenses of conviction were substantially a consequence of national economic turmoil that will not recur in the future. MR. McGINN will never again be in the type of employment where he could have a meaningful economic impact.

C. The Need to Avoid Sentencing Disparity

See co-defendants' sentences (pages 16 and 17). (*See* pages 1-9 above).

D. The Need for Restitution

MR. McGINN'S First Line rescue/salvage payment efforts are referenced above. He also commits that should he ever be able to work again the money earned would go toward restitution. He deeply regrets the losses suffered and will do anything to alleviate those. As stated above, both he and MR. SMITH are certain they could multiply the amount of money generated by the receiver were they given the opportunity. The receiver, as the court knows, has yet to pay a single dime to any investor even though he appears to have taken in some $20 million or more. A period of imprisonment that would permit MR. McGINN to re-enter the job market will assure that whatever earnings that produces will be contributed to the restitution fund.

IV. The Adjustment for Obstruction of Justice Should be Rejected

This adjustment would penalize MR. McGINN for exercising his constitutional right to testify on his own behalf. Simply because the verdict was adverse does not justify the conclusion that MR. McGINN committed perjury. The reality is that it was a very close case and that much of the evidence and many of the witnesses supported MR. McGINN'S position and testimony. The testimony at this trial does not fall within perjurious conduct under U.S.S.G. §C1.1 as it is made clear that the provision does not and is not intended to punish the defendant for exercising his testimonial right. Significantly, MR. McGINN was consistent in his position and statements from the beginning of the FINRA investigation through the conclusion of his testimony at trial. As acknowledged in note 2 of §C1.1, inaccurate testimony does not necessarily equate with a willful attempt to obstruct justice. Moreover, I would submit that there was no "inaccurate" testimony by MR. McGINN as his testimony was consistent as stated above, unlike many of the witnesses who testified for the prosecution who on cross-examination were disclosed to have repeatedly made inconsistent statements.

V. The Sophisticated Means Adjustment Should be Rejected

"Sophisticated means" is incompatible with transparency. The subject transactions were all fully and openly recorded and documented. There was no execution or concealment of an offense that was "especially intricate". There were no hidden assets or transactions. There was no use of fictitious entities, corporate shells or off-shore financial accounts. It is well recognized that simply because the charged offense is fraud the sophisticated means adjustment is not implicated. As the commentary indicates, there must be false identities, or fictitious entities, or hidden accounts, or sophisticated efforts to conceal participation, records or the transaction. None of those are present here.

VI. The Evidence is Insufficient to Allow a Conclusion That There were 250 or More Victims Specific To This Indictment

There is no distinction made in the victim count between those associated with the Four Funds and those associated with the trust entities. There were far greater number of investors in the Four Funds, and far greater losses occurred there. However, the Four Funds were not the indictment target and that victim count should not be part of the calculation. Moreover, with respect to the trust entities

themselves, many of the investors were repeat investors. The six level upper adjustment requiring 250 or more victims should be rejected as there is inadequate evidence to support that number relevant to this indictment.

VII. The Government's Proposal of A Financial Solvency Adjustment Must be Rejected

This adjustment pursuant to U.S.S.G. §2B.1.1(b)(15)(iii) is applicable only when the solvency or financial security of 100 or more victims is substantially in danger. This enhancement is not applicable. It is certainly unproven that 100 or more investors have had their solvency or financial security substantially endangered. Moreover, it is extremely unlikely. The total number of investors in the trust (avoiding double counting) was less than 100. The investments in question involved private placements requiring each investor to agree and acknowledge 1) an individual net worth, or joint net worth, exclusive of the residence, in excess of $1 million, or 2) in each of the two most recent years an individual income in excess of $200,000.00, or joint income in excess of $300,000.00, and a continuing expectation that the same income level would be met. The subscribed investors were considered "sophisticated" and "accredited". While non-accredited investors (a maximum of 35 with respect to each deal) were permitted, they were still considered "sophisticated" with respect to knowledge of associated risks. Should the government seek to impose this four level adjustment that should be rejected as neither the investors, the number or the circumstances meet the requirements.

VIII. The Loss Amount Has Not Yet Been Fairly Calculated and the Amount Advocated by Probation and the Government is Neither Reasonable Nor Fair

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. McGINN and for MR. SMITH have made countless 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 incomplete 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 substantive and beneficial activity under the Receiver's management, control and direction.

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 unchallenged proof at trial through the testimony of Geoff Smith (CFA-Certified Financial Analyst) was that as of April 20, 2010, the SEC shutdown date, the investors had received 80% (slightly more) of that to which they were entitled as of that date, and that analysis did not include the money that the First Line investors later received as the outcome of MR. McGINN'S exceptional efforts on their behalf. The government's proposed loss amount of $30,233,514.98 fails to factor in all of the above-referenced issues and inexcusably 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 our objections to the Presentence Report, 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.

That the value of the investments have been impacted by market and economic forces, as well as by the receiver's management, cannot be denied and all of that is well beyond the control of MR. McGINN. Moreover, clearly established at trial was the repeated inaccuracy of the information inputted into the MS books and records by accounting employees. The court heard ample testimony with respect to the erroneous financial information recorded in virtually every book and record and bank submission, inaccuracies and errors due solely to the accounting staff and their failure to understand the business. The government and probation have, nonetheless, relied upon that tainted information.

A reasonable estimation of loss with respect to §2B.1.1(b)(1) is impossible to make under the facts and circumstances here for the above reason, which further supports the fairness and justice of a non-guidelines sentence.

IX. A Downward Departure for Aberrant Behavior is Applicable

MR. McGINN meets the five criteria for a downward departure for aberrant behavior (U.S.S.G. §5K.2.20(b)). His convictions are not within any of the prohibitions precluding departure as they do not involve serious bodily injury or death, the discharge of a firearm or the use of a firearm or dangerous

weapon, drug trafficking and MR. McGINN does not have any criminal history. These convictions occurred at the end of a distinguished personal and professional life and clearly represent a dramatic departure from all that MR. McGINN has been, has done and who he is, making this departure directly applicable. Should the court apply a Guidelines Sentence, MR. McGINN is entitled to consideration of a substantial downward departure for aberrant behavior.

X. A Non-Guidelines Sentence is Warranted for Tim McGinn

In *Rita v. United States,* 551 U.S.338, 350, the court stated that in determining a reasonable sentence "[t] Sentencing Court does not enjoy the benefit of a legal presumption that the guidelines sentence should apply (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. Section 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. The court may and indeed should impose a non-guidelines sentence where the recommended guidelines sentence fails to reflect 18 U.S.C. §3553(a) considerations, *or* simply because the case warrants a non-guidelines sentence. (*See Rita supra* 351). Both situations are present here.

The Second Circuit in **United States v. Jones,** rejected the government's argument that the District Court had erroneously relied upon factors such as defendant's "education, emotional condition, favorable employment record, family support, and good record on state probation [because] the Sentencing Commission has concluded [such factors] are 'ordinarily 'not relevant 'in determining whether a departure is warranted'". 397 F.3d 191, 194 (2d Cir. 2006) (citation omitted). The court further stated that: "[w]ith the entire guidelines scheme rendered advisory by the Supreme Court's decision in **Booker,** the guidelines limitations on the use of factors to permit departure are no more binding on sentencing judges than the calculated guidelines themselves". *Id. In other words, ultimately the judge must apply his own sense of what is fair and just under the circumstances.* **Jones,** *supra* at 195; See also **United States v. Castillo,** 460 F.3d 337, 356 (2d Cir. 2006) (emphasis added) (reaffirming Jones' holding that "a district

court judge may consider the judge's own sense of what is a fair and just sentence under all the circumstances".)

In doing all of this, a Sentencing Court "[m]ay not presume that a guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors. . . ." **United States v. Cavera**, 550 F.3d 180, 189 (2d Cir. 2008). See also, **United States v. Gall**, 552 U.S.38 (2007), in which the Supreme Court Stated:

> In reviewing the reasonableness of a sentence outside the guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the guidelines. *We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the guidelines range. Id.* at 595 (emphasis added).
>
> We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. *Id.*

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).

I respectfully implore the court to consider the analyses of Judges Rakoff and Block and other Federal District Court Judges in rejecting the guidelines here and avoiding a travesty of justice by imposing a non-guidelines sentence, specifically consistent with those analyses that the court impose a single digit year sentence, acknowledging Judge Block's finding that in similar cases where the loss amount was below $100 million a single digit year sentence is more than sufficient and anything greater is not necessary.

SELF-SURRENDER

It is respectfully requested that TIMOTHY McGINN be allowed to self-surrender. MR. McGINN is a United States citizen, has led an otherwise unblemished and exemplary life, has met all of the terms and conditions of his pre-trial, trial and post-trial release, and has been present in court

whenever asked to be. He has been released on terms and conditions since the convictions, fully aware of the range of potential punishments and their duration without breach of any of his responsibilities. To remand him following the imposition of sentence inflicts on him state prison time in a state facility, essentially warehousing him in that state facility until he is transferred to a federal facility. A federal sentence of imprisonment should be served only in a federal facility.

DATED: July 24, 2013

Respectfully submitted,

E. STEWART JONES, PLLC
/s/ E. Stewart Jones, Jr.
E. STEWART JONES, JR.
Bar Roll No. 103064
Attorney for Defendant
TIMOTHY M. McGINN
28 Second Street
Troy, New York 12180
(518) 274-5820

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

CERTIFICATE OF SERVICE

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

ELIZABETH C. COOMBE, ESQ.
Assistant United States Attorney
United States Attorney's Office
445 Broadway
Albany, New York 12207

By e-mailing a copy of same (Elizabeth.c.coombe@usdoj.gov)

This 24th day of July, 2013.

E. STEWART JONES, PLLC
/s/ *E. Stewart Jones, Jr.*
E. STEWART JONES, JR.
Bar Roll No. 103064
Attorney for Defendant
TIMOTHY M. McGINN
28 Second Street
Troy, New York 12180
(518) 274-5820