UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-15448

In the Matter of

GARY A. COLLYARD,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT GARY COLLYARD

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PRELIMINARY STATEMENT

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement ("Division") respectfully submits this memorandum of law in support of its motion for summary disposition against Respondent Gary A. Collyard ("Collyard" or "Respondent"). The Division respectfully requests that the Court issue an Order barring Collyard from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"), and from participating in any offering of a penny stock based on Respondent's conviction for conspiracy to commit securities fraud and conspiracy to commit bank fraud in United States v. Collyard, 12-CR-58 (SRN) (D. Minn. 2013).

The conduct in this case is egregious and requires that Collyard be permanently barred from the securities industry. As detailed in his plea agreement, Collyard offered and sold the securities of Bixby Energy Systems, Inc. ("Bixby") to numerous investors by materially misrepresenting information about the company, its main projects, its financial condition, and its use of investor proceeds. He caused approximately $4 million in investor losses. In addition, Collyard devised a fraudulent scheme to obtain $1.3 million in business loans from federally insured banks, the proceeds of which he used for his personal expenses. For these crimes, Collyard was sentenced to ten years in jail and ordered to pay over $5 million in restitution.

STATEMENT OF FACTS

A. Collyard's Guilty Plea and Sentencing Order

On February 27, 2012, the Office of the United States Attorney for the District of Minnesota filed a criminal action against Collyard. (Div. Ex. A.) The Amended Information charged him with one count of conspiracy to commit securities fraud and one count of

conspiracy to commit bank fraud. (Id. at 1-2.) Collyard entered a guilty plea on February 27, 2012. (Div. Ex. B.)

In his plea agreement, Collyard admitted to conspiracy to commit securities fraud in connection with the offer and sale of Bixby securities in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. (Id. at 2.) He admitted that from 2006 through 2010 he induced investors to purchase Bixby securities by means of fraudulent misrepresentations and omissions. (Id. at 2-3.) Collyard admitted that he made numerous false statements and omissions of material facts concerning, among other things, Bixby's business project, its financial condition, and its use of investor proceeds. (Id. at 3-4.) He admitted knowingly and willfully soliciting unqualified investors to invest in Bixby. (Id. at 3.) He admitted receiving commission payments for his sale of Bixby securities. (Id.) His lies cost investors at least $4 million. (Id. at 5.)

Collyard further admitted that from April 2005 through September 2011, he devised a scheme and artifice to defraud multiple federally insured banks to obtain money, funds and credits by means of false and fraudulent pretenses, representations and promises in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1344. (Id.) Collyard received approximately $1.3 million in business loans, procuring such loans by lying to banks. He used the proceeds from the loans for personal expenses and promptly defaulted on the loans. (Id. at 6-7.)

Following Collyard's guilty plea, the court scheduled a sentencing hearing. (Div. Ex. C, at 6.). Shortly before the hearing, he moved to withdraw his guilty plea, claiming it was involuntary, unknowing, and unintelligent due to a [redacted] (Id. at 9-10.) The court rejected Collyard's arguments and denied his motion to withdraw his plea. (Id. at 18, 26.)

On August 1, 2013, the court sentenced Collyard to 120 months in prison – the maximum

under the applicable federal sentencing guidelines – followed by three years of supervised release, and ordered him to pay more than $5 million in restitution. (Div. Ex. E.) That same day, the court denied Collyard's motion for voluntary surrender and he was taken into custody. (Div. Ex. D at 72:2-5.)

At the sentencing proceedings Judge Nelson emphasized Collyard's lack of contrition:

> I have never, ever seen a criminal Defendant come up here at sentencing and fail to at least show some remorse or apologize in some fashion to the victims in the room, even if you believe, which I presume you still do, that you're somehow innocent of these charges. No acknowledgment of people's pain. That is a serious problem, because what that suggests is that you're not easily deterred.

(Id. at 64:9-16.) Judge Nelson expressed concerns that the sentence – stiff though it was – would ultimately prove insufficient to deter Collyard from future malfeasance:

> I hope that this prison term is sufficient. It's the maximum I can give you. I'm not convinced that it is, because there is nothing either in your life that I've heard of or anything in this case, especially the way you've treated your victims here today, that suggests that you're going to be deterred at all.

(Id. at 65:2-7.)

B. The Commission's OIP and the Procedural History of the Case

On September 3, 2013, on the basis of Collyard's criminal conviction, the Commission filed an Order Instituting Proceedings and Notice of Hearing pursuant to Section 15(b) of the Exchange Act, based on Collyard's guilty plea and conviction of one count of conspiracy to commit securities fraud and one count of conspiracy to commit bank fraud. (Div. Ex. F.) Neither Collyard nor his attorney acting on his behalf served or filed an answer to the OIP. (Div. Ex. H.)

On October 17, 2013, during a telephonic prehearing conference in which both Respondent and his attorney participated, the Court granted the Division leave to file a Motion for Summary Disposition pursuant to Rule of Practice 250(a). (Id.) While Collyard never

answered the OIP, during the prehearing conference he stipulated that he had pled guilty to and was convicted of conspiracy to commit securities fraud and conspiracy to commit bank fraud; that he had been sentenced to 120 months in prison; and that he was ordered to pay restitution in an amount in excess of $5 million. (Div. Ex. G, at 22-24).

ARGUMENT

In light of Collyard's conviction, the Division respectfully seeks summary disposition against him and requests that the Court bar him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO, and from participating in any offering of a penny stock.

I. SUMMARY DISPOSITION IS APPROPRIATE PURSUANT TO RULE 250.

Rule 250(a) of the Commission's Rules of Practice permits a party, with leave of the hearing officer, to move for summary disposition of any or all of the OIP's allegations. On October 17, 2013, the Court granted the Division leave to file a motion for summary disposition against Collyard.

A motion for summary disposition should be granted when there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." (Rule of Practice 250(a)). The Commission has repeatedly upheld the use of the summary disposition procedure in cases in which the respondent has been convicted, leaving the appropriate sanction as the sole determination. See Gary M. Kornman, Exchange Act Release No. 59403, 2009 WL 367635, at *12 (Feb. 13, 2009) ("We have repeatedly upheld the use of summary disposition by a law judge in cases...where the respondent has been enjoined or convicted of an offense listed in Exchange Act Section 15(b) and Advisors Act Section 203, the sole determination is the proper sanction, and no material fact is genuinely

disputed."), pet. denied Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010); Martin A. Armstrong, Initial Decision Release No. 372, 2009 WL 482831(Feb. 25, 2009); John S. Brownson, Exchange Act Release No. 46161, 2002 WL 1438186 (July 3, 2002).

As noted above, during the pre-hearing conference Collyard stipulated that he pled guilty to and was convicted of conspiracy to commit securities fraud and conspiracy to commit bank fraud. He further stipulated that he was sentenced to 120 months in prison and ordered to pay restitution in an amount in excess of $5 million. Therefore, the only remaining issue is what sanctions are appropriate and in the public interest. Summary disposition should thus be granted.

II. COLLYARD'S CONVICTION COMPELS THE ADMINISTRATIVE RELIEF SOUGHT BY THE DIVISION.

Under Exchange Act Section 15(b)(6)(A)(ii), the Commission has authority to bar any person convicted of a felony or misdemeanor involving: (i) the purchase or sale of a security or (ii) theft, fraudulent conversion, or misappropriation of funds, if, at the time of the misconduct, such person was associated with a broker or dealer. Either of the two counts for which Collyard was convicted – conspiracy to commit securities fraud or conspiracy to commit bank fraud – is a free-standing basis supporting the imposition of remedial sanctions. Shaw Tehrani, Initial Decision Release No. 42, 1993 WL 528211 (December 15, 1993) (granting summary disposition finding that conviction of bank fraud is sufficient to bar an individual from the industry).

The conduct admitted by Collyard in his plea agreement establishes that he acted as a broker-dealer. (Div. Ex. B.) He admitted in his plea agreement that he communicated with prospective investors to induce them to purchase Bixby securities. He further admitted that he sold Bixby securities to investors and received commissions for doing so. Such activities establish that he acted as a broker-dealer under Section 15(a) of the Exchange Act. See SEC v. George, 426 F.3d 786 (6th Cir. 2005) (defendant acted as broker when he was regularly involved

in communications with and recruitment of investors for the purchase of securities).[1]

While Collyard is apparently appealing his conviction, that is no defense to the imposition of sanctions in this tribunal. See Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) ("Nothing in the statute's language prevents a bar [from being] entered if a criminal conviction is on appeal."); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1497 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court."). Further, Collyard is precluded from relitigating his criminal conviction before this tribunal. Gregory Bartko, Initial Decision Release No. 467, 2012 WL 3578907 at *2 (Aug. 21, 2012) ("The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent."); In the Matter of Jose P. Zollino, Exchange Act Release No. 55107, 2007 WL 98919 (Jan. 16, 2007) ("[A] party cannot challenge his . . . criminal conviction in a subsequent administrative proceeding"); William F. Lincoln, Exchange Act Release No. 39629, 1998 WL 80228 at 2, (Feb. 9. 1998) (in proceedings based on a criminal conviction, a respondent "is collaterally estopped from attacking here the merits of the criminal proceeding against him"). Therefore, neither Collyard's appeal nor his continued protestations of innocence serve as a viable defense in this matter.

[1] Section 15(b)(6) applies to persons acting as a broker or dealer or associated with a broker-dealer regardless of whether such person or broker-dealer is registered with the Commission. Dale J. Englehardt, Exchange Act Release No. 64389, 2011 WL 1681678, at *5 (May 4, 2011) (Section 15(b) applies to respondent's sales of securities in unregistered offering while not associated with any registered broker or dealer); see also Scott B. Hollenbeck, Exchange Act Release No. 58847, 2008 WL 4693185 (October 24, 2008) (merely because respondent was not associated with a registered broker or dealer during the time of his wrongdoing does not insulate him from a bar).

III. THE PUBLIC INTEREST REQUIRES THAT COLLYARD BE BARRED FROM SERVING AS A PROFESSIONAL IN THE SECURITIES INDUSTRY.

The public interest would best be served by barring Collyard from the securities industry. To determine whether a bar is appropriate, courts consider several factors, including: (a) the egregiousness of the defendant's actions; (b) the isolated or recurrent nature of the infraction; (c) the degree of scienter involved; (d) the sincerity of the defendant's assurances against future violations; (e) the defendant's recognition of the wrongful nature of his conduct; and, (f) the likelihood that the defendant's occupation will present opportunities for future violations. Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). Each of these factors supports a bar in this case.

A. Collyard's Conduct Was Egregious, and He Acted Knowingly.

The conduct for which Collyard was convicted was egregious and involved a high degree of scienter. His criminal conviction depended upon his admission that he acted willfully. Collyard admitted that he actively and knowingly made material misrepresentations and omissions to investors in the offer and sale of Bixby securities, and thereby caused approximately $4 million in investor losses. (Div. Ex. B at 5.) He admitted devising a scheme in which he unlawfully obtained $1.3 million in business loans from federally insured banks by submitting false financial statements as a demonstration of income that he did not have. (Id. at 6.) The egregiousness of such admitted misconduct strongly supports a bar from the industry. See John S. Brownson, 2002 WL 1438186 at *2 ("[a]bsent extraordinary mitigating circumstances, [an individual convicted of securities fraud] cannot be permitted to remain in the securities industry").

B. Collyard's Conduct Was Recurring.

Collyard's misconduct was no isolated occurrence; he participated in securities fraud for a period of at least ***four years*** and engaged in scheme to defraud banks for at least ***six years***. (Div. Ex. B at 2, 5.) See Richard J. Daniello, 50 S.E.C. 42, 46 (1989) (four months of misappropriating employer's funds was not isolated). His fraudulent conduct resulted in ***$4 million in losses to investors and $1.3 million in losses to banks***. The length and degree of his fraud supports the imposition of a bar. See Brion G. Randall, Advisers Act Release No. 3632, 2013 WL 3776679 (July 18, 2013) (defrauding at least 27 customers and three banks of millions of dollars over five years constituted recurring and egregious conduct).

C. Collyard Has Not Acknowledged the Wrongful Nature of His Conduct or Provided Assurances against Future Violations.

Collyard has neither acknowledged nor expressed remorse for his egregious misconduct. His attempted retraction of his guilty plea is compelling proof of his refusal to own up to his misdeeds, as is his continued challenge to his conviction. During the sentencing hearing, the trial judge noted Collyard's lack of remorse, his failure to acknowledge his wrongdoing, and his refusal to acknowledge the pain he caused his victims. The court further expressed concerns that, notwithstanding his sentence, he would be undeterred from engaging in future malfeasance. The court's concerns and observations warrant particular consideration in this proceeding because "the securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants" Bruce Paul, 48 S.E.C. 126, 128 (1985).

* * *

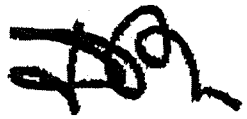
Each and every factor weighs heavily in favor of a permanent bar against Collyard. The conduct in this case was knowing and egregious. Collyard made material misrepresentations and

omissions both when he solicited investors and when he fraudulently obtained bank loans. While Collyard financially benefited from his fraud – through both his commission payments and the loan proceeds – he caused over $4 million in investor losses and an additional $1.3 million in losses to federally insured banks. His conduct was not an isolated incident, but rather a long-running scheme. Collyard has neither acknowledged his wrongdoing, expressed any remorse for his actions, nor provided any assurances against future violations. In light of these factors, a bar is appropriate and in the public interest.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that its motion for summary disposition be granted, and that the Court issue an order barring Collyard from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO, and from participating in any offering of a penny stock.

Dated: November 15, 2013



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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15448

In the Matter of **GARY A. COLLYARD,** **Respondent.**	**DECLARATION OF JONATHAN S. POLISH IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT GARY A. COLLYARD**

I, JONATHAN S. POLISH, pursuant to 28 U.S.C. §1746, declare:

1. I am employed as Senior Trial Counsel for the Division of Enforcement at the Chicago Regional Office of the United States Securities and Exchange Commission, located at 175 W. Jackson Blvd., Suite 900, Chicago, Illinois 60604. I submit this Declaration in support of the Division of Enforcement's Motion for Summary Disposition against Respondent Gary A. Collyard pursuant to Commission Rule of Practice 250. I am fully familiar with the facts and circumstances set forth in this Declaration.

2. On February 27, 2012, Respondent Gary A. Collyard ("Collyard") pled guilty to one count of conspiracy to commit securities fraud and one count of conspiracy to commit bank fraud in a criminal action brought in federal district court in the District of Minnesota, *United States v. Collyard*, 12-cr-58 (SRN) ("U.S. v. Collyard"). Appended hereto as Exhibit A is a true and correct copy of the Amended Information filed on February 27, 2012, against Collyard.

3. Appended hereto as Exhibit B is a true and correct copy of Collyard's plea agreement in *U.S. v. Collyard.*

4. Appended hereto as Exhibit C is a true and correct copy of the Memorandum Opinion and Order denying Collyard's motion to withdraw his guilty plea, issued on May 28, 2013, in *U.S. v. Collyard.*

5. Appended hereto as Exhibit D is a true and correct copy of the transcript of the sentencing hearing before Hon. Susan Richard Nelson in *U.S. v. Collyard*, which took place on August 1, 2013.

6. Appended hereto as Exhibit E is a true and correct copy of the Amended Judgment entered against Collyard on August 12, 2013, in *U.S. v. Collyard.*

7. Appended hereto as Exhibit F is a true and correct copy of the Commission's Order Instituting Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing in this matter.

8. Appended hereto as Exhibit G is a true and correct copy of the transcript of the prehearing conference before Chief Judge Brenda P. Murray in this matter, which took place on October 17, 2013.

9. Appended hereto as Exhibit H is a true and correct copy of the Order Following Prehearing Conference, issued in this matter by Chief Judge Murray on November 7, 2013.

10. Pursuant to Rule 323 of the Commission's Rules of Practice, 17 C.F.R. §201.323, the Division respectfully requests that this Court take official notice of the documents described

above in paragraphs 2 through 9 and attached hereto as Exhibits A through H, all of which were filed either in *U.S. v. Collyard* or in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2013

Jonathan S. Polish

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No.: 12-58(SRN)

UNITED STATES OF AMERICA,	)	AMENDED INFORMATION
	)	
Plaintiff,	)	(18 U.S.C. § 371)
	)	
v.	)	
	)	
GARY ALBERT COLLYARD,	)	
	)	
Defendant.	)	

THE UNITED STATES ATTORNEY CHARGES:

COUNT 1
(Conspiracy to Commit Securities Fraud)

From at least in or about January 2006 and continuing until in or about May 2011, in the State and District of Minnesota and elsewhere, the defendant,

GARY ALBERT COLLYARD,

conspiring with others, including but not limited to Robert Allen Walker, Dennis Luverne Desender, and others, did knowingly, willfully, and unlawfully conspire, by the use of means and instrumentalities of interstate commerce, to directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the sale of securities, that is Bixby Energy Systems securities, and to make untrue statements of material facts and omit to state material facts necessary in order to make the statements not misleading in connection with the sale of said securities, in violation of Title 15, United States Code,

Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

In furtherance of the above-described conspiracy, defendant committed one or more overt acts, including the following:

On or about November 21, 2007, Gary Albert Collyard made material false representations to investor W.J., causing investor W.J. to purchase $240,000 in Bixby Energy Systems securities by mailing a check to The Collyard Group.

All in violation of Title 18, United States Code, Section 371.

COUNT 2
(Conspiracy to Commit Bank Fraud)

From at least April 2005 and continuing through September 2011, in the State and District of Minnesota and elsewhere, the defendant,

GARY ALBERT COLLYARD,

conspiring with others, did knowingly and unlawfully conspire, to devise a scheme and artifice to defraud multiple federally insured financial institutions, and to obtain money, funds and credits owned by and under the custody and control of those banks, by means of material false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1344.

In furtherance of the above-described conspiracy, defendant committed one or more overt acts, including the following:

On or about May 25, 2007, Gary Albert Collyard submitted a materially false loan application to MidCountry Bank, resulting in a loan of $450,000 to Gary Albert Collyard.

All in violation of Title 18, United States Code, Section 371.

Forfeiture Allegations

Counts 1 and 2 of this Information are hereby realleged and incorporated as if fully set forth herein by reference, for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c).

As the result of the offenses alleged in Counts 1 and 2 of this Information, the defendant shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 and 2 of the Information.

If any of the above-described forfeitable property is unavailable for forfeiture, the United States intends to seek the forfeiture of substitute property as provided for in Title 21,

United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

All in violation of Title 15, United States Code, Sections 78ff and 78j(b), Title 18, United States Code, Sections 981(a)(1)(C) and 1344, and Title 28, United States Code, Section 2461(c).

Respectfully submitted,

Dated: February 27, 2012

B. TODD JONES
United States Attorney

BY: CHRIS S. WILTON
Assistant U.S. Attorney

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No.: 12-58(SRN)

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY ALBERT COLLYARD,

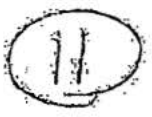
Defendant.

PLEA AGREEMENT

The United States of America and Gary Albert Collyard (hereinafter referred to as the "defendant") agree to resolve this case on the terms and conditions that follow. This plea agreement binds only the defendant and the United States Attorney's Office for the District of Minnesota. This agreement does not bind any other United States Attorney's Office or any other federal or state agency.

1. Charges. The defendant agrees to plead guilty to conspiracy to commit securities fraud, in violation of 18 U.S.C. Section 371, and 15 U.S.C. Sections 78j(b) and 78ff. In addition, the defendant agrees to plead guilty to conspiracy to commit bank fraud, in violation of 18 U.S.C. Section 371, and 18 U.S.C. Section 1344.

2. Factual Basis. The defendant agrees to the following facts and further agrees that, were this matter to go to trial, the United States would prove the following facts beyond a reasonable doubt:



SECURITIES. Beginning in at least January 2006, through December 2010, the defendant, conspired with others, including but not limited to Robert Allen Walker (hereinafter referred to as the "Walker"), Dennis Luverne Desender (hereinafter referred to as the "Desender") and others, did knowingly, willfully, and unlawfully conspire, by the use of means and instrumentalities of interstate commerce, directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the sale of securities, and did make untrue statements of material facts and omitted to state material facts necessary in order to make the statements not misleading in connection with the sale of said securities, in violation of Title 18, United States Code, Section 371 and Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Beginning in at least January 2006 through December 2010, the defendant was a "finder" for Bixby Energy Systems, Inc. Collyard, acting in concert with Walker, Desender, and others, was primarily charged with raising funds for Bixby and its business projects, including a coal gasification energy project.

In his capacity as a "finder" for Bixby, the defendant, Walker, Desender and others, communicated with prospective investors and shareholders by telephone, mail, email, and in person, for the purpose of inducing those investors and shareholders to provide funds to Bixby. Collyard, Walker,

Desender, and others knowingly and willfully caused unqualified investors to be solicited to invest in Bixby in violation of federal securities laws. In exchange for investment funds, the defendant, Walker, Desender, and others caused the sale of Bixby securities to investors. To entice the investors, the defendant, Walker, Desender, and others made, and caused to be made, numerous material false statements, false representations, and omissions of material facts about Bixby's business project and prospects of conducting an initial public offering of Bixby shares.

Based on the misrepresentations made by the defendant, Walker, Desender, and others, investors provided investment money to Bixby for the sole purpose of investing in Bixby stock to further Bixby's business. Although some investor money was used for the Bixby business, Walker, Desender, and others, caused a significant portion of the investor's funds to be used for large salaries and commission payments to the defendant, Walker, Desender, and family members of Walker, and other uses.

The defendant, Walker, Desender, and others acting on behalf of Bixby, both verbally and in written materials provided to existing and potential investors, made material misrepresentations and concealed material information about the coal gasification project and the prospects of Bixby to induce existing investors to remain in the project and to induce potential investors to invest additional funds. For example, with some investors, the defendant,

Walker, Desender, and others misrepresented (i) that the coal gasification technology was proven and ready for market, which in fact, they both knew the coal gasification units had substantial technological defects and did not function; (ii) that functional commercial units for coal gasification were ready to ship to end users, when in fact, Walker and others knew there were no fully functional coal gasification units that were ready to ship, and (iii) that Bixby was going to conduct an initial public offering of its shares in the near term, when in fact, Walker and others knew that Bixby could not have an initial public offering because, among other things, Bixby could not obtain audited financial statements. In addition, the defendant, Walker, Desender and others affirmatively concealed, and did not disclose, (i) that Bixby was in dire financial condition, and (ii) a majority of the investor money was going to pay commissions, large salaries, travel and other fund raising expenses; and (iii) that investor money was being used to make payments to other investors.

An example of such material misstatements and omissions by defendant, Walker, Desender and others occurred on or about November 21, 2007. The defendant and others made material misrepresentations and omissions when meeting with W.J. Based on these omissions and misrepresentations, W.J. invested in the coal gasification program by mailing a check for $240,000 to the

Collyard Group in Wayzata, Minnesota, in the name of Bixby. The defendant then transmitted the money to Bixby.

The defendant agrees that he is responsible for at least $2,500,000 but not more than $7,000,000 in losses to investors in the various projects. Specifically, the defendant agrees that he is responsible for approximately $3.0 million in losses to investors.

BANK FRAUD. Beginning in at least April 2005, through September 2011, the defendant, conspiring with others, did knowingly, willfully, and unlawfully conspire, by devising a scheme and artifice to defraud multiple federally insured banks, to obtain money, funds and credits owned by and under the custody and control of those banks, by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 371 and Title 18, United States Code, Section 1344.

Beginning in at least April 2005, through September 2011, the defendant owned and operated "The Collyard Group, LLC" (hereinafter referred to as the "Collyard Group"), a real estate company involved in the leasing, renting, and development of real property. During the above mentioned dates, the defendant obtained over a million dollars from federally insured banks.

The defendant initiated banking relationships with multiple federally insured banks, including MidCountry Bank, The National

Bank, Alerus Financial, Prosperan Bank, and Americana Bank, for the purposes of obtaining business loans for the Collyard Group. During those meetings, the defendant made numerous misrepresentations. For example, the defendant, both orally and in writing misrepresented (i) that he had a successful real estate development business with current, recurring, collectable, contracts receivables from multiple customers; (ii) that he had a personal financial wealth of over $20 million; (iii) that he had a current active real estate license; (iv) that he had the ability to repay credit card debt and his mortgage at his discretion; and (v) that he would pay back the loan as agreed upon in the terms of the loan agreements.

Based on the misrepresentations, the defendant received approximately $1.3 million dollars from the above-mentioned federally insured banks in Minnesota. The defendant used much of the business loans to pay personal debt, living expenses and his children's private school education in violation of the terms of the loans. The defendant defaulted on his obligations to pay his $1.3 million dollar debts.

For example, on May 25, 2007, the defendant secured a business loan in the amount of $450,000 from MidCountry Bank in Minnesota. During his meeting with bank personnel, the defendant provided a false personal financial statement and a false personal contract revenue projection statement. Based on these false documents,

MidCountry Bank provided $450,000 to the defendant. MidCountry is a federally insured bank. The defendant defaulted on this loan and the loan remains unpaid to this date.

The defendant agrees that he is responsible for at least $1,000,000 but not more than $2,500,000 in losses to financial institutions. Specifically, the defendant agrees that he is responsible for approximately $1.3 million in losses.

3. Statutory Penalties. The parties agree that Count 1 and Count 2 of the Information carry statutory penalties of:

Count 1 - Conspiracy to Commit Securities Fraud

a. a term of imprisonment of up to 5 years;

b. a criminal fine of up to $250,000.00 or twice the amount of gain or loss;

c. a term of supervised release of up to three years;

d. a special assessment of $100.00, which is payable to the Clerk of Court prior to sentencing; and

e. the costs of prosecution (as defined in 28 U.S.C. §§ 1918(b) and 1920).

Count 2 - Conspiracy to Commit Bank Fraud

a. a term of imprisonment of up to 5 years;

b. a criminal fine of up to $250,000.00 or twice the amount of gain or loss;

c. a term of supervised release of up to three years;

d. a special assessment of $100.00, which is payable to the Clerk of Court prior to sentencing; and

e. the costs of prosecution (as defined in 28 U.S.C. §§ 1918(b) and 1920).

4. Revocation of Supervised Release. The defendant understands that if defendant were to violate any condition of supervised release, defendant could be sentenced to an additional term of imprisonment up to the length of the original supervised release term, subject to the statutory maximums set forth in 18 U.S.C. § 3583.

5. Guideline Calculations. The parties acknowledge that the defendant will be sentenced in accordance with 18 U.S.C. § 3551, et seq. Nothing in this plea agreement should be construed to limit the parties from presenting any and all relevant evidence to the Court at sentencing. The parties also acknowledge that the Court will consider the United States Sentencing Guidelines in determining the appropriate sentence and stipulate to the following guideline calculations:

a. Securities and Bank Fraud Offense Level. The parties believe that the base offense level is 6 for both violations of Title 18, United States Code, Section 371. (U.S.S.G. § 2B1.1(a)(1).) The parties agree the loss is at least $2,500,000 but does not exceed $7,000,000 ($3 million for securities conspiracy plus $1.3 million for the bank fraud conspiracy). For a loss of more than $2,500,000 but not more than $7,000,000, the base offense level should be increased by 18 levels. (U.S.S.G. § 2B1.1(b)(1)(J)). The parties agree that the offense level should be increased by 2 levels, because there were ten or more victims involved. (U.S.S.G. § 2B1.1(b)(2)). The parties agree that the offense level should be increased by 2 levels, because the offense involved the defendant deriving more than $1 million dollars in gross receipts from financial institutions. (U.S.S.G. § 2B1.1(b)(15)(A)).

b. Chapter 3 Adjustments. Other than as provided for herein no other Chapter 3 adjustments apply.

c. Acceptance of Responsibility. The government agrees to recommend that the defendant receive a 3-level reduction for acceptance of responsibility and to make any appropriate motions with the Court. However, the defendant understands and agrees that this recommendation is conditioned upon the following: (i) the defendant testifies truthfully during the change of plea hearing, (ii) the defendant cooperates with the Probation Office in the pre-sentence investigation, (iii) the defendant commits no further acts inconsistent with acceptance of responsibility, and (iv) the defendant makes good faith efforts toward paying restitution. (U.S.S.G. §3E1.1).

f. Criminal History Category. Based on information available at this time, the parties believe that the defendant's criminal history category is a I or II. This does not constitute a stipulation, but a belief based on an assessment of the information currently known. Defendant's actual criminal history and related status (which might impact the defendant's adjusted offense level) will be determined by the Court based on the information presented in the Presentence Report and by the parties at the time of sentencing.

g. Guideline Range. If the offense level is 25 and the criminal history category is I, the Sentencing Guideline range is 57-71 months imprisonment; if the offense level is 25 and the criminal history category is II, the Sentencing Guideline range is 63-78 months imprisonment; and if the offense level is 25 and the criminal history category is III, the Sentencing Guideline range is 70-87 months imprisonment. (U.S.S.G. § 5G1.1(c)).

h. Fine Range. For an adjusted offense level of 25, the fine range is $10,000 to $100,000 or twice the gain or loss, whichever is higher. (U.S.S.G. § 5E1.2(c)(3)).

i. Supervised Release. The Sentencing Guidelines require a term of supervised release of at least 2 but not more than 3 years. (U.S.S.G. § 5D1.2(a)(3)).

j. Sentencing Recommendation and Departures. The parties reserve the right to argue for a sentence outside the applicable guideline range.

6. Discretion of the Court. The foregoing stipulations are binding on the parties, but do not bind the Court. The parties understand that the Sentencing Guidelines are advisory and their application is a matter that falls solely within the Court's discretion. The Court may make its own determination regarding the applicable guideline factors and the applicable criminal history category. The Court may also depart from the applicable guidelines. If the Court determines that the applicable guideline calculations or the defendant's criminal history category are different from that stated above, the parties may not withdraw from this agreement, and the defendant will be sentenced pursuant to the Court's determinations.

7. Special Assessments. The Guidelines require payment of a special assessment in the amount of $100.00 for each felony count of which the defendant is convicted. U.S.S.G. § 5E1.3. The defendant agrees to pay the special assessment prior to sentencing.

8. Restitution. The defendant understands and agrees that the Mandatory Victim Restitution Act, 18 U.S.C. §3663A, applies and that the Court is required to order the defendant to make restitution to the victims of his crime.

There is no agreement as to the amount of restitution. The defendant understands and agrees the Court may order the defendant to make restitution to any victim of the scheme regardless of whether the victim was named in the indictment. The defendant agrees that restitution will not be limited to the counts of conviction but will be based on the total loss caused by his entire pattern of criminal activity.

The defendant represents that the defendant will fully and completely disclose to the United States Attorney's Office the existence and location of any assets in which the defendant has any right, title, or interest. The defendant agrees to assist the United States in identifying, locating, returning, and transferring assets for use in payment of restitution and fines ordered by the Court.

9. Forfeiture. The defendant agrees and understands that the United States reserves its right to seek a personal money judgment forfeiture against the defendant in this action, or to proceed against any of the defendant's property in a civil, criminal or administrative forfeiture action if said property, real or personal, tangible or intangible, is subject to forfeiture under federal law. The defendant agrees not to contest any such forfeiture proceeding.

10. Cooperation. The defendant has agreed to cooperate with law enforcement in the investigation and prosecution of other

suspects. This cooperation includes, but is not limited to, being debriefed by law enforcement agents and testifying fully and truthfully at any trial or other proceeding involving other suspects. If, in the sole discretion of the United States Attorney's Office, the defendant has provided substantial assistance to law enforcement, the United States will move the Court for a downward departure at the time of sentencing pursuant to § 5K1.1 of the Sentencing Guidelines. No such motion will be made unless the defendant is completely truthful and has provided substantial assistance to law enforcement.

The defendant understands that the Court will determine whether the defendant has cooperated fully and truthfully. The defendant further understands that the decision to grant or deny the downward departure motion is solely the Court's. The defendant further understands that there is no guarantee that the Court will grant a motion by the United States for a downward departure or, if a motion for a downward departure is granted, to what degree the Court will depart. It shall not be a basis for the defendant to withdraw from this plea agreement that the United States elected not to move for a downward departure, that the Court denied the motion of the United States for a downward departure, or that the Court did not depart downward to the extent hoped for by the defendant.

Finally, the defendant understands that the United States is not obligated to accept any tendered cooperation on the defendant's part. If the United States chooses not to accept tendered cooperation, the defendant will not be rewarded for such tendered cooperation nor will the defendant be allowed to withdraw from the plea agreement because the tendered cooperation was not accepted.

The defendant has agreed to cooperate with law enforcement authorities in the prosecution of defendant's co-defendants, and in the investigation and prosecution of other suspects. This cooperation includes, but is not limited to, being interviewed by law enforcement agents, submitting to a polygraph examination if the government deems it appropriate, and testifying truthfully at any trial or other proceeding involving defendant's co-defendants and other suspects. If the defendant cooperates fully and truthfully as required by this agreement and thereby renders substantial assistance to the government, the government will, at the time of sentencing, move for a downward departure under 18 U.S.C. § 3553(e) and Guideline Section 5K1.1. The government also agrees to make the full extent of the defendant's cooperation known to the Court. The defendant understands that the government, not the Court, will decide whether the defendant has rendered substantial assistance. The government will exercise its discretion in good faith. The defendant also understands that there is no guarantee the Court will grant any such motion for a

downward departure, and the defendant understands that the amount of any downward departure is within the Court's discretion. In the event the government does not make or the Court does not grant such a motion, the defendant may not withdraw this plea based upon that ground. Finally, the defendant understands that the government is not required to accept any tendered cooperation on the defendant's part. If the government, in its sole discretion, chooses not to accept tendered cooperation, the defendant will not receive a sentence reduction for such tendered cooperation and will not be allowed to withdraw from the plea agreement based upon that ground.

11. Waiver of Appeal. The defendant understands that 18 U.S.C. Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this right, and in exchange for the concessions made by the United States in this plea agreement, the defendant hereby waives all rights conferred by 18 U.S.C. Section 3742 to appeal his sentence, unless the sentence exceeds the top of the applicable guideline range as determined by the Court. The defendant has discussed these rights with the defendant's attorney. The defendant understands the rights being waived, and the defendant waives these rights knowingly, intelligently, and voluntarily.

12. Complete Agreement. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or

understandings.

Date: 2/27/12

B. TODD JONES
United States Attorney

BY: CHRIS S. WILTON
Assistant U.S. Attorney

Date:
2/27/12

GARY ALBERT COLEYARD
Defendant

Date:
2/27/2012

Thomas E. Breven
Counsel for Defendant

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, v. Gary Albert Collyard, Defendant.	Case No. 12-CR-58 (SRN) **MEMORANDUM OPINION AND ORDER**

David J. MacLaughlin and Benjamin F. Langner, United States Attorney's Office, 300 South Fourth Street, Suite 600, Minneapolis, MN 55415, for Plaintiff.

William J. Mauzy and Casey T. Rundquist, The Law Offices of William J. Mauzy, 510 First Avenue North, Suite 610, Minneapolis, MN 55403, for Defendant.

SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Defendant Gary Albert Collyard's ("Defendant") Amended Motion to Withdraw Guilty Pleas. [Doc. No. 59]. The United States of America ("the Government") opposes Defendant's motion. [Doc. No. 65]. On May 13, 2013, the Court conducted an evidentiary hearing to examine evidence relating to Defendant's amended motion. (Min. Entry for Evidentiary Hr'g [Doc. No. 73].) For the reasons that follow, the Court denies Defendant's motion.

I. BACKGROUND

A. Factual Background

On February 22, 2012, the United States Attorney for the District of Minnesota charged Defendant with conspiracy to commit securities fraud (Count 1) in violation of

15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 371. (Felony Information [Doc. No. 1].) Defendant was also charged with conspiracy to commit bank fraud (Count 2) in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 371. (Id.) On February 27, 2012, the Government filed an Amended Information, changing the alleged start date of Defendant's conspiracy to commit securities fraud from January 2010 to January 2006. (Am. Felony Information [Doc. No. 6].) Defendant pled guilty to Counts 1 and 2 of the Amended Information under the terms of a written plea agreement. (Plea Agreement ¶ 1 [Doc. No. 11]; Plea Hr'g Tr. at 32 [Doc. No. 61-1].)

At the change-of-plea hearing on February 27, 2012, this Court examined Defendant's competency to enter a plea.

> THE COURT: I have to ask you certain questions that I have to ask everybody. Have you had any alcohol in the last 24 hours?
>
> DEFENDANT: No, Your Honor.
>
> THE COURT: Have you had any drugs in the last 24 hours? And before you answer that, I mean over-the-counter drugs, prescribed drugs, or illicit drugs.
>
> DEFENDANT: [redacted]
>
> THE COURT: Okay. [redacted] afternoon?
>
> DEFENDANT: That is [sic] correct.
>
> THE COURT: And here we are Monday afternoon.
>
> DEFENDANT: That is correct. [redacted]
>
> THE COURT: [redacted]

DEFENDANT: Oh, yes.

THE COURT: [redacted]

DEFENDANT: No, Your Honor.

(Plea Hr'g Tr. at 5.)

The Court also asked whether Defendant was satisfied with the performance of then-counsel, Thomas Brever.

THE COURT: Have you told him [Mr. Brever] everything you want him to know about your case?

DEFENDANT: I have tried to, Your Honor.

THE COURT: Okay. Are you satisfied with his services?

DEFENDANT: Yes, Your Honor.

THE COURT: When you say you have tried to, is there something that you haven't had a chance to talk to him about?

DEFENDANT: Your Honor, not to be persnickety, I am just trying to gather up all of the information I know. I think I have.

THE COURT: Have you withheld anything from him?

DEFENDANT: No, Your Honor.

(Id. at 6.)

Mr. Brever described his interactions with Defendant during the course of the representation and his impressions of Defendant's competency to enter a plea.

THE COURT: Mr. Brever, have you had a fair amount of time to investigate the law and the facts of your client's case and discuss them with him?

MR. BREVER: Yes, I have, Your Honor. I represented Mr. Collyard for several months, now. We have received information from governmental authorities regarding the underlying facts of this case.

Mr. Collyard and I have discussed those facts, repeatedly. We have adopted positions towards them, discussed them in detail, and considered carefully what to do in this circumstance. And after consideration of all of the evidence, Mr. Collyard, after discussion with me, is here today to plead guilty.

DEFENDANT: Yes, Your Honor. We certainly did.

THE COURT: Thank you. Are you satisfied Mr. Collyard understands the full range of punishments he faces in this case?

MR. BREVER: Yes, Your Honor, we discussed that in detail, as well. And I think Mr. Collyard is fully aware of the Sentencing Guidelines which this Court will consider in the sentencing, and the various permutations that take place within those Guidelines.

THE COURT: And do you believe he is competent to plead guilty?

MR. BREVER: I do, Your Honor, Mr. Collyard has exhibited very rational, logical thinking as part of this process here.

(Id. at 6-7.)

At the plea hearing, the Court explained to Defendant his constitutional rights, including the rights to trial by jury, to confront the witnesses against him, to put the Government to its burden of proof, and to remain silent or testify at trial. (Id. at 7-10.) Defendant indicated that he understood these rights. (Id. at 8-10.) Defendant also confirmed that if he pled guilty, he would not be able to withdraw his plea. (Id. at 10.) The Court then reviewed Counts 1 and 2 with Defendant and their possible penalties. (Id. at 12-13.) The Court also informed Defendant of the nature of supervised release and the possibility of losing his rights to vote, hold public office, serve on a jury, possess any

kind of gun or firearm, or eligibility to receive benefits from the United States Government. (Id. at 14.)

Defendant confirmed that he had read the plea agreement with Mr. Brever and by himself, "line by line and page by page." (Id. at 23.) Defendant also confirmed that he had the opportunity to ask Mr. Brever about all the information in the plea agreement, and that the Government in fact changed some of the items in the plea agreement based on information provided by Mr. Brever. (Id. at 23-24.) Defendant further confirmed that he had read through the factual basis section in the plea agreement, and that all of the facts set forth were true and accurate. (Id. at 24.) The Assistant United States Attorney then thoroughly questioned Defendant about his understanding and acceptance of the facts stipulated under the plea agreement, to which Defendant responded in the affirmative. (Id. at 24-31.) Subsequently, the Court posed the following questions:

THE COURT: . . . Mr. Brever, anything you would like to say at this point?

DEFENDANT: No. Thank you very much.

THE COURT: Mr. Collyard, are you making this plea voluntarily, sir, and of your own free will?

DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone forced you, threatened you, coerced you, or done any violence to you or anyone else in order to get you to plead guilty?

DEFENDANT: No, Your Honor.

THE COURT: Are you pleading guilty because you are guilty of these crimes?

DEFENDANT: Yes, Your honor.

THE COURT: Mr. Brever, anything before he enters his plea?

DEFENDANT: No, thank you.

THE COURT: Mr. Wilton, anything further?

DEFENDANT: No, thank you.

THE COURT: Mr. Collyard, do you have any questions of me or your counsel before you enter your plea?

DEFENDANT: No, Your Honor.

THE COURT: Mr. Collyard, how, then, do you plead to Counts 1 and 2 of the information? Do you plead guilty or not guilty?

DEFENDANT: I plead guilty.

(Id. at 31-32.)

Consequently, this Court found Defendant "clearly mentally competent," "capable of entering an informed plea," and "aware of the nature of the charges against him, the nature of these proceedings, and the consequences of his plea of guilty." (Id. at 32.) The Court also found Defendant's guilty plea to be free, voluntary, knowing, informed, and supported by independent facts in the record establishing all elements of the offense. (Id.) The Court accepted Defendant's plea of guilty. (Id.) On July 24, 2012, the Court scheduled Defendant's sentencing for August 29, 2012. (Notice of Setting Sentencing [Doc. No. 17].)

On August 21, 2012, Defendant filed an Affidavit in a parallel action claiming that Thomas Brever ineffectively assisted him in his criminal defense. (See SEC v. Collyard et al., Civ. No. 11-3656 (JNE/JJK), Doc. No. 91 (D. Minn.).) Specifically, Defendant asserted that he "was pressured strongly by his former attorney to enter into the plea

agreement even though [he] did not understand the serious future effects of doing so." (Id. ¶ 2.) Defendant also claimed that Mr. Brever "told [him] he would discontinue representing [him] if he did not sign the plea agreement." (Id.). Defendant further stated that Mr. Brever never explained to him that being a "finder" did not subject him to liability for conspiring with Bixby officers in the sale of Bixby Securities. (Id.) As to the "tax fraud admissions" in the plea agreement, Defendant claimed that he believed the matters contained in the financial statements were accurate when made. (Id.) As such, Defendant stated that he did "not believe that he had adequate or competent legal representation relating to his entering into the plea agreement." (Id.)

On August 23, 2012, Mr. Brever moved to withdraw from representing Defendant in this action. (Mot. to Withdraw as Att'y [Doc. No. 19].) On August 27, 2012, this Court held a hearing on Mr. Brever's motion and granted it. (Min. Entry for Mot. Hr'g [Doc. No. 21].) At the hearing, Mr. Brever requested an Order Permitting Him to Disclose Documents and Information related to his representation of Defendant, arguing that Defendant had impliedly waived the attorney-client privilege. (Id.) The Court took Mr. Brever's oral motion under advisement and on September 4, 2012, Mr. Brever filed a Memorandum of Law in Support of his oral motion. (Mem. In Supp. Of Mot. for Order Permitting Disclosure of Doc. and Information [Doc. No. 23].)

On October 19, 2012, the Court appointed the Federal Defender to represent Defendant. (Min. Entry for Status Conference [Doc. No. 29].) On October 31, 2012, the Office of the Federal Defender notified the Court that Charles Hawkins would represent Defendant. (Notice of Appearance [Doc. No. 31].)

On December 14, 2012, Defendant moved to withdraw his guilty plea. (Def.'s Mot. to Withdraw Guilty Pleas [Doc. No. 33].) Defendant argued that he neither entered a knowing or voluntary guilty plea nor a waiver of his rights under the Fifth and Sixth Amendments because:

> (1) he did not receive the close assistance of counsel in this case; (2) he was not properly advised by counsel of the "finder's exception" that permits a person or entity to perform a narrow scope of activities without triggering the broker/dealer requirements of Section 15(a) of the Exchange Act; (3) he was expressly advised that the plea agreement would resolve or preclude any further claims or actions against him including the SEC action against him; and (4) that he maintained his factual innocence to counsel who pressured him to plead guilty. Stated differently, prior counsel was ineffective in failing to properly advise Mr. Collyard about the "finders exception" and the impact of his plea agreement and plea.

(Id. at 2-3.) Despite assertions to the contrary at the plea hearing about his satisfaction with Mr. Brever's services, Defendant attacked Mr. Brever's performance as "[falling] below an objective standard of reasonableness because he was not versed or educated in the law applicable to defendant's case." (Id. at 6.)

On December 19, 2012, the Government issued a subpoena duces tecum requesting that Mr. Brever produce "[a]ll documents in your possession of any nature relating to your representation of [Defendant]." (Decl. of Thomas E. Brever, Ex. D [Doc. No. 37-2].) The subpoena also sought Mr. Brever's testimony pertaining to Mr. Brever's communications with Defendant in this proceeding. (Id.)

On January 7, 2013, counsel for Mr. Brever filed a Motion for Protective Order and for an Order Permitting Disclosure of documents and other information relevant to Defendant's allegations of ineffective assistance of counsel. (Thomas E. Brever's Mot. for Protective Order and for Order Permitting Disclosure [Doc. No. 35].) On January 8,

2013, the Court granted Mr. Brever's request to produce attorney-client privileged documents related to Defendant's claim of ineffective assistance of counsel in the event that Defendant proceeded with allegations of ineffective assistance to support his motion to withdraw his guilty plea. (Mem., Op., and Order [Doc. No. 38].) The Court scheduled a status conference for January 10, 2013 to discuss the possibility of an in camera review of the identified documents ("the Brever Documents"). (Id.)

At the status conference on January 10, 2013, the Court directed Mr. Brever to produce the identified documents to the Court for in camera review. (Min. Entry for Status Conference [Doc. No. 39].) Mr. Brever provided the documents, Bates-stamped BREV000001-845 and BREV001000-3048. (Order at 2 [Doc. No. 40].) The Court reviewed the Brever Documents and ordered production of the vast majority of them. (Id. at 4.) The Court granted Defendant the opportunity to file objections to the Court's Order, but Defendant did not do so. After the objections period expired, counsel for Mr. Brever produced documents to the Government in accordance with the Court's Order. (Notice of Compliance [Doc. No. 44].)

On March 21, 2013, Defendant obtained new legal counsel, William Mauzy. (Notice of Withdrawal and Substitution of Counsel [Doc. No. 47].) On April 19, 2013, Defendant filed an Amended Motion to Withdraw Guilty Pleas. [Doc. No. 59]. Defendant "now explicitly abandon[ed] and waive[d] any claim that his plea counsel provided him with constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984)." (Id.) Instead, Defendant "now maintaine[d] only that his guilty pleas should [be] withdrawn because they were involuntary, unknowing and

unintelligent, due to his mental impairment at the time of the plea by taking prescribed medication containing the controlled substance hydrocodone." (Id.)

On May 2, 2013, the Government opposed Defendant's Amended Motion, contesting Defendant's alleged mental impairment at the plea hearing. (Government's Mot. to Deny Def.'s Mot. to Withdraw Plea Without a Hr'g [Doc. No. 65].) The Government argued that Defendant competently responded to the Court's questions at the change-of-plea hearing. (Id. at 4) The Government also argued that Defendant fabricated other bases—now explicitly abandoned and waived—for withdrawing his plea, and that fifty minutes before the plea hearing, Defendant's urine tested negative for hydrocodone. (Id. at 5.)

On May 3, 2013, the Court scheduled an evidentiary hearing on May 13, 2013 to examine evidence relating to Defendant's Amended Motion to Withdraw Guilty Pleas. (Order [Doc. No. 66].)

On May 7, 2013, Defendant moved this Court for an Order prohibiting the Government from calling Mr. Brever as a witness for the evidentiary hearing, arguing that his anticipated testimony was subject to the attorney-client privilege. (Def.'s Mot. in Limine and Req. for Return of Privileged Material [Doc. No. 68].) Defendant also requested return of all privileged documents that the Government received under the Court's February 21, 2013 Order, because Defendant had abandoned his ineffective assistance of counsel claim. (Id.)

On May 8, 2013, the Government opposed Defendant's Motion in Limine and request for return of privileged documents. (Government's Opp. To Def.'s Mot. in

Limine and for Return of Privileged Doc. [Doc. 70].) The Government argued that Mr. Brever's observations about Defendant's physical condition and general level of functioning and orientation at the plea hearing were not privileged, because they were not based on communication and did not involve the seeking of legal advice. (Id. at 4-5.) Regarding the requested return of the Brever Documents, the Government noted that Defendant had until March 4, 2013 to object to the Court's Order to produce these documents, but Defendant neither objected to the Order nor abandoned his ineffective assistance of counsel claims by March 4, 2013. (Id. at 2.)

On May 10, 2013, Mr. Brever moved the Court to order the Government not to call him as a witness at the evidentiary hearing on May 13, 2013, arguing that other individuals could testify about Defendant's demeanor, conduct, and state of mind at the plea hearing. (Thomas E. Brever's Mot. in Limine [Doc. No. 72].)

B. Evidentiary Hearing on May 13, 2013

On May 13, 2013, this Court conducted an evidentiary hearing to examine evidence relating to Defendant's Amended Motion to Withdraw Guilty Pleas.

Regarding Defendant's Motion in Limine and Request for Return of Privileged Documents [Doc. No. 68] and Mr. Brever's Motion in Limine [Doc. No. 72], the Court granted both motions to preserve the ongoing duty of confidentiality. (Evidentiary Hr'g Tr. at 40.)

The Court received the following exhibits in evidence at the hearing:

Defendant's Exhibit 1: [redacted]

Defendant's Exhibit 2: [redacted]

Defendant's Exhibit 3: [redacted]

Defendant's Exhibit 4: Email exchange between Gary Collyard and lawyer dated February 23, 2012

Defendant's Exhibit 5: Notarized memo regarding a lawyer call made to Gary Collyard dated February 24, 2012

Defendant's Exhibit 6: Stipulated Instant Technologies iCUP Screening Test Manual

Defendant's Exhibit 7: Defendant's phone records (February 7, 2012 to March 6, 2012)

Defendant's Exhibit 8: Email exchange between Lonnie Pierce and Michael Brandt regarding a meeting dated February 23, 2012

Defendant's Exhibit 9: [redacted]

Defendant's Exhibit 10: Curriculum Vitae of Glenn G. Hardin

(Def. Gary Albert Collyard's Exhibit List [Doc. No. 74].)

Defendant presented the following witnesses: Valerie Lennon, Lonnie Pierce, and Glenn Hardin. Following the defense witnesses' testimony, the Government orally made "the equivalent of a rule 29 motion," requesting the Court to deny Defendant's Amended Motion to Withdraw Guilty Pleas on the ground that Defendant failed to carry his burden. (Evidentiary Hr'g Tr. at 91-92.) To develop a full record, the Court denied the Government's request and asked it to proceed with its witnesses. (Id. at 93.) The Government presented the testimony of Dr. Andrew Harrison and Lesley Parsons.

II. DISCUSSION

Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure permits a defendant to withdraw a plea of guilty if the defendant can show a fair and just reason for requesting the withdrawal. FED. R. CRIM. P. 11(d)(2)(B); United States v. Maxwell, 498 F.3d 799, 800 (8th Cir. 2007). Although a defendant seeking to withdraw a plea before sentencing is given a more liberal consideration than someone seeking to withdraw a plea after sentencing, a defendant has no absolute right to withdraw a guilty plea before sentencing, and the decision to allow or deny the motion remains within the sound discretion of the trial court. United States v. Prior, 107 F.3d 654, 657 (8th Cir. 1997). Factors to consider in determining whether to set aside a plea of guilty include whether the defendant has demonstrated a fair and just reason; whether the defendant has asserted

his innocence; the length of time between the guilty plea and the motion to withdraw; and whether the government will be prejudiced. Id. If the defendant fails to show a fair and just reason to withdraw the plea, the district court does not need to address any additional factors. Maxwell, 498 F.3d at 801. A guilty plea is a solemn act not to be set aside lightly. Id.

Defendant seeks to withdraw his guilty plea for the second time, now explicitly abandoning his previous ineffective assistance of counsel claims and instead, embracing his [redacted] at the change-of-plea hearing. (Def.'s Mem. In Supp. Of Am. Mot. to Withdraw Guilty Pleas [Doc. No. 60 at 2].) [redacted] (Id.) Further, Defendant maintains his innocence and argues that withdrawal of his guilty plea will not prejudice the Government. (Id.) In opposition, the Government argues that Defendant competently responded to the Court's questions at the change-of-plea hearing. (Id.) The Government also argues that Defendant fabricated other bases—now explicitly abandoned and waived—for withdrawing his plea, and that fifty minutes before the plea hearing, Defendant's [redacted] d. at 4-6.)

Having considered the parties' arguments and the evidence, the Court finds that: (1) [redacted] hearing on February 27, 2012; (2) despite Defendant's assertions of innocence, a sufficient evidentiary basis exists for Defendant's guilt; (3) the length of time between Defendant's guilty plea and his two motions to withdraw his guilty plea weighs against

setting aside Defendant's plea; and (4) the Government would not be prejudiced if required to try Defendant's case. Overall, the factors support denying Defendant's motion.

A. Fair and Just Reason

Review of the plea hearing transcript shows that Defendant was not [redacted] when he pled guilty on February 27, 2012. First, the Court explicitly explored Defendant's [redacted] (Plea Hr'g Tr. at 5.) The Court confirmed with Defendant that he had not [redacted] (Id.) Defendant's plea counsel, Mr. Brever, agreed with Defendant's assessment of his competence, as Defendant "has exhibited very rational, logical thinking as part of this process here." (Id. at 6-7.) Second, after the Court carefully explained Defendant's constitutional rights to Defendant, he indicated that he understood these rights. (Id. at 8-10.) Defendant also confirmed that he understood that if he pled guilty, he would not be able to withdraw his plea. (Id. at 10.) Third, after the Government summarized the plea agreement at the hearing, Defendant expressed his understanding of the terms. (Id. at 15-20.) Defendant confirmed that he had read through the plea agreement with Mr. Brever and independently, doing so "line by line and page by page." (Id. at 23.) As Defendant

answered the Court's questions appropriately and responsively, he was competent to enter his guilty plea.

Testimony from the evidentiary hearing on May 13, 2013 also supports a finding that Defendant was competent when he entered a guilty plea. Ms. Lennon, who drove Defendant to and from the plea hearing, testified that on February 27, 2012, Defendant knew why he was going to the courthouse—specifically, to meet with his probation officer and to be in court afterward. (Evidentiary Hr'g Tr. at 24.) Defendant was in good-enough condition to exit the car, enter the courthouse, and conduct his business. (Id. at 23.) Ms. Lennon did not have concerns about Defendant's functioning. (Id.) When Ms. Lennon arrived at the courthouse after the hearing, Defendant recognized her, walked over, and entered the car on his own. (Id. at 27.)

Indeed, Defendant was lucid in the days leading up to and following the plea hearing. On February 24, 2012, one day after his first [redacted] Defendant spoke with Ms. Parsons on the telephone for a bond interview. (Id. at 109-110.) Over the course of their forty-five minute to an hour long conversation, [redacted] (Id. at 111.) On February 28, 2012, Defendant [redacted] (Id. at 102-103.) And on March 7, 2012, when Ms. Parsons interviewed Defendant in person for his presentence report, Defendant did not seem [redacted] (Id. at 113.)

Defendant's witnesses do not bolster his assertions of mental impairment on February 27, 2012. Ms. Lennon and Mr. Hardin could not confirm that Defendant actually consumed the hydrocodone-acetaminophen tablets on the morning of his plea hearing. Ms. Lennon stopped helping Defendant take his medication on February 25, 2012, and she did not know if he continued afterward. (Id. at 21.) Mr. Hardin reviewed Defendant's medical records, the prescription bottle, the instruction manual for the iCUP urine drug test kit, and some scientific articles. (Id. at 61.) His opinion assumed that Defendant took the medication at the prescribed levels through and including the day of February 27, 2012, but Mr. Hardin did not know personally whether Defendant had actually done so. (Id. at 86-87.) Without knowledge of this information or Defendant's medical past or neurological condition, Mr. Hardin could only provide generic background information about hydrocodone and the iCUP urine drug test. (Id. at 85, 61-67, 70-77.)

Similarly, the Court finds Mr. Pierce's testimony vague and unhelpful for showing Defendant's alleged mental impairment at the plea hearing. Mr. Pierce could not remember any of his calls with Defendant on the day of Defendant's first eyelid surgery and in the following days. (Id. at 45, 56.) Mr. Pierce assumed that on these calls, he was giving Defendant "an update on stuff," "following up on other stuff," or checking on Defendant's condition. (Id. at 54-55.) Significantly, the telephone records of Defendant's calls with Mr. Pierce during this time period belie the notion that Defendant was mentally impaired at the plea hearing. Telephone records show that Defendant and Mr. Pierce communicated by telephone for twenty-six minutes after his surgery on

however, does not constitute a fair and just reason to withdraw a guilty plea if there is a sufficient evidentiary basis at the time of the plea that supports a defendant's guilt. See United States v. Maxwell, 498 F.3d at 801-802.

A sufficient evidentiary basis for Defendant's guilt exists here. At the plea hearing, Defendant confirmed that he had read the plea agreement with Mr. Brever and independently, "line by line and page by page." (Plea Hr'g Tr. at 23.) Defendant confirmed that he had read through the factual basis section in the plea agreement, and that all of the facts set forth were true and accurate. (Id. at 24.) The Assistant United States Attorney thoroughly questioned Defendant as to his understanding and acceptance of the facts stipulated under the plea agreement, to which Defendant responded in the affirmative. (Id. at 24-31.) Subsequently, Defendant confirmed with the Court that he did not have anything to say at this point; that he was making his plea voluntarily and because he was guilty; and that he did not have questions for the Court or his counsel before entering the plea. (Id. at 31-32.) Defendant then pled guilty. (Id. at 32.) Defendant's claims of innocence carry little weight in light of his contrary testimony under oath at the plea hearing. The Court therefore finds a sufficient evidentiary basis for Defendant's guilt.

C. Length of Time Between Defendant's Guilty Plea and Motions to Withdraw

The next factor to examine in determining whether to set aside a guilty plea is the length of time between the guilty plea and the motion to withdraw. United States v. Prior, 107 F.3d at 657. The plea hearing occurred on February 27, 2012. The preliminary presentence report was disclosed to the parties on April 9, 2012, and a final

copy was filed with the Court on April 19, 2012. (Decl. of Casey T. Rundquist, Ex. 2 [Doc. No. 61-2]). On December 14, 2012, Defendant moved for the first time to withdraw his guilty plea, essentially alleging ineffective assistance of counsel. (Def.'s Mot. to Withdraw Guilty Pleas [Doc. No. 33].) On April 19, 2013, more than a year after the plea hearing, Defendant filed his amended motion to withdraw his guilty plea, asserting grounds of [redacted] instead of ineffective assistance of counsel. (Def.'s Am. Mot. to Withdraw Guilty Pleas [Doc. No. 59].)

After the plea hearing, nearly ten months passed before Defendant initially moved to withdraw his guilty plea, and nearly fourteen months passed before Defendant amended his motion to withdraw his guilty plea. Defendant did not protest his innocence from the beginning. The delay in filing both motions indicates that Defendant eventually regretted his guilty plea. But the "plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same." United States v. Woosley, 440 F.2d 1280, 1281 (8th Cir. 1971). Accordingly, the Court finds that this factor weighs against setting aside Defendant's guilty plea.

D. Prejudice to the Government

The last consideration is whether the Government suffers prejudice if the Court allows Defendant to withdraw his guilty plea. The Court finds no such prejudice other than requiring the Government to prepare for trial when Defendant previously waived his jury trial rights. Accordingly, this factor weighs neither in favor of nor against withdrawing Defendant's guilty plea.

For all of these reasons, the Court finds that Defendant may not withdraw his guilty plea and denies Defendant's motion.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Amended Motion to Withdraw Guilty Pleas [Doc. No. 59] is **DENIED.**

2. This matter is now scheduled for sentencing on **June 25, 2013 at 2:30 p.m.** before Judge Susan Richard Nelson in Courtroom 7B, at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

Dated: May 28, 2013

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge

EXHIBIT D

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

Gary Albert Collyard,

Defendant.

Case No. 12-cr-58 (SRN)

St. Paul, Minnesota
Courtroom 7B
August 1, 2013
2:00 p.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON

UNITED STATES DISTRICT COURT JUDGE

SENTENCING HEARING

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: We are here this afternoon on the matter of the United States of America versus Gary Albert Collyard. This is criminal file number 12-58. I'm going to ask Counsel and Mr. Collyard to come up to the podium and have Counsel note your appearances, please.

MR. MacLAUGHLIN: Your Honor, it's David MacLaughlin and Benjamin Langner appearing for the United States. Good afternoon.

MR. MAUZY: Your Honor, William Mauzy and Casey Rundquist, appearing for Defendant Gary Collyard who is present, Your Honor.

THE COURT: Good afternoon. And good afternoon, Mr. Collyard.

THE DEFENDANT: Good afternoon, Your Honor.

THE COURT: You may come right up there. Thank you.

We are here today, Mr. Collyard, for your sentencing. And I want you to know that in preparation for the sentencing, the Court has reviewed the Presentence Investigation Report, the Amended Presentence Investigation Report, the objections that were filed to that report. I had a chance to go through Mr. Mauzy's objections that were filed today. I've gone back and looked at relevant provisions of the guidelines. I've read the position papers carefully of

the Government and the defense.

There have been many letters written by victims, which I have reviewed. There have been some letters written on your behalf; I've reviewed all of those. I've talked to Probation at length. And I've gone back, of course, to look at the Bond Report and the plea agreement and the like. So, I've taken a look also, of course, at the motions that were filed and my previous order.

Mr. MacLaughlin, have you received a copy of the PSR and the Addendum?

U.S. ATTORNEY: Yes, Your Honor, we have.

THE COURT: And the Amended PSR?

MR. MacLAUGHLIN: Yes, Your Honor. This morning, actually.

THE COURT: Mr. Mauzy, have you received a copy of all of those and had a chance to discuss them with your client?

MR. MAUZY: Yes, Your Honor.

THE COURT: Now, there are some recent objections to the PSR, I acknowledge, by the defense. Let me talk about the calculation of the Guideline range and sort of get to the heart of the matter right away, and that will incorporate some of the objections. And then, Mr. Mauzy, I recognize that you have some additional objections. Don't let me forget to have you have a chance to voice those, as well. But let's talk

about Guideline calculation.

In calculating the correct Guideline range, the Court looked to the plea agreement and to the PSR and the Amended PSR, and everyone is in agreement that the base offense level for securities and bank fraud is six. The parties further agree that for a loss of at least 2.5 million but less than 7 million, the base offense level should be increased by 18 levels. So, everyone is in agreement on all of that. Now, the parties agreed in the plea agreement that there should be a two-level enhancement because there were 10 or more victims involved.

Now, of course, Probation has come forth and indicated that there are more than 50 victims and, under the Guidelines, that would call for a four-level enhancement. I understand from the Government that they are sticking, of course, to their plea agreement. In the plea agreement -- and ordinarily I would stick with the plea agreement, too, because just because Probation comes forward with that information doesn't mean the Government intends to prove it.

But what makes this case different is that there is a stipulation on restitution. And that means that the defense agrees to those victims and those numbers, and those victims are greater than 50. So, I can't take the stipulation in a vacuum. I have to look at what the stipulation means, and the stipulation means that the defense agrees there's more than 50

victims. Now, that is one, of course, of the objections that the defense has to the PSR.

Do you wish to be heard about that, Mr. Mauzy?

MR. MAUZY: Your Honor, the stipulation in terms of restitution was, in effect, a capitulation of the loss issue. There was never an intent to breach the plea agreement in any way. It was our belief that the stipulations contained in the plea agreement would prevail on the sentencing calculation. We viewed the restitution as an entirely separate matter. There would be issues contesting the number of victims. And we've objected to, in the Presentence Report, a finding that there are more than 50 victims.

The standard in the restitution is a different standard. The scope of the restitution hearing is a different standard. There were reasons to concede the point of the loss in the course of the restitution hearing and not contest the restitution alleged amount. So, for those reasons, Your Honor, I would ask that the Court honor the plea agreement and provide only an additional level of two rather than four. Certainly there was never any intention to change the position of the Defendant's pleading by --

THE COURT: Well, I appreciate that. I appreciate that you didn't intend to change your agreement with the Government, but the Court has to analyze what the appropriate Guideline range is, independent of the plea agreement. And

the restitution stipulation doesn't say, "We agree to X amount of dollars." The restitution stipulation says, "We agree on these amounts from these victims." Doesn't it, Mr. Mauzy?

MR. MAUZY: For purposes of restitution, that's correct. But it certainly wasn't intended to be for purposes of sentencing or Guideline calculations, Your Honor. That wasn't --

THE COURT: That's the part I can't distinguish. I can't understand how it can be for one purpose and not another. You're conceding that those amounts are true, are you not?

MR. MAUZY: For purposes of restitution, that's correct, Your Honor. We did not contest that amount based upon the Government's calculations.

THE COURT: Mr. MacLaughlin, any thoughts about this?

MR. MacLAUGHLIN: Your Honor, the Executive Branch is bound by its contract, and we're obliged to stand by that. It's our interest to stand by our plea agreements. I certainly see the Court's logic, and I agree that the Court, as a separate branch of Government, is not bound by the plea agreement, but we are.

THE COURT: Okay. The Court appreciates what the Defendant's intention was here, too, and that was to stipulate to an amount of restitution. But the stipulation, excuse me,

calls for a certain amount of restitution per victim, and everybody agrees that the number of victims is greater than 50. So, based on that uncontested record, the Court agrees with Probation that a four-level enhancement should apply.

Now finally in the plea agreement, the parties agree that an additional two-level enhancement is appropriate because the Defendant derived more than $1 million in gross receipts, and I think that's -- everyone's in agreement on that. So, the plea agreement anticipated an offense level of 28, but given the change to the four-level enhancement, the correct offense level is 30. Now, the Government urges that the offense level be 32. The Government argues that there should be an additional two-point enhancement under Section 3C1.1 for obstruction of justice. And the Government argues that there should be no reduction for acceptance of responsibility under Section 3E1.1.

The defense argues that the Government has not met its burden for an enhancement for obstruction of justice and further arguments -- argues that the defense -- Defendant is deserving of a two-level reduction because -- recognizing the Government wouldn't seek the additional level of acceptance of responsibility. So, on those two points, that is obstruction of justice and acceptance of responsibility, I'll hear argument on that now, and we'll start with the defense.

MR. MAUZY: Your Honor, in terms of the obstruction,

it's clear from the Guidelines and from the cases interpreting the Guidelines that a Defendant should not get a -- an obstruction enhancement based on his denial of guilt. Also, the notes point out that it is not intended to punish a Defendant for the exercise of a Constitutional right. Our essential point is that there was no perjury here, and secondly that any statement that was submitted was not a material statement.

With respect to the SEC Affidavits, Your Honor, the case law is clear that conclusions and opinions cannot be considered perjury. Perjury relates to factual assertions. The Court has stated, "A statement must be with respect to a fact or facts, and the statement must be such the truth or falsity is susceptible of proof." In addition, a standard jury instruction relating to perjury says, "If by any interpretation the statement may be true, then it does not constitute perjury."

When we additionally look at materiality, the standard and the guidelines is if the evidence, fact, or statement, if believed, would tend to influence or effect the issue under determination. This was an SEC civil proceeding, an Affidavit was submitted there. The Defendant did not testify in this proceeding, he did not testify in the withdrawal hearing, and did not otherwise testify. In a situation where a Defendant has not testified, it's rarely

found to be an obstruction enhancement when there is no impeding of investigation. There are a number of cases where the Defendant provides information to the FBI and it leads them, as one court said, to a wild goose chase.

Certainly here there was nothing done in terms of providing false information that led to a distraction of the investigation into other areas. The standard that the *Mashek* court, the Eighth Circuit said is, "The District Court must review the evidence, make an independent finding by a preponderance of the evidence Defendant gave false testimony concerning material matter with the willful intent to provide false testimony rather than as a result of confusion, mistake, or faulty memory."

If we look at the actual statements in the Affidavits submitted in the SEC proceeding, there are statements concerning [redacted] There was --

THE COURT: Well, there were, but perhaps not material. Am I right? He said there was [redacted], and there wasn't.

MR. MAUZY: Well, I --

THE COURT: Right?

MR. MAUZY: His misinterpretation and perhaps exaggeration.

The other matter related to his statement that he was a finder. The plea agreement refers to him as a "finder." The Government's first position on sentencing characterized him as a "finder." At the time of his plea, he was introduced as being a "finder." He, in fact, was a finder, so I think there was nothing false concerning that. The statement concerning his surgeries, whether he was coherent or not, sort of from his perspective -- and again, this is a conclusory statement, an opinion, and that type of statement or opinion certainly cannot constitute a false statement or obstruction.

Statements that are relating to Counsel, whether he was pressured or not, I think that's again a matter of opinion, a matter of perspective from a client's standpoint and of an attorney's standpoint. We go through the Affidavit one by one, there was certainly no material misrepresentations, certainly no willful intent, and certainly no basis for a conclusion that he committed perjury by submitting an Affidavit in the SEC.

The -- I reviewed the SEC file recently in terms of materiality to see what actually happened in the SEC proceeding. I do have one exhibit that I'd like to offer, Your Honor, and that's Judge Ericksen's order. If I may offer

that as Defendant's Exhibit 1.

THE COURT: Sure, sure.

(The Court is handed a document.)

MR. MAUZY: The Affidavit of Mr. Collyard that was submitted was in opposition to a motion to amend the pleadings to add claims, Judge Ericksen, in looking at Page 7, in discussing the objections that were made by Mr. Collyard's civil lawyer in the SEC proceeding said that "The Defendant's claim really was an assertion that the amended pleadings would be futile." And the Court, at Page 7, said, "The Collyard Defendant's futility arguments rest on the assertion that Collyard has absolutely, clearly denied proposed new allegations in the Amended Complaint and Affidavit filed in opposition of the motion."

The next line is the critical one, Your Honor: "However, Collyard's Affidavit is irrelevant to a futility analysis." And she goes on to say, "Neither Collyard's Affidavits nor Collyard Defendant's written responses in opposition demonstrate the allegations would be frivolous or legally insufficient." So, that's a finding in effect by Judge Ericksen that the Affidavit submitted was immaterial. She calls it irrelevant. It had no ability to influence that proceeding. She disregarded it and found it to be irrelevant. So, the entire contents of the Affidavit was not material, it didn't affect that proceeding whatsoever.

The other aspect, Your Honor, that the Government has alleged as a basis for obstruction of justice is the plea withdrawal process. And certainly the Federal Rules of Criminal Procedure permit a Defendant to file a motion to withdraw his guilty plea. There is no automatic rule suggesting that if he files a motion to withdraw a guilty plea that he's going to receive obstruction of justice. The procedure gives him that right. That's a right that he followed.

One court that we cited, the *Endo* court, said that "In this situation, to apply perjury to withdrawal of a guilty plea process, would effectively place any Defendant under the sword of Damascus" --

THE COURT REPORTER: I need you to slow down.

MR. MAUZY: All right. "Would effectively place any Defendant under the sword of Damascus whenever he or she might seek to assert a recognized procedural right to withdraw a plea." So, the Defendant made a decision to file a motion to withdraw a guilty plea. All of the grounds asserted were withdrawn with the exception of the competency ground. There was nothing about the Affidavit that remained as part of that proceeding. There was an amended motion to withdraw the guilty plea that was filed. The only grounds pursued were the competency grounds.

To assess an obstruction just for filing a motion to

withdraw a guilty plea is not something I think the cases interpreting the rules contemplated. The case cited, the *Alvarado* case cited by the Government, I really think is completely different. There, the written false statements were submitted to the Court as part of the proceeding. The lawyer stood up and made an offer of proof on what the testimony was going to be, what Defendant was going to testify to, and on that basis I think the interpretation was that the lawyer was making judicial admissions on the Defendant's testimony. It was on that basis that there was an obstruction enhancement.

There was not perjury committed here. The tactics of defense counsel during the course of the motion to withdraw the guilty plea cannot be assessed as obstruction of justice. There was nothing material about the submission of this Affidavit. Judge Ericksen found it to be totally irrelevant and didn't follow it, at least it didn't impede any investigation whatsoever. I think any obstruction enhancement was simply unwarded, Your Honor. I would ask the Court not impose on an obstruction enhancement.

THE COURT: Thank you, Mr. Mauzy. Why don't we allow the Government to respond, and I'll give you a chance to be heard on acceptance of responsibility.

MR. MacLAUGHLIN: Thank you, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. MacLAUGHLIN: Let me begin by simply saying that *Alvarado* appears to us to be directly on point. In that case where the behavior was much less egregious than here, the judge didn't even have a hearing. The entire hearing that we had in May was effectively a proffer through evidence and argument of Mr. Collyard's position that, A, he's innocent and, B, he didn't know what he was doing on the day of his plea. So, I just want to know that *Alvarado* is -- I don't understand how it's not directly on point here, and the behavior there was much less bad than the behavior here.

But let me make a commonsense argument. So, I'm looking at 3C1.1. It's very clear, Your Honor, on the face of the Guideline itself that it applies where a Defendant willfully obstructs or impedes, among other things, the sentencing in the matter. So, it applies where you impair or impede sentencing. When does it apply? What kind of impairing and impeding does the obstruction enhancement apply to?

We certainly agree, Your Honor, that just moving to withdraw your plea is not enough to trigger the enhancement. I agree with Mr. Mauzy on that point. But if the conduct involves the enumerated conduct in the Application Notes, then the issue begins to become clear, specifically if the conduct involved committing or attempting to commit or suborn perjury,

including in the course of a civil proceeding, if such perjury pertains to conduct that forms the basis of the offense or conviction or -- and that's Application Note 4(B) -- or if the conduct involved provided materially false information to a Judge or Magistrate judge, the provision applies.

So, if you obstruct a sentencing by lying under oath about a material matter, the obstruction enhancement applies. So, this morning I did an old-fashioned thing. I walked into the law library at the U.S. Attorney's Office, which unfortunately has only one book left in it, and that is Webster's New International Dictionary, Second Edition, Unabridged. It's an old book, it's dog-eared, and it's yellow with age. And it defines "obstruct" in the following way: To block, to place an obstacle in front of, to hinder from passing, to retard. And synonyms given are to interrupt, block, choke, and delay.

So, I read that definition, I wrote if down here on that little sheet of paper, and I went and I printed out the docket in this case. And I noted that in docket number 17, this Court issued a notice, a notice of sentencing. On July the 24th of last year, this Court issued a notice that Mr. Collyard's sentencing was to be held on August 29th of 2012. Almost a year ago.

So, here we are, Your Honor. We're almost a year later, and it appears to me that somehow this sentence has

been blocked, delayed, hindered, and Mr. Collyard is responsible for that. He succeeded in impairing, retarding, hindering, choking, and delaying his sentencing. Okay. How can he do that? He did it through the exact means described in Application Note 4(B) and 4(F). I was thinking I might go over some of these specific things, but I think the Court is pretty tuned up.

In the broad brush, Your Honor, what's the Defendant been saying over the course of time, without interruption, since July of 2012? "I didn't do it." He's repeatedly said, "I didn't do it. I didn't defraud any Bixby investors. And those balance sheets I submitted to those banks to get loans, as far as I knew they were true."

He's been saying until recently, "Brever made me plead. I kept telling him I was innocent, but Brever threatened to withdraw if I didn't plead guilty." And finally he's been saying, "I didn't know what I was doing when I pleaded guilty." Now, I read the defense pleadings and I have to say that I think Mr. Mauzy and Mr. Rundquist are talented at parsing legalities. But respectfully, in the big picture here, it's pretty obvious that Mr. Collyard has been saying, "I didn't do it. Brever made me plead. And I didn't know what I was doing on the day I was pleading guilty." These are not shades of legal distinction, these are not subtleties, these are not things that are just interpretation. These are

major, broad stroke assertions that Mr. Collyard has made over and over and over again.

Let me just talk a little bit about Defense Exhibit 1, which we certainly don't have any objections to the Court receiving. I would note it's Magistrate Mayeron's work, not Judge Ericksen. But I don't have a problem with the idea that telling these lies in the course of the civil proceeding wasn't material. I'm prepared to agree with that.

I am not, however, prepared to agree that they weren't material when they were submitted to this Court by Mr. Hawkins when he submitted his motion to withdraw for the first time. They were appended to his motion, and they were quoted at length, with Mr. Collyard's approval, in docket number 33. In this pleading and in the Affidavits attached to it, he says that Brever made him plead; Brever told him that the SEC action would be resolved if he pled guilty, and that the SEC couldn't touch him anymore. Let's just think about that for a second.

This guy graduated sixth in his high school class. Paragraph 53 of the Presentence Report says that Mr. Collyard graduated sixth out of 264 students at Hill Murray High School. He is not the village idiot, and Tom Brever is a very competent lawyer. How plausible is it that Mr. Collyard thought that by pleading guilty here he could somehow put off the SEC? Hawkins, in his pleadings, says that, "He was

explicitly advised by Mr. Brever that pleading guilty would put an end to the SEC action." That is an insulting thing to submit to this Court. Why Mr. Collyard would think anybody would believe that is beyond my comprehension.

And all of these things that he says in his Affidavits about his [redacted] are relevant here and they're material here because he used them to try to get out of his plea. He says in an Affidavit filed with this Court that

[redacted]

That is just an enormous lie, and it is material because he used these assertions to try to get out of his plea. They were the tool by which he sought to and, in fact, did impair his sentencing. I know the Court is very aware of all the rest of the false statements. I don't intend to belabor them anymore. The Court has seen them many times, but the conduct here is outrageous. It is just outrageous. So, *Alvarado* stands for the proposition that this Court would be very, very well within its discretion to assess the two points, and that the Eighth Circuit would be obliged to affirm

that.

Let me talk about the equities, why the Court should assess it, because if the Court doesn't, that's a final decision. What are the equities here? Are they -- did Mr. Collyard's decision to tell these lies, was it inconsequential, venial, and immaterial? Or was it consequential and material? It was very material.

First of all, it did achieve almost a one-year delay in his sentencing, as I've already noted. I would also note, Your Honor, that it wasted the resources of this Court, Mr. Brever, Katherian Roe's office. This Court has held six hearings; not the one sentence. This is the seventh hearing since Mr. Collyard started claiming he was innocent. This Court has issued several memorandum opinions.

How many hours did your clerks have to spend going over all of Mr. Brever's materials to determine whether or not they should be disclosed to the Government? I know that courts are very loft to punish Defendants for sucking up their own resources, but I'm pointing out that did happen here. Mr. Brever, his reputation in public filings, Mr. Collyard pileated him, said he was an incompetent lawyer, gave him bad advice, made him plead guilty.

It's outrageous, it's terrible conduct, and Mr. Brever had to go hire Chris Madel. I am thinking the Court can take judicial notice that Mr. Madel and Robins

Kaplan doesn't come cheap. I can tell you we've spent a lot of time litigating over this matter. I know that the Court knows that. I don't know how much the Federal Defender's Office had to pay Mr. Hawkins for his brief stint, but that's public money all because Mr. Collyard lied and for no other reason. There wasn't a kernel of truth in anything he submitted to this Court to try to get out of his plea. Nothing.

So, the question, I guess, before the Court is: Should a Defendant be allowed to get away with lying like this without an enhancement for obstruction? Again, "I didn't do it. Brever made me plead. I didn't know what I was doing." These are huge, broad-brush, material misrepresentations made over and over again. And some of them aren't even withdrawn as we stand here. As a matter of law, as a matter of fact, as a matter of fairness, as a matter of policy, as a matter of equity, this Court should apply the two-point enhancement for obstruction.

THE COURT: Thank you.

MR. MAUZY: If I --

THE COURT: Mr. Mauzy, would you like to respond briefly?

MR. MAUZY: Your Honor, the claims relating to ineffective assistance of counsel, I repeat, were abandoned and waived when I became involved in this matter. We did not

proceed by way of Affidavit. We proceeded by way of testimony at a hearing. We called three witnesses.

We had a witness who had previously given us a statement that if she had been consistent with what she told us before the hearing and before the Government contacted her, would have provided a, I think, clear factual predicate that Mr. Collyard was not competent at the time he entered his plea. And that, combined with the expert testimony, we think would have presented a compelling case that he was not competent to proceed. Her testimony changed dramatically when she hired a lawyer. That lawyer prevented us from talking to her further, although providing full access to the Government.

So, tactical decisions were made by the defense during the course of this. The claims against Mr. Brever were, in fact, abandoned. And all of those claims were waived; nothing was relied upon. The Defendant did seek to withdraw his guilty plea. That certainly caused a delay, but I don't think that's what the obstruction of justice has in mind.

The Court cases that I've cited about willful falsehoods, there were no willful falsehoods, there was no materiality here relating to anything that was submitted, and certainly nothing that was submitted to this Court after I started the representation of Mr. Collyard.

THE COURT: Thank you, Mr. Mauzy. Let me rule on

this piece, and then we'll move on to acceptance of responsibility. This is a tough call. The Court has a lot of sympathy with the arguments of the Government. The Court was there every step of the way and knows exactly what happened here, and the Court does appreciate that Mr. Mauzy came into this scene late in the game.

However, a two-level enhancement for obstruction of justice, first of all, that's the Government's burden of proof and ordinarily that requires some sort of active obstruction by the Defendant. And the Court does acknowledge that the Defendant did not testify at the evidentiary hearing and does also acknowledge that some of the statements made in the Affidavits to the SEC were -- in the SEC matter were inaccurate and incorrect, but legally inaccurate and conclusory.

And to the extent there were factual statements, I think probably the fair and perhaps more generous way of looking at them is that they were exaggerations. There isn't a kind of straightforward lie that was told here. Although after a year of this, and after that evidentiary hearing, the Court certainly found no credibility to Mr. Collyard's position. But in light of the precedent and in light of the burden and in light of the guidance by the Guidelines, the Court is going to decline to give an extra two-point enhancement for obstruction.

But I will hear from you now on acceptance of responsibility.

MR. MAUZY: Judge, we, of course, concede that the Government is not going to make a motion for a third point. We have simply requested the two points.

The reason for the Defendant clearly demonstrating acceptance of responsibility for the defense relate to the fact that he pled guilty; the fact that the withdrawal motion was an assertion of a Constitutional right and based solely on his [redacted] at the time of the plea. Based the -- the acceptance should be based on the acceptance letter that was submitted to the Probation Office; to his cooperative conduct with the Probation Office; to the fact that he did meet with several proffer sessions; that he discontinued his involvement with Bixby; that he's been law abiding since he discontinued his involvement with Bixby, over a period of several years.

So, by that conduct, Judge, he has accepted responsibility. The Court has denied his motion to withdraw the guilty plea, but a mere filing of a motion to withdraw a guilty plea does not deprive him, by itself, of the acceptance of responsibility points. And I would ask the Court to award two acceptance of responsibility points.

THE COURT: Mr. MacLaughlin?

MR. MacLAUGHLIN: In July of 2012, this Court set the matter on for sentencing. In August of 2012, as soon as

the Court did that, Mr. Collyard began denying his guilt. He has said nothing since then but, "I didn't do it. I didn't do the bank fraud piece. And I didn't do the Bixby piece. I didn't do it. I didn't mislead anybody. I didn't defraud anybody."

And he hasn't backed off that. Even after Mr. Mauzy and Mr. Rundquist came on board, part of the motion to withdraw was that he claimed he was innocent. He's not just simply incompetent; he's persisted in the claim that he didn't do this.

And I would note, Your Honor, even in the pleadings that were just filed by Mr. Mauzy and Mr. Rundquist in which they say, "My guy didn't commit perjury," there's one thing that isn't said in that pleading which is: "You know what, Mr. Collyard admits his guilt, got scared. He's a 62-, 63-year-old man and he was scared to death. And so he tried to get out of his plea, and it was a bad tactic. It was a bad strategy. He apologizes for it."He has not retracted his denial of guilt. Right now he denies his guilt.

We oppose any two-point reduction.

THE COURT: The record should reflect that originally the PSR stated that in their -- in the Probation's view, Mr. Collyard should be awarded acceptance of responsibility. As everybody knows, Probation has amended the PSR and has stated, just as the Government has just stated,

that over the past year, based on that conduct, Probation believes that the Court should not grant a deduction for acceptance of responsibility.

Now, if you look at the Guidelines on acceptance, excuse me, what you note is that it's the Defendant's burden and that it should only be awarded if the Defendant clearly demonstrates acceptance of responsibility. As I sit here today, I have no idea whether Mr. Collyard accepts responsibility. No idea. So, not only do I clearly see that he does, based on everything he's filed to date, I believe he does not. I believe his position today remains as it was during the withdrawal motion hearing, that is that he's innocent, that he misunderstood the law, that Mr. Brever misunderstood the facts, that he was coerced into pleading.

And when he stood up here in front of me at the plea hearing, despite an extensive colloquy where I asked him any number of times whether he understood what I was saying and he understood what he was doing and that he understood that he was giving up his rights and he could persist in his not guilty plea, he told me he clearly understood, that he wasn't under the influence of any medication, that he was able to think clearly, and that he did accept responsibility at that time. Since then, he has stated the opposite. There is no judge on earth here who could find that this man has accepted responsibility. I don't know when he gets up for his

allocution what he'll say but that I'm wrong, and he didn't do this. So, clearly this is a case where the Defendant is not entitled to a deduction for acceptance of responsibility.

So, I think the next step here should be to look at the rest of Mr. Mauzy's objections. I think we've covered victims and acceptance of responsibility. I think the only remaining objection, Mr. Mauzy, is whether his criminal history category overrepresents the seriousness of his crimes.

Do you wish to be heard on that?

MR. MAUZY: Your Honor, I made that a ground for a downward variance, so I would argue that as part of the downward variance.

THE COURT: Okay. All right. Okay.

The Court therefore determines that the Guidelines apply as follows: A total offense level of 30, criminal history category of two, which leads to an advisory imprisonment range of 108 to 135 months. The Court recognizes that there's a statutory max of 120 months. A supervised release range of one to three years; a fine range of 15,000 to $8,464,020; and a special assessment of $200.

Apart from the objections that you've made for the record, Counsel, does either the Government or the defense have any objection to the calculation of that Guideline range?

MR. MacLAUGHLIN: Your Honor, I think the numbers add up to 32.

THE COURT: Well, if I gave obstruction, it would. Let's walk through it to make sure the record is clear.

MR. MacLAUGHLIN: Okay, because the four-point enhancement puts it up to 32, even without obstruction.

THE COURT: All right. Let's see if I'm wrong. Okay. We start with six, we add 18; that's 24. Twenty-eight for the four-point enhancement. And two for the Defendant deriving more than $1 million. That's 30.

MR. MacLAUGHLIN: Maybe I'm wrong, because we had added it up to 32. And the Court subtracted two but added two, so I guess I'm -- that was --

THE COURT: All right. I just want to make sure we're all on the same page for this. Let's start at the beginning. Offense level of six. Loss amounts add 18, so that's 24. The Court has ruled four-level enhancement for victims; that's 28. Two levels because the Defendant derived more than $1 million; that's 30. No reduction for acceptance.

MR. MacLAUGHLIN: Maybe there's a reason why I became a lawyer instead of a scientist. I think that adds up to 30. We must have misadded in our papers, so I'm sorry, Your Honor.

THE COURT: All right. Are we all on the same page on that, then?

MR. MacLAUGHLIN: Yes. Thank you.

THE COURT: All right. Very good. All right.

Mr. Mauzy, I understand that you wish to move for a downward variance. Do you wish to be heard at this time?

MR. MAUZY: Judge, we move for a downward variance. We are asserting four grounds for the downward variance. One is the disparity between the financial gain of the Defendant and the amount of the loss attributable to him. A second ground is a post-offense rehabilitation; Mr. Collyard's law-abiding conduct since he disengaged from Bixby. The third ground is that the criminal history overstates the seriousness of his prior offenses. And the fourth ground is to avoid unwarranted sentencing disparities because he's significantly less culpable than other Defendants in this case.

Looking first, Judge, at the disparity between the gain here. Whether the calculation is that he was a finder at 10 percent or at 12 percent and if the loss amount is three or a four, that 10 percent or that 12 percent was split with his partner. The amount of his gain is either 150,000 or 250,000; that to be contrasted with a $3 million stipulated loss or the $4 million restitution amount, obviously, that's a huge disparity between his gain and the loss.

The Sentencing Guidelines have always looked at loss as a proxy for the culpability of the Defendant, but cases interpreting the loss amount when there is such a disparity between the Defendant's gain and the loss, to say that it's an inaccurate proxy when you have a situation where there is a

disparity between gain and loss. Here, he certainly received a gain, but he's not being sentenced on the basis of the gain; he's being sentenced on the basis of the loss to the victims here.

And because of that vast disparity, we believe that there should be a downward variance, viewed by the Court looking more at what his gain is. Obviously, there's a bank fraud combined with the amount of money that he received in introducing investors to the Bixby folks. That amount is substantially less than the loss amount and certainly would be under the $2.5 million figure and would put him down one level on the base offense level if the Court were to, more appropriately, focus on gain as opposed to the loss to the victims.

In terms of post-offense rehabilitation, the *Gall* and *Pepper* cases have focused on, "What has the Defendant done since the time of the offense?" The offense conduct here was, by and large, in 2006 and 2007. He stopped getting compensated by Bixby at the end of 2007. He has had a lengthy period of time where he has been a law abiding citizen. Since he disconnected with Bixby, has not engaged in any criminal conduct whatsoever. The Court should consider what he's been like over that extended period of time.

He, in effect, has been on probation since he disengaged with Bixby, and he's performed on probation. He

has remained law abiding at all times, and just as the *Gall* and *Pepper* Defendants, the courts viewed their conduct after the offense. This Court should look at Mr. Collyard's law-abiding conduct since disengaging with the Bixby Defendants.

The third ground, Your Honor, is the criminal history. His only prior offense was a misdemeanor federal offense. That prior conviction was in 1998; the offense conduct was in 1995. Obviously, a lengthy period of time between that misdemeanor offense. He was sentenced not to a jail sentence but to two years probation. Had he been sentenced to one year's probation, that would not have counted as a criminal history point; it would have been excluded.

Had it been more than ten years between the period of time of the present offense and the date of that conviction, it would have been excluded. Here, it was eight or nine or more here, but close to ten years, in any event. So, to punish him and give him one point for a prior misdemeanor, a very small amount of tax loss, it would have been in the extreme bottom end of any tax loss table that existed at the time. Now, it was not a serious offense, it was completely dissimilar to the offenses here, so to give him a point for that really overstates the seriousness of his prior criminal history.

The second matter that we pointed out, Judge, is the

fact that the State Court point that he's getting is from a guilty plea that he entered that was contemporaneous with the guilty plea that he entered in Federal Court. To assess a point for that is unfair for several reasons. One, it's unadjudicated. I know the Guidelines contemplate that. But he hasn't been sentenced under Minnesota law, he hasn't been convicted. The Guidelines will allow the Court to look at that, but it's a situation where if that matter had not resulted in a guilty plea while this case was pending, then there would not be that additional second point assessed him in this present proceeding.

It's an unadjudicated matter. It's not a -- in terms of criminal history, it's not a prior conviction at all. It's not even a conviction as yet, and it's contemporaneous conduct that's dissimilar from the offenses that are at issue here. And I think it's even compounded that if this had been a federal tax case, that matter would have grouped with the fraud allegations. He would not have received an additional criminal history point, and there would not have been any additional Sentencing Guidelines calculations. The offenses would have grouped.

So, to assess two additional points for him in moving from a criminal history category one to a criminal history category two is essentially unfair, and it really does overstate the seriousness of his criminal history. His

criminal history is a misdemeanor offense conduct from 1995, a very long time ago. And to move him over in a significant way from criminal history one to criminal history two on the basis of an unadjudicated State Court case that's contemporaneous with this case and an ancient prior misdemeanor that's not very terribly serious in nature really does overstate it.

Even in the original Sentencing Guidelines there was a grounds for a departure, a downward departure, if the criminal history overstated the seriousness of his criminal history. And here, to give him two points really does overstate it when the only prior conviction that he had appearing before a guilty plea was for an offense that occurred in 1995, a very lengthy time ago. And during -- so, we think that is another grounds for a variance based upon the fact that it's an old conviction, it was a misdemeanor conviction, there's a lengthy time, the fact that the Sentencing Guidelines have always offered a departure for someone in that category.

You know, in fact, one of the examples that is utilized in the Sentencing Guidelines talks about an appropriate guideline if someone has a -- two misdemeanor convictions that are approaching the ten-year cut off. Here, the Defendant has one misdemeanor conviction approaching the ten-year cut off. So by the very examples on the criminal history reference and the Guidelines, there is a basis for the

departure --

THE COURT: But I have to interrupt you. He's pled guilty to this tax evasion charge in State Court that he's about to get sentenced on, so it's a conviction, is it not?

MR. MAUZY: He hasn't appeared for sentencing so --

THE COURT: No, but he's pled guilty.

MR. MAUZY: He has pled -- for purposes of the sentencing guidelines, there's a clear reference to a plea of guilty. But in Minnesota State Court, until you're sentenced, you're not convicted. They don't view that as a conviction. That's our interpretation --

THE COURT: Okay.

MR. MAUZY: -- and my understanding.

So, it's the Application Note 3 on downward departure, Your Honor, it says, "Downward departure from Defendant's criminal history category may be warranted if, for example, a Defendant had two minor misdemeanor convictions close to ten years prior to the incident offense and no other evidence of criminal behavior in the intervening period." Here, he had one misdemeanor and, in the intervening time between that misdemeanor and the present offense, no criminal behavior. So, even under the terms of the Guidelines for downward departure, I think the same basis for a downward variance. His criminal history score, to put him in two based upon the State Court guilty plea and a prior misdemeanor

really overstates the seriousness of his criminal history and provides a basis for a downward variance.

We have also pointed out in our position paper there that our beliefs that Defendant's culpability is substantially less than the Codefendants. Mr. Desender has been sentenced; Mr. Walker awaits trial; Melanie Bonine, as I understand it, has pled guilty to a tax fraud case. Mr. Collyard's role at Bixby was significantly less than Desender's role, and Mr. Collyard was a finder. He sent people to Desender and to Walker. They're the ones who met with the investors. The investors made a decision whether or not to invest based upon their meetings with Walker and Desender.

Desender's compensation from the Presentence Report looks like his finder's fee was something approaching 2.4 million. And the loss amount attributed to him to be $40 million, although his Presentence Report confines it to the same level as the Defendant. He is much more involved in this, Your Honor, than Mr. Collyard was. In addition, you know, he violated the terms of his conditional release. He was assessed at being an average participant, but he was a far greater participant, certainly, than Mr. Collyard was. Mr. Collyard's role was to send people to Desender and Walker. They were the insiders, they were the people who had overall control of this, not Mr. Collyard.

Mr. Collyard's partner, Ron Musich, has not been

prosecuted. He's the person that he shared the finder's fees with. So, we view Desender's conduct -- attributed to him of 40 million, 1800 investors, 2.4 million in finder's fee -- as far more significant to -- than Mr. Collyard's. To avoid unwarranted sentencing disparities, Mr. Collyard's sentence should be far less than Mr. Desender's sentence of 97 months. It should be far less than that.

The courts also look at avoiding unwanted sentencing disparities to look at the criminal history of the Codefendants. What was Mr. Desender's criminal history? His criminal history consisted of five felonies -- theft by swindle over $35,000 in 1993; theft by swindle over $2,500 in 1993; concealing criminal proceeds, a felony, in 1995; computer theft, a felony, in 1995; federal bank fraud in 1998 -- versus Mr. Collyard's prior criminal history: A misdemeanor conviction in -- for an offense that took place in 1995 and was punished in 1998.

So, when you look at the disparity between the level of culpability of Mr. Desender and the criminal history, this Court needs to avoid unwarranted sentencing disparities between two Defendants. Desender is far more involved, has a far worse five-felony criminal history than the Defendant's one sole misdemeanor conviction that he had prior to the offenses here.

Judge, I've -- we have submitted a number of

letters. I know that Brever, in his request to the Court in terms of his position on sentencing, had suggested community service, that the Defendant had the opportunity to provide training in an entrepreneurial role for troubled teens. And we certainly, obviously, would join in that recommendation. We have submitted letters to the Court that give a little fair assessment to the Court of the characteristics of the Defendant. I know that the conduct in court in part by Mr. Collyard might be seen by the Court as vexatious or troublesome, but I request that the Court sentence him for the criminal behavior and not for anything else.

If the Court reviews the letters that were received, certainly they attest to his character, as he has been a law abiding citizen since disengaging with Bixby. He has been a law abiding citizen. The report from the Probation Office attests that he has perfectly complied with all of the conditions of release, has not engaged in any criminal behavior whatsoever.

For all those reasons, Judge, we would ask for a downward variance. We have requested a 48-month sentence would be appropriate to avoid the unwarranted sentencing disparities, to account for the overstatement of his criminal history, to fairly attribute the gain rather than the large loss amount to him. For all of the reasons we've submitted in the position papers and the argument, we'd ask for a downward

variance, Your Honor.

THE COURT: Thank you, Mr. Mauzy.

MR. MAUZY: I do have -- I -- and this happens on occasion. I did receive one additional letter --

THE COURT: That's fine.

MR. MAUZY: -- this morning, if I may submit that to the Court.

(The Court is handed a document.)

THE COURT: Mr. Collyard, before I impose sentence, is there anything, sir, you would like to say to the Court on your own behalf?

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Why don't you speak right into the mic so we can hear you.

THE DEFENDANT: Thank you, Your Honor. I stand here today, and our God knows what's in my heart.

THE COURT: Is that all you wish to say?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Thank you.

Mr. MacLaughlin.

MR. MacLAUGHLIN: Thank you, Your Honor. Let me begin with the criminal history and the imposition of the one point for the State Court offense. It's correctly assessed. Guidelines section 4A1.1(c) says add one point for each prior sentence which isn't 60 days or more. You do have to wait for

sentence to be imposed to assess a two- or a three-point enhancement, but Guideline section 4A1.2(a)(4) says that, "Where a Defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under 4A1.1(c) if a sentence resulting from that conviction otherwise would be countable"; and, "Convicted of an offense for purposes of this provision, means that the guilt of the Defendant was established by," among other things, "guilty plea."

So, it's correctly assessed by Ms. Parsons at one point. And I would respectfully suggest, Your Honor, that this criminal history score of two and criminal history category of two is very appropriate for this Defendant. He's been convicted of two prior crimes of dishonesty. This clearly is a crime of dishonesty. It's not a driving offense or some kind of unrelated criminal conduct. To treat him as though he were in criminal history category one, it seems to me, Your Honor, would ignore not only his convictions but also the consistent course of conduct that the Court has noted Mr. Collyard has engaged in of late --

THE COURT: So Mr. MacLaughlin, are you saying that if he had been sentenced on the State Court matter to which he's pled guilty, he might be assessed more points?

MR. MacLAUGHLIN: Yes. If he got a sentence of more than 60 days but less than a year and a month, that's a

two-pointer. And it would be a three-pointer if it was more than a year and a month.

THE COURT: And that would change his criminal history score?

MR. MacLAUGHLIN: Yes. It would increase it, but that hasn't occurred yet.

THE COURT: I see.

MR. MacLAUGHLIN: So he does get a benefit; he's sort of capped out at one point pursuant to the provisions that I cited. So, Ms. Parsons is correct.

THE COURT: Okay.

MR. MacLAUGHLIN: Let me talk a little bit about our view that Mr. Collyard should receive a sentence of 120 months, the statutory maximum. I'm going to start out by agreeing that Mr. Collyard, with respect to just the Bixby piece, is less culpable than Mr. Desender. I agree with that. Mr. Desender was at Bixby, he was there for a longer period of time. But to focus myopically on that piece I think ignores the criminality here in some very important ways.

First of all, Mr. Collyard was independently engaged in a seven-figure bank fraud scheme at the same time he was stealing money or enabling Bixby to steal money from victims. And he was committing, at the state level, this felony-level evasion of state taxes. So, he was out there committing three felonies, ongoing felonies, at the same time. I think it is

extremely material and relevant under the 3553(a), the sentencing statute, that Mr. Desender accepted his responsibility and didn't lie to the Court in order to try to get out of his plea. I understand that his conduct was not exemplary while he was out, but he didn't come into this Court and lie.

But mainly, let me talk about Mr. Collyard's history and characteristics, because I think they militate fairly strongly in favor of as protective of a sentence as this Court can get for the public. I think the totality of the record before the Court, including the materials in the Presentence Report, indicate that Mr. Collyard really is a lifelong fraudster. This is not a car dealer, the owner of a car dealership who got backed into a corner and decided to kite some checks. This is not somebody who, you know, out of desperation, out of situational desperation, committed an offense.

It's his way. It's what he does. I think the Court is aware, for example, that Mr. Collyard goes around telling people, I think women particularly, that he's a lawyer, some kind of real estate magnate. There are a number of women out there -- and I think the Court has received letters from some of them -- that say that, "Mr. Collyard sort of seduced me with his claims to being a real professional and having great acumen. He gained my trust, and then he stole my money." And

there are quite a few women out there who I think are saying that. The Court, I think, has some of that correspondence.

So, it appears he's really a serial fraudster. Look at his vocational history. His father, according to the Presentence Report, was a hard working steelworker and Mr. Collyard was apparently following in his footsteps until about 1989 when Mr. Collyard decided that the workaday world wasn't really for him. For the last 24 or 25 years, it has been apparently beneath Mr. Collyard to go work an honest week. He has been self-employed in various real estate development companies for the last 25 years, including, I would note, with Tom Petters for a couple years in the '90s.

To all it appears, his business activities are shot through with fraud. And indeed, Your Honor, I would suggest that the balance sheet in the Presentence Report -- and I'm talking about Page 12 -- is the balance sheet of a serial fraudster. First of all, it shows a sense of great entitlement. Gary Collyard, of course, gets to live in a home worth more than $1 million. Gary Collyard, of course, gets to drive around in Cadillacs and Porsches. And I'll tell the Court I've been receiving quite a few calls because I'm the prosecutor on this case from collection agencies wondering where these vehicles are because they're not paid for.

I would note, Your Honor, that although the residence is worth, according to the PSR, just over, you know,

about $1.1 million, it's got a $2.5 million dollar mortgage on it. That's interesting, I think. It certainly smells like fraud. I don't know how one, without lying, takes out $2.5 million dollars against a $1 million residence. That's quite a trick, but it is consistent with all of the other conduct that we've seen by Mr. Collyard.

Now, all of this luxury that we see reflected here is with OPM: Other people's money. According to the Presentence Investigation Report, Mr. Collyard reported that he has zero income and that he has a net monthly cash flow of almost $11,000, negative. Negative $11,000. You know, some people reduce their expenses when they can't meet their obligations, but not Mr. Collyard. Mr. Collyard hasn't really worked since 1989. He feels entitled to be well ensconced in luxury at other people's expenses.

His conduct and his nature seems to me to be entirely parasitical. I think his interest and characteristics, including the fact he doesn't file tax returns or keep up with any of his obligations, combined with his truly dishonest conduct before this Court, militates strongly under the statute in favor of 120-month sentence. And for that reason, Your Honor, we'd respectfully recommend 10 years.

THE COURT: Thank you.

Are there any victims here today who would like to

come on up to the podium and be heard? You're welcome to do so. When you come on up, please state your name and your involvement with Mr. Collyard.

JOHN O'DONNELL: Good afternoon, Your Honor. My name is John O'Donnell, and I was an investor in the Bixby transaction, as well as I have a friend that was actually employed by Gary Collyard who was the whistleblower in this case, that uncovered the case and the fraud that's occurred over the past several decades.

So, good afternoon, Your Honor. My name is John O'Donnell. In the interest of time, I speak for many of the victims here today. We have worked many years and spent many personal resources to finally get to the sentencing hearing for Gary Collyard. I would like to take five minutes to address the Court prior to your sentencing decision. As we have all witnessed and unfortunately learned, Gary Collyard is nothing he claims to be. He is not a real estate broker, he's not a securities broker, he's not an attorney, he's not a real estate developer, a former professional hockey player, a taxpaying citizen, or a victim.

It was all a facade. Gary Collyard has been exposed. The truth is, fraud and theft is a way of life for Gary Collyard. Gary Collyard has spent every waking hour of each day disregarding laws and living a life of lies and deceit to steal from innocent victims for his own personal

gain and greed. Gary Collyard uses people as pawns. He used his employees, his partners, investors, his attorneys, the Government and, last but not least, his own family. He will do and say anything for his own self-gratification and greed. Gary Collyard is not earnest, and his own greed was his ultimate demise.

This is not a case of a one time, isolated, spontaneous crime. This is a case of a career criminal that has managed to constantly break laws and evade the law for decades. Gary Collyard is charged with only two crimes in this plea agreement that we see, but the hundreds of victims know there have been many, many more crimes committed by Gary Collyard that he has not been charged with in this plea agreement and that you didn't see. Gary Collyard is nothing more than a lifelong fraud and serves no contribution to society.

Gary Collyard has made a career of robbing Peter to pay Paul. He begs, borrows and steals from any vulnerable, innocent victim he can find and defraud. And he continues to demonstrate time and time again absolutely no respect for the law. Regardless of what Gary Collyard continues to claim, he has finally been exposed, and the victims and the public now know the truth about Gary Collyard.

Gary Collyard is not a victim. But the real victims still have questions: Where's all the money? Gary Collyard

defrauded hundreds of victims of $4.2 million. He has money to pay thousands of dollars for expensive defense attorneys and [redacted] done immediately before and after pleading guilty to seven felony counts of securities fraud, bank fraud, and tax evasion. Paying thousands of dollars of the victim's money [redacted] done was his biggest priority before going to prison for up to ten years. Vanity was his first concern.

This is appalling to the victims. Where's the rest of the money that has been stolen? Your Honor, this is yet another case of whistleblowers making many personal sacrifices by stepping forward to expose Gary Collyard. Please reward these whistleblowers and encourage future whistleblowers with knowledge and evidence of fraud crimes to step forward by sentencing Gary Collyard to the maximum sentence in prison. Gary Collyard has demonstrated in this courtroom that he accepts no responsibility for his crimes. Gary Collyard is a repeat offender.

He was convicted of tax evasion with a slap on the wrist in 1998. And he was recently charged and convicted of the same crime, of five counts of tax evasion, within the past year. And today he continues to deny he has done anything wrong and shows no remorse and has not made a public apology to any of his victims when he was given the opportunity. We have all witnessed him constantly committing perjury and lying

to the federal investigators by contradicting his own sworn testimony over and over again in order to confuse the truth.

Gary Collyard has demonstrated he is a repeat offender. Gary Collyard knew he was going to be charged with securities fraud and was caught attempting to sell securities on January 31st of 2012 with his co-conspirator, Dennis Desender, once again snubbing the law. Please make Gary Collyard pay for his crimes. The hundreds of victims have lost $4.2 million and paid -- and paid dearly for Gary Collyard's crimes. And Gary Collyard has used these ill-gotten gains for [redacted] on the eve of his conviction and used his [redacted] procedure as a scheme and a legal ploy to avoid sentencing almost a year ago. His shameful actions have been -- become predictable. Despite all Gary Collyard's [redacted], the victims know who really hides behind his face. Gary Collyard have finally been exposed.

The victims have always paid for Gary Collyard, now it's time for Gary Collyard to pay. Your Honor, based on all the facts, on behalf of myself and the numerous other victims in this case, we respectfully ask the Court to sentence Gary Collyard with the maximum sentence in prison for the multiple crimes over his lifetime. Impose a maximum fine along with restitution to stop this predator from continuing to commit fraud and spare the public and his future victims from his

crimes and to promote a healthy respect for the law. After all, Gary Collyard is responsible for $4.2 million in loss for the victims. The maximum sentence is only one year in prison for every $420,000 in loss for each of the victims.

Thank you. After many years of sacrifices, pain, and resources, may justice finally be served.

THE COURT: Thank you, sir.

JOHN O'DONNELL: You're welcome.

THE COURT: Are there any other victims who would like to be heard today?

MICHAEL NOONAN: Good afternoon, Your Honor. My name is Mike Noonan. I'll try and keep this shorter than some of the letters that I've written to you previously, but I want to thank you to give me this opportunity to address your court. If I may, I would like to say thank you to everyone who has helped the group of John O'Donnell, Pamela Hagel, Carolyn Carpentier, Roger Henderson, and Phil Byrge -- God rest his soul -- and myself bring this case to a closure today.

There are many of you -- there are too many of you to mention by name, but they include investors from the U.S. federal Government, the State of Minnesota, newspaper reporters, as well as those who have assisted us getting our information through the proper channels. We're extremely grateful to all of you. And I also want to pass

congratulations also to the prosecutors representing the federal and state authorities. I'm sure this case has been annoying as a summer cold.

Your Honor, everyone in this courtroom is here today because Gary has finally run out of excuses. He can't claim his [redacted] again. His plan that he submitted to you to mentor children to remain out of prison is as laughable as him having to give a speech to the law students at the University of St. Thomas about -- and this is Gary's quote -- "the pitfalls of being a new attorney."

And he's not scheduled for any more excruciating [redacted] today. You would have thought that a former professional hockey player would have been able to withstand a little discomfort, but that's all -- that's not really true, Gary. You and I only played recreational broomball together for a number of years. I have known Gary Collyard longer than anyone else in this courtroom, unless one of his relatives is here today, and I do not recognize any of them.

I go as far back as high school and college classmates with him since 1965, socialized until the early '80s with him, and then got reacquainted in the early 2000s. I thought over those many years that we were friends. I quickly came to realize that clearly this wasn't the case when on March 18th, 2008, my coworker, on my 12th day of employment

with Gary Collyard, made the discovery that Gary Collyard was a fraud. I came to learn that he was an equal opportunity crook, as no one is above his wanting their possessions to enrich his life, his own life.

This includes both family and people that called him a friend. This isn't a person who came from a broken home where he was abused, unloved, or unwanted. He didn't grow up in the 'hood around criminal elements where there were gangbangers that he met on the street every day. Rather, he grew up in the same loving, hard working, blue-collar Catholic environment that many of St. Paul's north and east side families grew up in. He spent his entire educational years attending private schools, but at some point in his career he willingly and freely chose to become a criminal.

Roger Anderson, Phil Byrge and I, three of his victims, spent a combined 11 years working in U.S. military intelligence with top secret Government clearances. We learned to collect information regarding enemy forces and foreign agents. We were taught to investigate, decipher, and detail our findings. Upon analyzing Gary's momentous wealth of documents and conversations with many of his victims, it is apparent to us that he could be classified as a habitual white-collar criminal and a detriment to any civil community. His claim in his last motion of being an earnest businessman or person is highly comical.

He pretended to be a real estate broker when he wasn't even holding a license as a salesman since 2003. He paraded himself as a law school graduate, even creating business cards for his secretary saying "paralegal," which she wasn't. The only law school he probably ever went to was while working at construction jobs. Besides attaching "broker" and "juris doctorate," he also signed his business correspondence as having an MBA, while his self-written profiles claim he had four of them. Actually, it took him 19 years to earn his only degree: A BA in political science.

He sold investments without a license. There were phone conversations I personally heard to clients that highly inflated the value of Bixby Energy stock and thoroughly misrepresented where that company was standing and where it was headed. Gary has never been truthful in any of his business or personal actions or while under oath. We found a former employee of his -- one who he didn't name when asked in the deposition, a pretrial deposition -- who said Gary was the most devoid person of morals and ethics he had ever met. His claims of unknowing clearly contradict what I would experience as I worked two months for him.

He denied ever having employees, but there were at least six of us. It would take two trial court judges and a ruling from the IRS to say that we were. He would issue to Pamela and me false paperwork for us to file with the State of

Minnesota and the IRS, using numbers that didn't exist and never sending his copies to those Government agencies. He used to tell Phil, Roger and myself that he was having lunch often with the former Archbishop of St. Paul, Bishop Flynn. But when asked, the Bishop denies even knowing Gary.

We know that he had three mistresses at the same time, telling them he was a wealthy, single attorney when, in fact, he was a married father of two. He was even so bold and arrogant, he took one mistress to the Lake Minnetonka home of another mistress, claiming it was his. Gary suggests that he wasn't aware what he was doing. I submit to this Court that he is trying to confuse everyone into believing he is not guilty of these crimes. He blames the economic turndown -- downturn on many of his business crimes, but the only downturn was in his own pockets.

Did he ever stop to think about how embarrassing this would be for his family if caught? No. He only thought of himself, as usual. How does the recession justify submitting fraudulent numbers or names to a lending institution? Couldn't he have just as easily filed bankruptcy? No, because he would have exposed himself as a fraud who would not be able to use the money personally rather than going into his business.

Gary's crimes not only victimized those lending institutions that were too stupid to do their homework, but he

went after the vulnerable by earning their trust. He was good at it, just like his former partner, Tom Petters, taught him. Birds of a feather, fraud, and manipulation. Gary used to voice a few times in the office that he'd exceed success of Petters because Petters doesn't have a college degree like Gary does.

Gary at least once a week would claim to everyone around him that his wealth was worth 30 million. How stunned we were to find that he was scamming banks after assuming that he was a talented money manager. He is not either a role model or a pillar of society, as he claims, or as a father, husband or businessman. He doesn't believe that rules, laws, or even God's Commandments pertain to him.

Apparently, Gary, when you were in the seminary -- I'm sorry, I didn't mean to address him -- but he went to the seminary for two years and learned about God's Ten Commandments, apparently he feels that only about six or seven of them really pertain to him. Please tell him, Your Honor, that he should not spend his golden years living better than the wealth or health he took from others. Please tell him that his perfectly styled hair, GQ clothes, rich food, affluent home, and expensive cars have to be purchased with honestly-earned funds.

Tell him I would rather be the "simpleton" he called me because he couldn't motivate me with money, than the loser

he is today. Remind him I grew up around money and that all the money in the world can't buy you class; he is proof of that. Let him know I was the first one who approached the FBI -- in April 2008, Mr. Mauzy -- when he still was conducting his criminal activities to report what Pamela and I knew at the time.

I clearly have never been exposed to this kind of an individual who puts himself above and beyond anything else in life. The only love he has for himself. He is the most dishonest, deceitful, despicable human I have ever met. He is Satan personified in my opinion. I ask that you limit his freedom to prey on any more citizens. Sure, you have to follow the Sentencing Guidelines, but the total sum of his crimes well exceeds the recommended term. I ask you, Your Honor, to rid us of this narcissist for as long as possible. I cannot, in my good Christian conscious, see any redeeming quality in this deviant being that could justify him returning to our streets.

Once again, thank you, Your Honor.

THE COURT: Thank you, Mr. Noonen.

Is there anybody else who would like to be heard today? You're welcome to come forward.

Why don't you start by telling us your name.

SYLVIA KIDD: My name is -- excuse me, I've got a cold -- is Sylvia Kidd. And, um, I am one of those ladies

that was spoken of earlier. Um, Gary and I were the best of friends for many, many years, all to find out that he's probably one of the biggest liars I've ever known. For nearly 15 years, he told me that he was single, didn't have children, didn't have a wife, and I dated him. He knows very well I would not have gone out with him had I known. I feel really bad for his children and for now his ex-wife.

At the time that we met, I was working three jobs to put three children through school. He knew that I had sold my home in Des Moines before I had moved up here, and had put the money away for my children and for my retirement, and that I wouldn't have to live in an apartment the rest of my life. I trusted him, and I believed that he really loved me. I was exactly what he was looking for: I was single; I was very frugal with my money, which I didn't have a lot of.

Just waiting for the chance when he could take advantage of me, and he did. He needed my money immediately. He had a great, big deal that was coming down; he didn't have the cash. He had $19,000 -- or 18 -- excuse me -- $19 million to his name, so he knew I was -- I could trust him to pay me back right away. So, I withdrew my 401k. Thirty days and it was going to be paid back, 10 percent interest, which he denied once I found a lawyer to represent me to get it back.

I didn't get it back in 30 days. I didn't get it back in 60, 90, 120 days. I didn't get it back for years,

until I found a lawyer. We met, we discussed it, Gary agreed to pay part of it, but I had to pay 28,000 in taxes on that 401k because he didn't get it back to me in time. I wasn't paid back for that. I had to pay for my own attorney; I wasn't paid for that. I trusted him.

I believe that he was an attorney; he said he was. He said he was a financial adviser. Why wouldn't I trust him to invest part of my 401k? He needed half of it; the other half he was going to invest for me. He got me into a stock account that was for qualified people only. I don't know about stocks and stuff. I've never had that kind of money. He said that some paper he had me sign said that I had to be making 100,000 a year and be worth $1 million in order to get into this stock, but he said he could get me into it because he had some pull.

Why wouldn't I want to get into something that he could make me all this money? It wasn't going to be illegal; it was a company right here locally. Yeah. You know how that turned out. He lied to me over and over again, and I know now when he lies to me because his lips are moving. Everything he told me was a big lie.

I don't know how people like this can exist and how many other ladies -- I know of two others. In fact, one of the other ladies read my letter and I read hers, and I would have thought it was me writing the other letter. It was the

exact same scenario. And I don't know this for sure, but I would guess the money he needed from me immediately was to pay off one of the other girls. Where did he get this money that he paid me partially off? He didn't have any money to his name. Go from one gullible woman to another, steal everything we have, and be on your way to the next person.

He not only stole my money from me, but what he stole from me was my trust. I trusted him, and I thought all people could be trusted. And I know it's gullible. I wouldn't lie to somebody; why would somebody lie to me? I don't understand where he was coming from. Now I question each person that comes up to me. My chances of finding another man are probably none because I trusted him and he used me. I don't trust anymore.

Gary does not deserve to be out in the streets where he can take money from us gullible women. This was a lot of years ago. I knew him for 15 years, and I moved up here in 1985. He's just a really bad egg. I don't feel bad that he's going to prison because he belongs there. I'm a Christian woman, and I believe that he deserves to get what the law says he should get, not any more, not any less. But I think the law needs to take into consideration what he has done to us ladies that trusted him, and I'm not alone.

And I do have something I'd like to say to Gary, if I may.

THE COURT: You may do that, but you need to stand right there and say it.

SYLVIA KIDD: Okay. That's fine.

THE COURT: Yeah.

SYLVIA KIDD: But --

THE COURT: But you also need to speak in the mic, so why don't you --

SYLVIA KIDD: Oh, okay. Gary, you owe me a new wardrobe. Remember the night when you told me if I could get down to 110 pounds you would buy me all new clothes? Remember? Oh, yeah, you remember. Well, I got down, I lost that 15 pounds, and so now he owes me a new wardrobe. He owes me the money that I had to spend for taxes and legal counsel. He owes me the trust that he stole from me. I don't think he can ever pay that back, and I think this Court needs to recognize that. Thank you.

THE COURT: Thank you, Ms. Kidd.

Who else wishes to be heard?

PAMELA HAGEL: Hi. My name is Pamela Hagel. Pamela --

THE COURT: Okay. Speak right into the mic, please. And your name again is Pamela Hagel, right?

PAMELA HAGEL: Yep. I really wasn't prepared to come and say anything. However, after listening to Sylvia, I guess I wanted to say that I'm the one who went to work for

Gary first, and I'm the one who discovered his fraud. And same thing: I was a very trusting and earnest person when I went to work for him. I listened to him tell people -- he didn't send people to Bob Walker or to Bixby.

He found their vulnerable point, whether it was a man that had a baby that was in a car accident that was a paraplegic for life at two, asking him, "If you could have anything, all the money that Bixby can give you, what would you do with it?" And he said, "I would spend time with my children." And he said, "Bob Walker likes to make millionaires out of people. Friends and family, that's what we're bringing in now. Come into Bixby. Thirty days, 60 days, 90 days, this is going to come to an end and you will have those millions." He invested $100,000.

Another friend of mine who Gary spoke with -- he didn't send him to Bob Walker -- invested $310,000 with Bixby because he believed Gary. All these people have lost their money, not just people I know but many, many people, obviously. And he still denies it. I have been to every one of these hearings, I've never ever heard him say he's sorry, that he wished he wouldn't have done it, that he accepts any responsibility for it. In fact, Mike worked with me and some other people in our office. As Mike said, Gary never recognized that he had employees. We had to fight to be able to collect unemployment even.

But the thing that I wanted to say about that is every person that came up against Gary that worked with him, he trashed their reputation. He called them every name in the book. He went around telling people that, "Oh, they were an alcoholic" or they were, you know -- well, I can't think of the word -- a tramp or -- it was something. I can't remember. But anyway, he trashed people's reputations.

Gary always looked for the vulnerability in every person so that he could get money from them. I hope that the Court recognizes -- I'm sure you do recognize -- everything that Gary has done, recognize the fact that he has not accepted responsibility for any of this. And I hope he gets the maximum sentence that the Court can impose. Thanks.

THE COURT: Thank you.

Is there anybody else who'd like to come forward?

(No response.)

THE COURT: All right. Mr. Collyard, would you come on up for sentencing, please.

Gary Albert Collyard, you've been charged with conspiracy to commit securities fraud and conspiracy to commit bank fraud. Based upon your guilty pleas to those counts, I now accept the plea agreement and find you guilty of those offenses. It is -- you will be -- it is therefore adjudged that you will be committed to the custody of the Bureau of Prisons for a period of 120 months. This term consists of 60

months on Count 1 and 60 months on Count 2, to be served consecutively.

No fine is recommended. Mandatory restitution is applicable, and there is a stipulation that you will pay restitution in the amount of $5,672,994.44, as per the stipulation. That amount is due and payable immediately. Over the period of incarceration, you shall make payments of either quarterly installments of a minimum of $25 if working non-UNICOR, or a minimum of 50 percent of monthly earnings if working UNICOR.

I will recommend that you participate in the Inmate Financial Responsibility program while incarcerated. Once you are released, payments of not less than $100 per month are to be made over a period of five years, commencing 30 days after release from confinement. Your payments will be made to the clerk of the -- why don't you focus on me. I'm sure Mr. Mauzy, if he has something to raise with me, he'll raise it later. Thank you.

Your payments should be made to the Clerk of the United States District Court of the District of Minnesota who will forward your payments, in turn, to the victims. The interest requirement is waived.

On release from imprisonment, you will be placed on supervised release for a period of three years. This term consists of three years on each of Counts 1 and 2, to run

concurrently. The following mandatory conditions will be applicable while you are on supervision. Once you are released from prison, you have 72 hours to report to the nearest U.S. Probation and Pretrial Services Office. You shall not commit any crimes: Federal, state or local.

Mandatory drug testing will be suspended based on the Court's determination that you pose a low risk of future substance abuse. You shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. You shall cooperate in the selection of DNA as directed by your probation officer. And you shall pay your restitution in accordance with the Schedule of Payments sheet that will be attached to the judgment in this case.

There are standard conditions of supervised release, that is rules that will supervise your conduct. You must abide by those, including the following special conditions. You must provide your probation officer access to any requested financial information, including credit reports, credit card bills, bank statements, and the like. You may not incur any new credit charge or open any new line of credit without pre-approval from your probation officer. You may not hold employment with any fiduciary responsibility without pre-approval of your probation officer. If you're not employed when you get out of prison, you may have to perform up to 20 hours of community service per week until you are

employed. A $200 special assessment for the Crime Victims Fund is required by statute, to be paid immediately.

Now, did I get that number wrong, Mr. Mauzy?

MR. MAUZY: May I have a moment, Your Honor?

THE COURT: You may.

MR. MAUZY: I have nothing additional, Your Honor.

THE COURT: Okay.

MR. MAUZY: I do have a request for voluntary surrender and a request that --

THE COURT: Let me finish my reasoning, but we'll get to that.

The restitution breaks down as follows: $1,232,010 on the bank fraud, $4,440,784.44 on the Bixby securities fraud. Okay?

Sir, sentencing is the most difficult thing that a Federal Court does. And in determining how to approach a sentence, the Court starts with the Sentencing Guidelines but does not presume they are reasonable. They are just a starting point in assessing a fair and reasonable sentence. And the goal is to come up with a sentence that is sufficient but not one day greater than necessary to achieve the goals of sentencing. And my view, and I'm going to explain why this is the sentence that is not one day more than necessary to achieve the goals of sentencing.

So, what factors do I consider? Well, I look at the

seriousness of the offense. I want to provide just punishment for the offense. I want to deter you from committing crimes in the future. I want to deter others from committing similar crimes. I want to protect the public.

And as Mr. Mauzy pointed out, I want to make sure I am avoiding unfair disparities between your sentence and the sentence of other culpable Codefendants or individuals involved in the fraudulent scheme, and that's exactly what I focused on here. You've been accused of engaging in two separate fraudulent schemes in this case. First, conspiring with Mr. Walker and others to sell stock and bonds in Bixby Energy to victim investors by making false, misleading, and deceptive statements. Two, fraudulently obtaining loans from multiple financial institutions based upon representations about your financial successes, which were patently false and at the same time apparently evading taxes, something to which you have pled guilty.

And the Government is right here, and there's a common theme among the victims. You have engaged in a history of lying. Not only have you engaged in a history of lying, you don't ever take responsibility for your actions. You were convicted in 1998 for submitting false expense reports to the IRS during a civil audit. You've currently pled guilty to evading your tax responsibilities to the State of Minnesota. And as you heard from these victims -- and I read in many,

many more letters that I received -- you are accused of lying and cheating for much of your life.

Now, Mr. Mauzy is correct: This Court needs to focus the sentence on this case, and I have done so. But one of the factors the Court takes into account in sentencing is you and your character and whether or not your actions suggest that you are deterred from committing future crimes. And I haven't been on the bench as a District Court Judge long, three years now. I have never, ever seen a criminal Defendant come up here at sentencing and fail to at least show some remorse or apologize in some fashion to the victims in the room, even if you believe, which I presume you still do, that you're somehow innocent of these charges. No acknowledgment of people's pain.

That is a serious problem, because what that suggests is that you're not easily deterred. And one thing that distinguishes you from Mr. Desender, although I will agree he's not a model citizen by a far stretch of the imagination, he did demonstrate acceptance of responsibility and remorse. Big difference. As soon as you were -- as soon as I scheduled a sentencing in this case, we started this odyssey through the motion to withdraw. And I'm not going to repeat what I said here today because that odyssey is reflected in this Court's decision not to deduct from your offense level three points or two points for acceptance of

responsibility.

I hope that this prison term is sufficient. It's the maximum I can give you. I'm not convinced that it is, because there is nothing either in your life that I've heard of or anything in this case, especially the way you've treated your victims here today, that suggests that you're going to be deterred at all. I can only hope that you will take this occasion to think clearly about what matters in this world and take this occasion -- that is, this time in prison -- to at least make the rest of your life one in which you are law abiding, in which you do respect others, in which you don't engage in lying, cheating, or stealing. Make that your challenge when you are in prison because in our society, if people don't take accountability for their actions, we don't have justice. And that's what this Court is here to promote, and that's what sentencing is all about.

And so again, this sentence is not one day greater than necessary to achieve the goals of sentencing, and I am not yet convinced that you will be deterred. You have not demonstrated anything to suggest that you will. I am -- I have given careful consideration to what your counsel has argued today regarding the disparity about financial gain, about whether or not your criminal history overstates your -- criminal history score overstates your criminal history, whether there's an unwarranted sentencing disparity with

Mr. Desender, and to recognize that you've been law abiding since you've been released.

I have taken all of that into consideration, and I will say that I disagree with Mr. Mauzy about your criminal history score. I don't think it overstates your criminal history at all. The crime that you were charged with was a crime of dishonesty, not a driving revocation or something like that. And keep in mind that were you to have been sentenced in the State Court action before this -- which is just a matter of serendipity -- you might even have a higher criminal history score.

But criminal history score of two clearly reflects the seriousness of your criminal history to date. And as I've said, there's no unwarranted sentencing disparity with Mr. Desender, very significant difference in how you've approached this and whether you'll be deterred. Had you received three points for acceptance of responsibility, you likely would have received a sentence lower than Mr. Desender because that would have taken you down to a sentencing range of 78 to 97 months, and you might have gotten the lower sentence. So, that does distinguish you.

You have the right to appeal your conviction if you believe that your guilty plea was unlawful or invalid for any reason, and ordinarily you have the right to appeal your sentence. In your plea agreement, you agreed that you would

only appeal your sentence if it exceeded the top of the applicable Guideline range as determined by the Court, which is not the case here. But nonetheless, if you believe you have a basis to appeal your conviction or your sentence or both, you must file a Notice of Appeal within 14 days after entry of judgment of conviction in this case. And if you cannot afford to pay the costs of that appeal, you can apply *in forma pauperis*. And if you establish indigence, then the Court will file the Notice of Appeal on your behalf and forward the PSR and the Amended PSR to the Eighth Circuit.

Mr. Mauzy, do you wish to be heard on self-surrender?

MR. MAUZY: Yes, Your Honor. I would request that he be permitted a voluntary surrender, and that the date be September 3rd, 2013. I'd note that the report from the Probation Office recommends voluntary surrender, and he has followed all the conditions of release.

I'd secondly request that he be designated at Duluth at the Federal Correctional Institution so that he may be visited by his family members.

Third, if eligible, I would request that the Court recommend participation in the Residential Drug Abuse Program.

THE COURT: Does the Government wish to be heard?

MR. MacLAUGHLIN: Yes, Your Honor. Mr. Collyard, excuse me.

At this time, Your Honor, the United States moves to have this Defendant taken into custody right now. Now that he is a convicted Defendant, we are no longer under the Bail Reform Act. We're under Title 18 U.S.C. § 3143. Under that statute and under Eighth Circuit law interpreting it, Mr. Collyard now bears the burden by clear and convincing evidence that he's going to show up for sentence and by a preponderance of the evidence that he's not a danger to any other person in the community.

I respectfully submit that he has no chance of meeting that burden. For the most part, Your Honor, we take a Defendant's word for it that he's going to show up. That is the primary backbone of release under 3143. How can anybody take this Defendant's word for anything? Honestly. He now knows he's got a 10-year sentence. Frankly, I don't know what's keeping him around. He lives in a house that's in foreclosure. And although he has kids, his connection with other human beings seems to be rather illusory.

I would strongly suggest that he is a very significant risk to not show up for a 10-year sentence at the age of 63. And I would certainly urge the Court to consider that he cannot meet the burden of proving by clear and convincing evidence that he will show up. With respect to danger to the community, I -- even before the preponderance standard, how can he establish he's not a danger? He has been

a danger to the community and to other persons for 30 years. He's done nothing but be a danger to the community.

I would note, Your Honor, that in this letter that the Court received today from Richard Scherber, Executive Director of Minnesota Adult and Teen Challenge, Mr. Scherber notes that Mr. Collyard is currently involved with our capital campaign to raise over $2 million for start-up of our new center down in Rochester. What's he doing out there raising money? This guy is dangerous. And under 3143, he cannot possibly meet his burden.

I would also point out, Your Honor, that we put right in our pleadings that we were going to move for custody. He has been on notice of it. I mean, you know, usually the Defendants say, "I need a chance to put our affairs in order, my affairs in order." He's had that chance. We've put him on notice when we filed our papers a month ago. Please, Your Honor, take him into custody.

THE COURT: Mr. Mauzy, do you wish to respond?

MR. MAUZY: Your Honor, he did review the Presentence Report with me. He knew the Sentencing Guidelines that he was facing. He appeared today. I note that the release status report submitted to the Court that I was provided a copy, on the question, "Has Defendant met conditions of release," the box that is checked is the "yes" box.

He's complied with all of the conditions without deviation, he reported to the supervising office as directed; not involved in fiduciary functions in employment; home inspections performed at his residence; no contraband, illegal activity; regular record checks -- including one done July 26th, 2013 -- revealed no unknown criminal history or pending court matters.

He did appear for sentencing. He knew that he was going to be sentenced to prison. The question of the length was only -- the only issue, Your Honor. The recommendation by the probation officer was that, "Mandatory detention is not applicable based on the Defendant's adjustment to pretrial supervision, recommend the Defendant be continued on a bond under the same conditions and afforded a period of voluntary surrender." I have asked for September 3rd, Your Honor.

He has made all of his court appearances. He's been in touch with me. He knew he was going to be sentenced to prison this afternoon. He appeared in this court for that sentencing. He will appear, I have no doubt, for voluntary surrender if the Court provides that opportunity to him.

THE COURT: So there is a fiduciary obligation provision in his release allegations? Is there a condition? Because it concerns me that there is and he's raising money. I can't understand that.

MR. MAUZY: For charitable purposes, Your Honor --

THE COURT: That doesn't matter. He's taking money from people.

Ms. Parsons?

MS. PARSONS: Your Honor, I do not have a copy of his conditions of release at this time. I do have a copy of the Bond Report, what was recommended, but I'm not --

THE COURT: All right. Actually, we're going to take about 10 minutes. I'll talk to Probation, and we'll come back and discuss this. Court is temporarily adjourned.

(Short break taken.)

THE COURT: Mr. Mauzy, as you know, the Court can make a recommendation to the Bureau of Prisons. I can make a recommendation that he be imprisoned somewhere in Minnesota. The Bureau of Prisons does what they want then, but I can certainly make that recommendation, and I will do that. Similarly, I can make the recommendation about the RDAP program. What's most important about the RDAP program is that they'll ask Mr. Collyard whether he wants to participate, and he has to express an interest in doing so. So, I will also make that recommendation.

MR. MacLAUGHLIN: Your Honor, I would just like to point out so the Court is aware that Mr. Desender is actually at the Duluth prison camp. I just wanted the Court to know that.

THE COURT: Okay. I'm not going to specify a

particular prison in Minnesota. I will just simply recommend something close to home. But Mr. Collyard, based on this record and based on the recommendation of Probation, I am going to deny your request for self-surrender, and I'm remanding you to the United States Marshal today.

Anything further from the Government?

MR. MacLAUGHLIN: No, Your Honor, thank you.

THE COURT: Anything further from the defense?

MR. MAUZY: No, Your Honor.

THE COURT: Court is adjourned.

(WHEREUPON, the matter was adjourned.)

* * * *

CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter

Heather A. Schuetz, RMR, CRR, CCP
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EXHIBIT E

AO 245B (Rev. 10/11) Sheet 1 - Judgment in a Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
Gary Albert Collyard

AMENDED JUDGMENT IN A CRIMINAL CASE
Case Number: **12-CR-58 SRN**
USM Number: **08256-041**
Social Security Number: 9689
Date of Birth: 1949

William Mauzy and Casey Rundquist
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s): **One and Two**.
[] pleaded nolo contendere to counts(s) which was accepted by the court .
[] was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Commit Securities Fraud	05/2011	One
18 U.S.C. § 371	Conspiracy to Commit Bank Fraud	09/2011	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on counts(s) .
[] Count(s) (is)(are) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

August 1, 2013
Date of Imposition of Judgment

s/Susan Richard Nelson
Signature of Judge

SUSAN RICHARD NELSON, United States District Judge
Name & Title of Judge

August 12, 2013
Date

AO 245B (Rev. 10/11) Sheet 2 - Imprisonment

DEFENDANT: GARY ALBERT COLLYARD
CASE NUMBER: 12-CR-58 SRN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 months. This terms consists of 60 months on Count 1 and 60 months on Count 2, to be served consecutively.**

[X] The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a Minnesota facility to be close to his family. Also, that the defendant be allowed to participate in the 500-hour Residential Drug Abuse Program offered by the Bureau of Prisons if he is eligible.

[X] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district.
[] at on .
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before on .
[] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: GARY ALBERT COLLYARD
CASE NUMBER: 12-CR-58 SRN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years. This terms consists of 3 years on each of Counts 1 and 2, to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[X] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GARY ALBERT COLLYARD
CASE NUMBER: 12-CR-58 SRN

SPECIAL CONDITIONS OF SUPERVISION

a Within 72 hours of the defendant's release from the custody of the Bureau of Prisons, the defendant must report to the probation office in the district where he is released.

b The defendant shall comply with the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall not commit another federal, state, or local crime.

d The defendant shall not possess a firearm, ammunition, destructive device, or other dangerous weapon.

e The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated by 18 U.S.C. §§ 3563(a) and 3583(d).

f Mandatory drug testing is suspended based on the Court's finding that the defendant poses a low risk of future substance abuse. 18 U.S.C. §§ 3563(a)(5) and 3583(d).

g The defendant shall provide the probation officer access to any requested financial information, including credit reports, credit-card bills, bank statements, and telephone bills.

h The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the prior approval of the probation officer.

i The defendant must not hold employment with fiduciary responsibilities without the prior approval of the probation officer.

j If the defendant does not find full-time, lawful employment as deemed appropriate by the probation officer, the defendant may be required to do community-service work for up to 20 hours per week until the defendant becomes employed. The defendant may also be required to participate in training, counseling, or daily job searching as directed by the probation officer.

AO 245B (Rev. 10/11) Sheet 5 - Criminal Monetary Penalties

DEFENDANT: GARY ALBERT COLLYARD
CASE NUMBER: 12-CR-58 SRN

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200.00	$0.00	$5,383,014.44

[] The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[X] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	**Total Loss	Restitution Ordered	Priority or Percentage
See supplemental list		$5,383,014.44	
TOTALS:	$0.00	$5,383,014.44	0.00%
Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.			

[] Restitution amount ordered pursuant to plea agreement $.

[] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[X] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[X] the interest requirement is waived for the [] fine [X] restitution.

[] the interest requirement for the: [] fine [] restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996

AO 245B (Rev. 10/11) Sheet 6 - Schedule of Payments

DEFENDANT: GARY ALBERT COLLYARD
CASE NUMBER: 12-CR-58 SRN

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [X] Lump sum payment of **$5,383,014.44** due immediately,

[] not later than , or
[X] in accordance [] C, [X] D, [] E, or [X] F below; or

B [] Payment to begin immediately (may be combined with [] C, [] D, or [] F below); or

C [] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [X] Payments of not less than **$100** per month are to be made over a period of 5 years commencing 30 days after release from confinement. Your payments should be made to the Clerk of U.S. District Court for the District of Minnesota, who will forward your payments to the victim.

E [] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [X] Special instructions regarding the payment of criminal monetary penalties:
While incarcerated, the defendant must make payments as follows: If the defendant is working UNICOR, he must make monthly payments of at least 50 percent of his earnings. If the defendant is not working UNICOR, he must make quarterly payments of at least $25. It is recommended the defendant participate in the Inmate Financial Responsibility Program while incarcerated.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[] Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[] The defendant shall pay the cost of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7)penalties, and (8) costs, including costs of prosecution and court costs.

EXHIBIT F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70300 / September 3, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15448

In the Matter of GARY A. COLLYARD, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Gary A. Collyard ("Respondent" or "Collyard").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Collyard, age 64, was the sole owner and control person of The Collyard Group, LLC ("Collyard Group"), a limited liability company with its principal place of business in Minnetonka, Minnesota. From at least 2004 to November 2007, Collyard acted as an unregistered broker or dealer in connection with the offer and sale of the securities of Bixby Energy Systems, Inc. ("Bixby"). During the relevant period, Collyard was a resident of Delano, Minnesota. He currently resides at the Duluth Prison Camp in Duluth, Minnesota.

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On February 27, 2012, Collyard pled guilty to one count of conspiracy to commit securities fraud in violation of 18 U.S.C. 371 and one count of conspiracy to commit bank fraud in violation of 18 U.S.C. 371, before the United States District Court for the District of Minnesota in United States v. Gary A. Collyard, No.12-cr-58 (SRN). On August 1, 2013, the court entered a judgment against Collyard. He was sentenced to a prison term of 120 months followed by three years of supervised release and ordered to make restitution in the amount of $5,672,994.44.

3. The counts of the criminal information to which Collyard pled guilty alleged, inter alia, that from at least January 2006 through May 2011, Collyard, conspiring with others, and by the use of means and instrumentalities of interstate commerce, used and employed manipulative and deceptive devices and contrivances in connection with the sale of Bixby securities, and made untrue statements of material facts and omitted to state material facts necessary in order to make the statements not misleading in connection with the sale of such securities. The criminal information further alleged that Collyard, conspiring with others, devised a scheme and artifice to defraud multiple federally insured financial institutions and to obtain money, funds, and credits owned by and under the custody and control of those institutions, by means of materially false and fraudulent pretenses, representations, and promises.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act;

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

EXHIBIT G

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. 3-15448
GARY A. COLLYARD)

ADMINISTRATIVE PROCEEDINGS - PRE-HEARING CONFERENCE

PAGES: 1 through 31

PLACE: Securities and Exchange Commission
175 W. Jackson Blvd.
Suite 900
Chicago, IL 60604

DATE: Thursday, October 17, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 2:15 p.m.

BEFORE (via telephone):

BRENDA MURRAY, CHIEF ADMINISTRATIVE LAW JUDGE

APPEARANCES:

On behalf of the Securities and Exchange Commission:
JONATHAN S. POLISH, ESQ.
THU B. TA, ESQ.
Division of Enforcement
Securities and Exchange Commission
175 West Jackson Blvd.
Suite 900
Chicago, IL 60604

On behalf of the Respondent:
ROBERT KNUTSON, ESQ. (Via telephone)
9372 Creekwood Drive
Eden Prairie, MN 55347

Also Present:
Gary Collyard (Via telephone)

PROCEEDINGS

JUDGE MURRAY: Let's go on the record. My name is --

MR. KNUTSON: Let me interrupt right now. If this is something where I should be talking to Mr. Collyard about whether I'm going to represent him or not, I'm not so sure that this is something that I want recorded -- I mean, that's --

JUDGE MURRAY: Could I start it, and then we'll take appearances of who is on the phone call, and then we'll start the discussion; is that okay?

MR. KNUTSON: Well, I think we -- I just want all of you to know that I have not agreed or nor have I talked to representing -- I mean, anything other than the case that's in Minneapolis in the Federal District Court.

JUDGE MURRAY: Well, let me -- let's go on the record, and I'll state who I am, and then the Division of Enforcement will say who they are, and then you'll say for the record who you are.

And then I will tell you why I've ordered this pre-hearing conference in this administrative proceeding, and if you don't want to participate, you will say you don't want to participate. All right.

MR. KNUTSON: Well, I'm not saying I don't want to participate, but I think we need some kind of a postponement so I can discuss this with Mr. Collyard and find out what this administrative hearing is all about.

Has the other one been abandoned, the District Court case?

JUDGE MURRAY: We're not going to discuss the merits of anything until I establish that this is a pre-hearing conference held in Administrative Proceeding File No. 3-15448, which is an administrative proceeding before the United States Securities and Exchange Commission In the Matter of Gary A. Collyard, C-o-l-l-y-a-r-d -- and let me just see -- the order instituting proceedings was issued on September 3rd, 2003.

Okay. Who do I have on from the Division of Enforcement? Is that a Mr. Jonathan S. Polish?

MR. POLISH: It is, Your Honor, and with me --

JUDGE MURRAY: Okay.

MR. POLISH: -- is Thu Ta with us who is also a member of the staff of the Division of Enforcement.

JUDGE MURRAY: Okay. Good.

And who represents Mr. Gary A. Collyard?

MR. KNUTSON: I don't know if -- I don't know if -- this is Robert Knutson. I don't know if I'm going to be representing him or not. I've got to find out at least -- I guess, there's a possibility I will if the hearing is going to be held in Minneapolis.

JUDGE MURRAY: Well, so, you haven't communicated with the gentleman?

MR. KNUTSON: No, I haven't. I didn't even know. I was gone for well over a month, but -- until just days ago I didn't even know that this hearing was going on.

JUDGE MURRAY: Okay. Well, let's start from the beginning.

I think the agency puts on the service list the name of the representative of the defendant or respondent from the underlying action, so, I guess, you must have represented Mr. Collyard in the other case.

MR. POLISH: And, Your Honor -- I'm sorry, this is Jonathan Polish for the Division, and just for the record, Mr. Collyard, himself, is participating telephonically.

JUDGE MURRAY: Oh, he is?

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MR. POLISH: Yes.
JUDGE MURRAY: Oh, okay. Well, let's -- okay. So, let's see.
Your name is Mr. Knutson is it, K-n-u-t-s-o-n? You're an attorney.
MR. KNUTSON: Knutson, not -- Knutson (pronouncing).
JUDGE MURRAY: Knutson -- Knutson.
And you're an attorney; right?
MR. KNUTSON: Yes.
JUDGE MURRAY: Okay. All right.
Well, see if we -- Mr. Collyard, I apologize. I didn't know there was another person on the phone.
Mr. Collyard, are you present on the phone?
MR. COLLYARD: Judge Murray, this is Gary Collyard, and I am present, yes.
JUDGE MURRAY: Okay. Good. All right.
Well, let me -- let's -- we'll try to take it one at a time.
This is the Securities and Exchange Commission in what we call a follow on proceeding. It's a type of proceeding where there has been another action, either a criminal or a civil action

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in the District Court. Most of the time it's in the Federal Court; sometimes it can happen in a state court.
Based on that state or federal prior action, this agency, under the Securities and Exchange Act of 1934, has the authority to sanction a person based on the -- what we call the underlying action, okay.
It can take action against a person. It can bar a person from the securities industry. That's basically what it can do, and it can order disgorgement and it can put on a cease and desist.
Now, if I'm saying something wrong, and Mr. Knutson or the Division disagrees with me, let me know, but that's my understanding.
So, that's what this administrative proceeding is all about.
What should this agency do based on this underlying proceeding. There are two separate matters -- two separate matters, and it doesn't even make a difference if the other underlying action is being appealed. This agency can go ahead with its administrative proceeding, which is what it should do based on the fact of that underlying action.

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Now, I can turn to the Division of Enforcement and I can ask the Division of Enforcement what action are you asking that this Commission take against Mr. Collyard?
MR. POLISH: We are -- Your Honor, we are going to be seeking a bar, an industry bar, and that is going to be the only relief that we are seeking in this proceeding.
JUDGE MURRAY: Okay. So, you're seeking an industry bar, okay.
Mr. Collyard, do you know what that means?
MR. COLLYARD: Your Honor, I would -- I would ask that you define that for me.
JUDGE MURRAY: Well, I don't have the statute right in front of me, but under the Dodd-Frank statute, it's a -- they broadened it under the Dodd-Frank law. It used to be we administrative law judges, those of us who handle these cases, we -- if we found that the allegations were accurate, if, in fact, what it says in this order instituting proceeding was true, then we could bar you from participation as a broker-dealer or as an investment advisor.
But the Dodd-Frank statute has increased,

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so now we can -- we can bar you from transfer agent, municipal securities dealer. There's a whole raft of them. There's about six or seven categories, and we can issue an order that you should be barred from all those things.
Now, I should tell you it's a two-pronged thing. The Division of Enforcement not only has to show that this underlying action did, in fact, occur, which is in this case it's the United States District Court for the District of Minnesota, that that -- that that didn't -- that that action really didn't -- that judgment didn't happen, and it has to show that that -- that action and the public interest indicates, it's not just the action, itself. It has to be the public interest, that -- that the public interest based on that action indicates that the Division of Enforcement should get the relief it requests.
Do you understand that part, Mr. Collyard?
MR. COLLYARD: Gary Collyard. I do believe I understand that.
JUDGE MURRAY: Okay. Now, the -- one of the --
MR. KNUTSON: This is Mr. Knutson.

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Are you saying this is a de novo hearing now?

JUDGE MURRAY: Yes, yes -- I mean, I'm not saying this is a hearing, this is a pre-hearing conference.

MR. POLISH: Your Honor, it would be -- sorry, I apologize.

MR. KNUTSON: You know, then the thing that the SEC has brought here, the administrative proceeding against Mr. Collyard, is this -- is this de novo so that -- that we can prove that -- that he didn't do what they're alleging from scratch?

JUDGE MURRAY: No, because there's a theory in the law called collateral estoppel, and the collateral estoppel theory says that you cannot re-litigate what has been litigated before. So --

MR. KNUTSON: It hasn't been litigated. That's the problem.

JUDGE MURRAY: Well, it says he -- he hasn't been litigated, because if he -- look at the order of proceedings. It says he pled guilty.

MR. KNUTSON: Well, but that's what they're trying -- it was based on -- it wasn't based on a hearing or anything. There was no facts --

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JUDGE MURRAY: Oh, well, I -- let me try to explain it to you.

I don't have to have the facts. I have to have the fact that he pled guilty. If he pled guilty to one count of conspiracy to commit securities fraud in violation of 18 USC 371 and one count of conspiracy to commit bank fraud in violation of 18 USC 371, then that's enough.

This security statute says that if there's been a finding of guilt and -- has he been -- yes, he entered a judgment. He was sentenced to a prison term of 120 months following three years of supervised relief in order to make restitution of over $5 million, so the securities statute says based on that.

Now, you can't come in here and say, well, that's not true -- I mean, if the Division of Enforcement gives me a certified copy or if I ask for you to take official notice of that and I go on CourtLink and I look it up and I find out that it is, in fact, true, then the issue in this case is whether based on that -- that finding by the court is it in the public interest to bar this individual from the securities industry.

Does that make any sense to you, Mr.

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Knutson?

MR. KNUTSON: Yes, it does make sense.

And what you're telling me is, is that there isn't going to be any hearing on this unless -- unless I can somehow -- and maybe that's what I'll be willing to do, that it isn't in the public interest to do this against him, and I -- obviously I'm self-serving for Mr. Collyard here, but it isn't in the public interest if they would bar him on this. That's my understanding.

JUDGE MURRAY: Well, there is -- I will go to wherever you are, and I will hold a hearing if there are material facts at issue.

I'm not going to hold a hearing just to listen to arguments, because I can ask for motions of summary disposition and have the Division file a motion and then have you reply to the motion and then the Division files a rebuttal. I can do it all on paper if there are no material facts.

If there are material facts in dispute, then I have to go someplace and hold a hearing, but I don't know what material -- you are -- are you disputing that this judgment was entered on August 1st, 2013, entered a judgment? Are you disputing that?

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MR. KNUTSON: No, of course, not.

JUDGE MURRAY: Oh, well, okay.

So, that's what the order instituting proceeding alleges, okay. And if that's a given, I can -- you can -- I can -- I have to give leave to the Division to file a motion for summary disposition.

Have you tried to talk settlement with the Division at all, Mr. Knutson, or Mr. Collyard, have you -- or, I guess -- I don't know when -- where would the negotiations be, but have you tried to talk to them at all?

MR. KNUTSON: Yes, I would have said something some time ago, but it was -- there was no point in Mr. Collyard signing that, because it will just give an incomplete to what they're asking for now, I think, in for what they're asking for now. So, that's kind of a --

JUDGE MURRAY: So, you're saying that the arguments that you would advance to me, that it's not in the public interest to grant the relief requested, that the Division didn't think they were persuasive?

MR. KNUTSON: Well, no, of course, I didn't make those arguments.

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You know, this is -- I understand things pretty fast. I'm a pretty quick study when somebody gives me this, so when you talk about this two-prong thing, the first thing when you got into -- and I understand what collateral estoppel is, too, but it's -- you know, I've done a lot of state court stuff, but I'm just looking for -- and I think we need a postponement -- I mean, they have to go to -- first of all, I was headed up Duluth to go see Gary, and then -- and then I called and found out he wasn't there anymore, that he had been transferred to South Dakota -- where is it, Yankton you're at now?

MR. COLLYARD: That's right, Mr. Knutson.

MR. KNUTSON: Yes. So, maybe I have to get there -- try to get there and sit down with him and -- but I think we need a postponement, but I would like to -- if this is a two-prong thing, I would like to somehow make the argument so that -- that this isn't in the public interest.

I certainly know that a background of all of this from -- from reading the stuff on -- you know, on the -- you know, the case in -- in Minneapolis, not the criminal case, but the civil case.

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MR. COLLYARD: Mr. Knutson, I've been in solitary confinement, so I have not been able to reach out and communicate with anyone because --

MR. KNUTSON: Yeah, I'll tell you I don't know what that's all about either, Gary, but I'll talk to you about that when I talk to you.

JUDGE MURRAY: Okay. Well, let me -- let me say this now.

What if -- just from what you all describe, I don't see what purpose would be served by a hearing, because I don't know, you know, what kind of evidence I would get if I'm not going to get -- you can't deny the facts is what it comes down to it seems to me, so what if we try to do this on motion? What if I gave leave to the Division of Enforcement to file a motion for summary disposition which is a motion that says there are no material facts, and they should get what they want to get for the reasons that they say whatever they are.

And then you, Mr. Knutson or Mr. Collyard, will have an opportunity to reply back to that, then under the rules the maker of the motion has the -- has the opportunity to get rebuttal, and then I get those -- I get those arguments, and I

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decide it on paper.

Do you have a problem with that, Mr. Knutson and Mr. Collyard?

MR. KNUTSON: No, I don't have a problem.

Gary, I think that's really the only shot we have at this -- I mean, I don't mind saying this.

JUDGE MURRAY: Listen, let me tell you, I'm an old lady. I've handled a lot of these cases. Your chances of prevailing on this are not very good. People lose these kinds of cases most of the time.

Now, it's not to say it's -- it's signed, sealed and delivered, but I'm just telling you, you have an uphill -- you have an uphill struggle.

If you have an opportunity to go online, you can go online and look at some of these other cases, because this is not an odd ball case. We have these cases all the time where somebody is convicted and then the agency tries to do the administrative proceeding. It's the way the statutes are set up.

But -- so, there are lots of similar cases to this one is what I'm trying to say.

MR. KNUTSON: In my estimation, normally

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the way they would be similar, even close to being similar is if -- if there wasn't any kind of hearing that the convicted person -- this is a whole -- and I know they spent a lot of money, and I -- with Mr. Miles, if he was on this call to -- because he represented him, and I don't know if there's still something going on there, but it's one thing to tell me there's a bunch of cases, but another if those cases were based on where the person actually entered trial and there was testimony.

JUDGE MURRAY: No, no, there are not -- most of them are not. Most of them are either guilty pleas or consent -- I mean, they're not guilty -- I mean, they're not -- and once in awhile we'll get a jury trial, and there will be a follow on proceeding based on a jury verdict, but I -- you know, I don't have an accurate statistic, but I can tell you in my opinion most of the follow on proceedings we get are very similar to this one.

Now, a lot of them are civil. This is based on an underlying criminal case. Most of the ones we get are following a civil proceeding where the agency says that this person has been found guilty in the civil proceeding, then they

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shouldn't -- they're subject to an injunction, and they shouldn't be allowed in the securities industry -- I mean, look -- look up under sanctions in the Securities and Exchange Commission and Google it. You'll find a whole lot of cases on this.

But anyway, that's -- that's not here -- getting us neither here nor there.

Let me just ask the Division of Enforcement, when can you file a motion for summary disposition?

MR. POLISH: Your Honor, would it be appropriate if you gave us -- could we have a month to do so?

JUDGE MURRAY: Sure.

MR. POLISH: That would be great.

The only -- the only thing we would request is a response by way of an answer from the Respondent.

JUDGE MURRAY: Yes, yes. We'll have to get to that, too.

I guess nobody has got any of these orders that I've put out in this case.

MS. TA: No.

JUDGE MURRAY: Okay. Well, first, let's

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get the date straight, okay. We got -- today is the 17th. I think it is the 17th. Okay. So, we'll go until -- let me see -- October, November -- we'll give you to like -- what about the 15th, that's on a Friday, the 15th of November; is that okay?

MR. POLISH: That's fine, Your Honor. Thank you.

JUDGE MURRAY: Okay. So, the Division of Enforcement is going to file -- and I'm giving them leave to file a motion for summary disposition by the 15th of November.

Now, we've got -- now, we're going to have a problem with you, Mr. Knutson and Mr. Collyard, because we're running -- it's going to run into the holiday season, and Mr. Collyard is distant from Mr. Knutson.

So, what do you think in time -- how much time do you --

MR. KNUTSON: We're going to be in Virginia during a lot of December, especially around Christmastime. My wife is out there now, part of the reason I haven't been able -- that I didn't see this matter is I was gone.

JUDGE MURRAY: Can you --

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MR. KNUTSON: So, I would like to have -- I would like to have where I don't have to have something done, you know, on Christmas Eve or something.

JUDGE MURRAY: I agree with you completely.

Well, how does it sound like -- oh, gosh -- do you want to go by the Christmas holiday?

MR. KNUTSON: Yes.

JUDGE MURRAY: Okay. Well, what if we said -- because this is such an unusual case, I guess, what if we said until like January 10th which is a Friday? That's a long time.

I never do that, because I'm giving you longer than I'm giving the Division, but it seems to me you've got an unusual situation here.

Would that be agreeable with you now, the 10th of January?

MR. KNUTSON: Yes, it will, but, you know, when you say you're giving me more than the Division, I would be glad to have you give them all the time they want -- all the time they want.

JUDGE MURRAY: Well, let me just add another ingredient.

When the Commission puts deadlines on

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these cases, though, I can't give everybody, you know, all the time in the world.

Okay. So, we've got the -- we've got the Division filing on November 15th. We've got the Respondent replying by the 10th of January.

And what about the Division's rebuttal, do I have a date for that?

MR. POLISH: Could we have two weeks, Your Honor?

JUDGE MURRAY: Okay. So, we'll go back, and we'll give it to the 24th of January.

MR. POLISH: Thank you.

JUDGE MURRAY: Okay. So, we've got those two dates. All right.

Now, getting back to basics, so we've got those three dates. Let's -- the Division talked about an answer.

In these -- is every case before their agency, when it issues a what it calls the order instituting proceedings, which is like the complaint, the Respondent is required to answer that. If he doesn't answer or if she doesn't answer, and if they don't participate in this pre-hearing conferences, and if they don't defend the proceedings, they can be found in default.

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Now, you've participated in the pre-hearing conference, but you haven't filed an answer. I went on the computer system this morning, and there's no answer.

I suppose, Mr. Collyard, your position is that you don't have the ability to answer if you're in solitary?

MR. COLLYARD: Well, that's correct, Your Honor. I -- obviously, I did nothing wrong, but there was a co-defendant in that institution --

MR. KNUTSON: So, you'll accept this giving an answer right now in this phone call?

JUDGE MURRAY: Well, I don't think the rules say for that, but I -- I -- you know, the Division would like you to do that, but I will -- I mean, and it's black letter law that you should -- however, your situation is such if you're moving from prison to prison, I think filing an answer might be something that's not on the top of your priority list.

So, what does the Division want on that one?

MR. POLISH: Well, Your Honor, can we get at the very least a stipulation from the Respondent that there was a criminal conviction In The Matter

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of United States V. Collyard, the District of Minnesota, Case No. 12 CR 58, and that that -- that judgment in that criminal matter was entered on August 1st, 2013, and that it involved a sentence of Mr. Collyard of 120 months in prison and restitution in excess of $5 million among other things?

JUDGE MURRAY: Mr. Collyard and Mr. Knutson, do you agree with that one, what he just stated? That's a paragraph in this -- in this order instituting proceedings. That's the charge in this.

MR. KNUTSON: Okay. I understand that, but I didn't get what his request was.

JUDGE MURRAY: Do you admit that that is, in fact, true, that this -- that that judgment was entered?

MR. KNUTSON: Gary, you don't have any problem with that, do you?

MR. COLLYARD: Well, it was a plea, and the judgment was entered, and, of course, we're appealing.

JUDGE MURRAY: Okay. Is the Division satisfied with that?

MR. POLISH: Yes, Your Honor. If the

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Court will accept that stipulation with respect to that element, then I think the only thing as a practical matter that's going to be left for us to argue is that it would -- it would be in the public interest for there to be a bar, and we can argue that on the papers.

JUDGE MURRAY: Fine. Okay.

So, we have that admission.

I have no problem with taking that from what's been said at this pre-hearing conference.

Gentlemen, you should all know that this is being transcribed by a court reporter, and there will be an official transcript of this proceeding, and, also, the Commission's rules require that I issue an order following this pre-hearing saying what was decided at the pre-hearing, so I'll have to -- I'll do that as soon as I can.

One other thing is let's get these addresses straight now so that you people will get copies of these orders and they won't be going around the country.

Now, your address has changed, Mr. Collyard -- let's see -- I think it's in one of these filings. Now you're in Duluth, right, Federal Prison Camp, Post Office Box 1000, Duluth,

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Minnesota, 55814; right?

MR. COLLYARD: I'm sorry, Your Honor, that's -- that is incorrect.

MR. KNUTSON: That's where he was.

JUDGE MURRAY: Oh, that's where you were, okay. Wait a minute. Then that's in -- that's in one of these letters that I got, I think. I'm not sure where -- I thought I had that.

I know -- I know that you had been moved, but can you give me the new address; do you know?

MR. COLLYARD: Your Honor, I might need to have a minute here to find it.

JUDGE MURRAY: Could I ask the Division, is that in any of these letters you sent me?

MR. POLISH: I believe it is, Your Honor. This is Jonathan Polish. I'm looking on my BlackBerry. I think it -- it is -- I do believe that the address is set forth in one of the e-mail exchanges, although that might have been with the -- with Your Honor's staff instead of you.

JUDGE MURRAY: If it's through my staff, then I can get it. I can find it.

MR. POLISH: But let me -- let me make sure.

I'm looking while we're talking, so I'm

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hoping I can get an address during this hearing.
JUDGE MURRAY: I see one October 15th to a law clerk. You had scheduled a telephone pre-hearing conference with Gary Collyard at the Duluth Federal Prison. He has since been moved to Yankton, South Dakota, so that's what I have.
MR. POLISH: All right.
JUDGE MURRAY: Okay. And, Mr. Knutson, am I right that you're a [redacted]
MR. KNUTSON: Yes, [redacted]
And I guess to clear -- clear up everything so Gary hears this, too, I might be somewhat reluctant on this, but I -- I am signing on -- or I do represent him in this now if he needs me officially saying that.
JUDGE MURRAY: You're going to represent him?
MR. KNUTSON: Yes, I am representing him now.
JUDGE MURRAY: Okay. All right.
Well, we'll get this address straight, and I will --
MR. KNUTSON: I'm sorry to interrupt you, but that's for you to pass on, because he asked me

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in an e-mail I saw when I was gone --
JUDGE MURRAY: Mr. Knutson, do you possibly have an e-mail address?
MR. KNUTSON: Yes, I have, but I went for over a month where -- well, it's a long story -- where I was in rural areas, West -- West Virginia border and way down in Texas in rural areas and I didn't have access, nor did I think I needed access for any purpose to a computer.
Yes, I have an e-mail, and now I am done with that, and I'll make sure that I follow -- it was registered to me in some way that my daughter got an e-mail of that. I would have known about it and probably decided to follow up and get a hold of Mr. Collyard, and I tried, you know, going up to Duluth, I thought he was up in Duluth, too, because that's what I had been told.
JUDGE MURRAY: Well, I think that's what we thought.
And, Mr. Knutson, maybe you could -- when I get off this phone call and recess the pre-hearing, you can give Mr. Polish and Mr. Collyard your e-mail address so they can communicate with you. Is that --
MR. KNUTSON: Yes, they both have it.

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JUDGE MURRAY: Oh, they both have it, okay. All right.
Well, I will put out an order as soon as I can, although, I'm working on a decision, so it's going to take me a little bit of time, but I'll get it out as soon as I can.
Is there anything else now before we recess this pre-hearing conference?
MR. KNUTSON: Do you need -- do you need my e-mail address?
JUDGE MURRAY: Well, I will have my law clerk get it from somebody. Somebody -- but my law clerk is very good at things like that. We'll get it.
MR. KNUTSON: One point, though.
I don't want to waste your time, but, Gary, how do I get a hold of you? What's your phone number there?
MR. COLLYARD: Bob, I don't know that you can get a hold of me here.
MR. KNUTSON: Well, I can, I'm your attorney, but you've got to be -- I've got to tell them that, that I'm your attorney. This isn't just like a visitor coming -- I mean, I've done quite a bit of this in the past, and --

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MR. COLLYARD: Let me research that, Bob, so I can get you some solid, factual information.
MR. KNUTSON: Yes, but you can call me then, but you'll have to get it so that I'm able to call in there to you.
MR. COLLYARD: Right. I will -- I will have to -- I'll have to research that. I'm just too new here. I'm sorry.
MR. KNUTSON: Okay.
JUDGE MURRAY: Okay. If there's nothing else, then I recess this pre-hearing conference, and thank you all very much.
MR. POLISH: Thank you, Your Honor.
JUDGE MURRAY: Okay. Bye.
MR. KNUTSON: Thank you, Your Honor.
(Whereupon, at 2:35 p.m., the pre-hearing conference was concluded.)
* * * * *

PROOFREADER'S CERTIFICATE

In The Matter of: GARY A. COLLYARD
ADMINISTRATIVE PROCEEDING - PRE-HEARING CONFERENCE
File Number: 3-15448
Date: Thursday, October 17, 2013
Location: Chicago, IL

This is to certify that I, Donna S. Raya, (the undersigned), do hereby swear and affirm that the attached proceedings before the U.S. Securities and Exchange Commission were held according to the record and that this is the original, complete, true and accurate transcript that has been compared to the reporting or recording accomplished at the hearing.

_____ _____
(Proofreader's Name) (Date)

REPORTER'S CERTIFICATE

The within and foregoing hearing was taken before Mary Kay Andriopoulos, CSR and Notary Public, at the place, date and time aforementioned.

The said witness was first duly sworn and was then examined upon oral interrogatories; and I further certify that the foregoing is a true and complete transcript of my shorthand notes so taken as aforesaid; and proofread by me. The within and foregoing is a true, accurate and complete record of all the questions asked of and answers made by the aforementioned witness, at the time and place hereinabove referred to.

I am not counsel for, nor in any way related to any of the parties to this action, nor am I in any way interested in the outcome thereof.

Witness my official signature on this _____day of _____, A.D., 2013.

_____
Mary Kay Andriopoulos
License No. 084-002248
Diversified Reporting
Services, Inc.

EXHIBIT H

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1027 / November 7, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15448

In the Matter of GARY A. COLLYARD	ORDER FOLLOWING PREHEARING CONFERENCE

On September 3, 2013, the Securities and Exchange Commission issued an Order Instituting Proceedings (OIP) alleging that on February 27, 2012, Gary A. Collyard (Collyard) pled guilty to one count of conspiracy to commit securities fraud and one count of conspiracy to commit bank fraud in United States v. Collyard, No. 12-cr-58 (D. Minn.), and on August 1, 2013, Collyard was sentenced to 120 months in prison followed by three years of supervised release and ordered to make restitution of $5,672,994.44.

Collyard and Attorney Robert Knutson (Knutson), who represents him, and the Division of Enforcement (Division) participated in a telephonic prehearing conference on October 17, 2013. Tr. 26. I waived Collyard's obligation to file an Answer because he stipulated or acknowledged that the OIP's allegations about Collyard are true. Tr. 22-24. The only remaining issue is whether it is in the public interest to impose a sanction pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934. Collyard is appealing the district court's judgment. Tr. 23. Collyard was recently transferred from a federal prison camp in Duluth, Minnesota, to one in Yankton, South Dakota, and Knutson is located in Minnesota. Tr. 22-24.

I granted the Division leave to file a motion for summary disposition and ORDERED the following procedural schedule:

November 15, 2013:	Division's motion for summary disposition;
January 10, 2014:	Collyard's opposition; and
January 24, 2014:	Division's reply.

Brenda P. Murray
Chief Administrative Law Judge