UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
JESSE C. LITVAK	:	Administrative Proceeding File No. 3-16050

STIPULATED FACTS

The parties hereby submit the following stipulated facts, with exhibits, for the Court's consideration in determining the matters alleged in this administrative proceeding.

1. Jesse C. Litvak ("Mr. Litvak") was indicted by a Grand Jury sitting in the District of Connecticut. The Indictment, which was unsealed on or about January 25, 2013, alleged violations of 15 U.S.C. §§ 78(b), 78ff (securities fraud), 18 U.S.C. § 1031 (TARP fraud) and 18 U.S.C. § 1001 (false statements to the government). A true and complete copy of this Indictment is attached hereto as Exhibit 1.

2. Before the trial in the case began, the government moved to dismiss Count Seven of the Indictment. That motion was granted by the court.

3. Following a jury trial, Mr. Litvak was found guilty on all remaining counts in the Indictment. A true and complete copy of the jury verdict form is attached hereto as Exhibit 2.

4. Mr. Litvak moved for a judgment of acquittal and for a new trial. That motion was denied by the District Court. A true and accurate copy of this ruling is attached hereto as Exhibit 3.

5. On or about July 23, 2014, Mr. Litvak was sentenced in the District Court. A true and correct copy of this transcript is attached hereto as Exhibit 4.

6. On or about July 23, 2014, Mr. Litvak made an oral motion in the District Court for bail pending appeal. That motion was denied by the District Court.

7. On or about July 25, 2014, a judgment was entered in the criminal case. That judgment reflects that Mr. Litvak was found guilty on Counts 1-6 and 8-16 of the Indictment. A true and correct copy of this judgment is attached hereto as Exhibit 5.

8. On or about August 5, 2014, Mr. Litvak filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. That appeal is pending.

9. On or about August 22, 2014, Mr. Litvak filed a motion for bail pending appeal in the United States Court of Appeals for the Second Circuit. The motion was granted and Mr. Litvak has been ordered released pending resolution of his appeal. A true and accurate copy of this ruling is attached hereto as Exhibit 6.

Respectfully submitted,

THE RESPONDENT,
JESSE C. LITVAK

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Dated:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GRAND JURY N-12-3

UNITED STATES OF AMERICA	:	CRIMINAL NO. 3:13CR___ (___)
	:	
v.	:	VIOLATIONS:
	:	15 U.S.C. §§ 78j(b), 78ff [Securities Fraud]
JESSE C. LITVAK	:	18 U.S.C. § 1031 [TARP Fraud]
	:	18 U.S.C. § 1001 [False Statements to the
	:	Government]

INDICTMENT

The Grand Jury charges that at all times relevant to this Indictment:

The Defendant

1. Defendant JESSE C. LITVAK, a licensed securities broker, resided in the State of New York and was a senior trader and managing director at Jefferies & Co., Inc. (referred to herein as "Jefferies"). LITVAK was hired by Jefferies on or about April 14, 2008 and was terminated on or about December 21, 2011.

2. Jefferies is a broker-dealer registered with the Securities and Exchange Commission ("SEC") and a Financial Industry Regulatory Authority ("FINRA") member firm. Jefferies is a global securities and investment banking firm, with headquarters in New York. Jefferies also has a trading floor in Stamford, Connecticut where LITVAK and other members of its Mortgage and Asset-Backed Securities Trading group worked.

3. LITVAK specialized in trading certain types of residential mortgage-backed securities ("RMBS"), which are securities within the meaning of the federal securities laws.

The Victim-Customers

4. LITVAK's victims are known by the Grand Jury to have been certain of Jefferies' customers.

5. LITVAK's victim-customers included funds established by the United States Department of Treasury's Legacy Securities Public-Private Investment Program ("PPIP"). PPIP was, and is, a part of the United States Government's Troubled Asset Relief Program ("TARP"), the Government bailout plan created in 2009 in response to the financial crisis.

6. In March 2009, Treasury announced the creation of PPIP, the purpose of which was to purchase certain troubled real estate-related securities, including types of RMBS, from financial institutions to allow those financial institutions to free up capital and extend new credit.

7. Beginning in late 2009, the Government used more than $20 billion of bailout money from TARP to fund Public-Private Investment Funds ("PPIFs"), which would purchase the troubled securities. The Government matched every dollar of private investment in a PPIF with one dollar of equity and two dollars of debt. Thus, 75% of each PPIF's money consists of taxpayer funds disbursed by the Government as part of its bailout plan through TARP.

8. Each PPIF was established and managed by a Legacy Securities PPIP fund manager (a "PPIF Manager") selected by the Department of Treasury. Each PPIF Manager owed fiduciary duties to the investors that contributed money to its PPIF, which was primarily the Government.

9. Each PPIF received between approximately $1.4 billion to $3.7 billion of bailout money.

10. Under the rules of PPIP, a PPIF could buy or sell only certain types of RMBS, including the types of RMBS that LITVAK specialized in.

11. The following six PPIFs are known by the Grand Jury to have been LITVAK's victim-customers (each a "TARP-Funded Victim"):

a. AG GECC PPIF Master Fund, L.P. (PPIF Manager: Angelo, Gordon & Co., LP);

b. AllianceBernstein Legacy Securities Master Fund, L.P. (PPIF Manager: AllianceBernstein, LP);

c. BlackRock PPIF, L.P. (PPIF Manager: BlackRock, Inc.);

d. Invesco Legacy Securities Master Fund, L.P. (PPIF Manager: Invesco Ltd.);

e. RLJ Western Asset Public/Private Master Fund, L.P. (PPIF Manager: RLJ Western Asset Management, LLC); and

f. Wellington Management Legacy Securities PPIF Master Fund, LP (PPIF Manager: Wellington Management Company, LLP).

12. In addition, the following non-PPIP entities or their affiliates, or funds or entities managed by or affiliated with them, are known by the Grand Jury to also have been LITVAK's victim-customers (each a "Privately-Funded Victim"):

a. DE Shaw & Co.;

b. DW Investment Management LP;

c. EBF & Associates;

d. Magnetar Capital;

e. MFA Financial, Inc.;

f. Monarch Alternative Capital;

g. Oak Hill Capital;

h. Pine River Capital Management;

i. Putnam Investments;

j. QVT Financial;

k. Red Top Capital Investments;

l. Soros Fund Management LLC;

m. Third Point LLC; and

n. York Capital Management, LLC.

Other Relevant Persons

13. Supervisor #1 is known by the Grand Jury to have been one of LITVAK's supervisors at Jefferies.

RMBS Trading

14. RMBS are bonds comprised of large pools of residential mortgages and home equity loans. The RMBS owners receive payments on a monthly basis based on repayments from the homeowners that took out the mortgages or loans, until the homeowners repay their debt, refinance or default. Unlike stocks, RMBS bonds are not publicly traded on an exchange, such as the New York Stock Exchange or NASDAQ, and pricing information is not publicly-available. Instead, buyers and sellers of bonds use broker-dealers, like Jefferies, to execute individually negotiated transactions.

15. The unit at Jefferies that handles RMBS trading is known as the Mortgage and Asset-Backed Securities group, which employs traders and salespeople. In general, a trader, like LITVAK, specializes in particular kinds of RMBS or "sectors," while a salesperson is responsible for certain customers or "accounts."

16. RMBS bonds typically are sold in three ways:

a. from a broker-dealer's inventory, in which the broker-dealer like Jefferies is selling a bond that it has owned for a period of time;

b. as an order, in which the seller commissions the broker-dealer to seek a buyer, or the buyer commissions the broker-dealer to seek a seller, for a particular bond; or

c. as part of a "bid list" or "BWIC" ("bids wanted in competition"), in which the seller circulates a list of specific bonds it is interested in selling so that the broker-dealer may seek a potential buyer willing to negotiate terms for the trade.

17. Orders and bid list trades are considered "riskless" trades for broker-dealers like Jefferies because in those transactions broker-dealers merely act as match-makers, serving as a conduit for a bond to pass from a seller to a buyer.

18. In orders and bid list trades, the buyer and the seller do not know each other's identity, but communicate exclusively through the broker-dealer's traders and salespeople.

19. Buyers attempt to purchase bonds at the lowest price available in the market, and sellers try to sell bonds at the highest price available. This is called "best execution." Where a buyer does not obtain best execution, its investment will be less profitable than it would have been otherwise.

20. A broker-dealer's profit, if any, on a set of trades is the difference or "spread" between the price it pays the seller and the price it charges the buyer. In the bond industry, prices are measured in 1/32s of a dollar, commonly referred to as "ticks." For instance, if a broker-dealer buys a bond for $65.25 (meaning $65.25 per $100 of current face value), the price would be expressed as "65 dollars and 8 ticks," "65 and 8" or "65-8." If the broker-dealer then sells that bond for $65.50 (meaning $65.50 per $100 of current face value), the price would be expressed as "65 dollars and 16 ticks," "65 and 16," or "65-16." The broker-dealer's profit on this set of trades would be $0.25 per $100 of current face value, or 8 ticks.

21. A customer can compensate a broker-dealer for a trade in one of two ways, either on an "all-in" or an "on-top" basis.

a. In an "all-in" trade, the buyer agrees to a price without reference to the price the broker-dealer paid to the seller; the spread between the amount paid by the buyer and the amount paid to the seller is the broker-dealer's compensation.

b. In an "on-top" trade, the buyer and the broker-dealer agree on a specific amount that is added to the price the broker-dealer paid to the seller; in other words, the broker-dealer's compensation is a commission added to the cost of the bond.

22. Inventory trades are usually "all-in" transactions, while bid lists are "on top" trades, and orders can be either depending on what the broker-dealer, buyer and seller negotiate.

Jefferies' Codes of Conduct

23. Jefferies maintained (i) a Code of Ethics, (ii) Compliance and Supervisory Policies and Procedures for Mortgage & Asset-Backed Securities Sales and Trading Personnel, and (iii) Compliance and Supervisory Policies and Procedures for Fixed Income Sales and Trading Personnel.

24. In the section entitled "Fair Dealing," Jefferies' Code of Ethics stated that "[t]aking unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practice is a violation of the Code."

25. Both the Compliance and Supervisory Policies and Procedures for Mortgage & Asset-Backed Securities Sales and Trading Personnel and the Compliance and Supervisory Policies and Procedures for Fixed Income Sales and Trading Personnel include the following statement: "Traders should bear in mind that the anti-fraud provisions of the Exchange Act and

the best execution provisions of FINRA-NASD rules continue to apply to all securities transactions, regardless of the customer's status, and that trading that is suggestive of abuse will not be permitted."

26. Before and during the acts alleged in this Indictment, LITVAK completed acknowledgement forms certifying that he had "read, understood, complied and agree[d] to comply with" these policies.

COUNTS ONE through ELEVEN
Securities Fraud
15 U.S.C. §§ 78j(b), 78ff

The Scheme and Artifice

27. The allegations set forth in paragraphs 1 through 26 of this Indictment are realleged and incorporated as though fully set forth herein.

28. Beginning in approximately 2009 and continuing until approximately December 2011, the precise dates being unknown to the Grand Jury, in the District of Connecticut and elsewhere, LITVAK knowingly and willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the mails, in connection with the purchase and sale of RMBS, would and did use and employ manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by (i) employing devices, schemes and artifices to defraud, (ii) making untrue statements of material facts and omitting to state material facts necessary to make the statements made not misleading in the light of the circumstances under which they were made and (iii) engaging in acts, practices and courses of business which would and did operate as a fraud and deceit on purchasers and sellers of such RMBS.

29. As a result of this scheme, LITVAK caused victim-customers to sustain losses of more than $2,000,000.

Purpose of the Scheme and Artifice

30. A purpose of LITVAK's scheme was to enrich Jefferies and himself by using materially false and fraudulent misrepresentations and omissions to take secret and unearned compensation from TARP-Funded Victims and Privately-Funded Victims on RMBS trades.

31. LITVAK's supervisors at Jefferies, including Supervisor #1, established and communicated specific annual profit goals for the Mortgage and Asset-Backed Securities group. As LITVAK knew, his individual trading revenue was tracked by his supervisors and steadily declined each year—from a profit of more than $40,000,000 in 2009 to a loss of more than $10,000,000 in 2011.

32. LITVAK's scheme increased the profitability of his trades. For example, on or about June 22, 2011, LITVAK corresponded with a trader at another broker-dealer firm about a RMBS bond being offered via a bid list. The approximate "on-top" compensation a broker-dealer can expect on a bid list transaction is between four ticks and eight ticks (between 4/32s and 8/32s per $100 of the bond's current face value). In discussing the price that LITVAK hoped to induce a specific TARP-Funded Victim to pay for this bid list bond, LITVAK wrote "f this 4 - 8/32 sht [*sic*]," to which the other trader responded, "that doesnt feed anyone."

Manner and Means of the Scheme and Artifice

The manner and means by which LITVAK sought to accomplish the scheme included, among others, the following:

33. In certain order and bid list transactions:

a. where the buying victim-customer had agreed upon a specified commission "on top" of the price that Jefferies had negotiated with the seller of a RMBS bond, LITVAK would and did misrepresent to the buyer the price Jefferies had agreed to pay the seller, providing Jefferies with an extra and unearned profit at the buying victim-customer's expense; and

b. where the selling victim-customer had agreed upon a specified commission to be deducted from the price at which Jefferies had negotiated to sell a RMBS bond, LITVAK would and did misrepresent to the seller the price the buyer had agreed to pay to Jefferies, providing Jefferies with an extra and unearned profit at the selling victim-customer's expense.

34. In certain sales of bonds from Jefferies' inventory, LITVAK would and did misrepresent to the buying victim-customer that the transaction was an order or bid list trade requiring "on top" compensation, providing Jefferies with an extra and unearned profit at the buying victim-customer's expense.

35. LITVAK perpetrated this scheme by the use of means and instruments of interstate commerce and the mails in various ways:

a. LITVAK used electronic communications with victim-customers, including telephone, email, instant messages and electronic group "chats," to communicate false statements and misrepresentations with the intent and purpose of soliciting and negotiating fraudulent RMBS bonds trades;

b. LITVAK sent and caused to be sent to victim-customers trade confirmations or tickets documenting fraudulent transactions; and

c. LITVAK caused victim-customers to wire funds to Jefferies, and Jefferies to wire funds to victim-customers, to pay for fraudulent transactions.

Misrepresented Prices

36. It was part of the scheme that LITVAK would defraud victim-customers buying RMBS bonds in bid list and order trades, where the victim-customers agreed to pay Jefferies specific amounts of compensation "on top" of the prices paid to the sellers, by misrepresenting the acquisition costs to be higher than the prices actually paid by Jefferies to the sellers, fraudulently increasing Jefferies' compensation on the transactions.

37. For instance, on or about March 31, 2010, LITVAK executed his scheme in connection with the purchase by the PPIF Manager for the AllianceBernstein Legacy Securities Master Fund, L.P. of two RMBS bonds, HVMLT 2006-10 2A1A (the "HarborView Bond") and LXS 2007-15N 2A1 (the "Lehman Bond"), as follows:

a. On March 31, 2010 at approximately 10:32 a.m., the seller placed an order with Jefferies to sell these two bonds. The seller's offering price at that time was 58 on the HarborView Bond and 57 on the Lehman Bond.

b. At approximately 10:49 a.m., LITVAK approached the PPIF Manager for the AllianceBernstein Legacy Securities Master Fund, L.P. about buying these bonds, writing "wanted to give you first crack on em." The PPIF Manager asked for details, and LITVAK responded by misrepresenting the seller's offering prices as 59 on the HarborView Bond (instead of the actual offering price of 58) and 58-16 on the Lehman Bond (instead of the actual offering price of 57).

c. Between approximately 11:21 a.m. and 11:42 a.m., LITVAK and the PPIF Manager spoke by telephone.

d. At approximately 11:42 a.m., LITVAK electronically communicated with Supervisor #1 as follows:

> alliance just bid me 58 on the 06-10s [the HarborView Bond]....i know he will pay us 4/32s if i tell him we have to pay 58-16.... he also bid us 57-16 on the lxs [the Lehman Bond]....i am thinking of telling him that one has to be 58-8 cuz its one of the bigger ones....

[Ellipses in original.]

e. At approximately 11:48 a.m., Supervisor #1 replied to LITVAK "boom! tell me when to go in." In this context, "tell me when to go in" means when Supervisor #1 should intercede to buy the bonds from the seller.

f. At approximately 12:45 p.m., Supervisor #1 electronically communicated with the seller to confirm Jefferies was buying the HarborView Bond for 57-16 and the Lehman Bond for 56-16. Supervisor #1 then described these prices to LITVAK as "layups."

g. At approximately 12:45 p.m., LITVAK misrepresented the state of negotiations with the seller to the PPIF Manager:

> ok big man....here is what i got from him...i beat him up pretty good.....but this is what he came back with:
> he will sell to me 20mm orig of hvmlt 0610 @ 58-00
> but he is being harder to knock back on the lxs bonds...said that he thinks that one is much cheaper yada yada yada....he told me he would sell them to me at 58-8 (30mm orig).....i would be fine working skinnier on these 2....but think you are getting good levels on these....let me know what you want to do big man....

[Ellipses in original.]

h. At approximately 1:14 p.m., the PPIF Manager responded by inquiring whether these would be "all-in" or "on-top" trades, asking "is he [the seller] paying u or am i?"

i. At approximately 1:21 p.m., LITVAK responded with additional misrepresentations:

> all the levels i put in this [chat]room are levels he wants to sell to me...i tried to beat him up so i could get these levels to you.....but those are the levels he wants to sell to me...i will work for whatever you want on these...

[Ellipses in original.]

j. The PPIF Manager replied back "gonna finish lunch first then re-run it all," and at approximately 1:24 p.m., LITVAK repeated and summarized his earlier misrepresentations:

> sounds good.....so to recap the levels he is offering to me:
> hvmlt 06-10 2a1a (20mm orig) @ 58-00
> lxs 40mm orig at 58-8

[Ellipsis in original.]

k. At approximately 1:45 p.m., LITVAK told the PPIF Manager "bot em," indicating that LITVAK had purchased the HarborView Bond and the Lehman Bond. The PPIF Manager replied by proposing Jefferies not receive any compensation on (or "wash") the smaller HarborView Bond trade and add five ticks as compensation on the Lehman Bond trade. Approximately one minute later, LITVAK responded "thats fine."

38. The AllianceBernstein Legacy Securities Master Fund, L.P. paid approximately $7,000,000 for the HarborView Bond and approximately $20,000,000 for the Lehman Bond.

39. The seller did not offer to sell the HarborView Bond for 59, as LITVAK misrepresented to the PPIF Manager for the AllianceBernstein Legacy Securities Master Fund, L.P. In truth and in fact, as LITVAK knew, the seller's offer was actually 58.

40. The seller did not offer to sell the Lehman Bond for 58-16, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, the seller's offer was actually 57.

41. LITVAK did not communicate to the seller the PPIF Manager's bids made between approximately 11:21 a.m. and 11:42 a.m., as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, all his statements about the seller's reaction to those bids were false.

42. When LITVAK electronically communicated with the PPIF Manager after approximately 12:50 p.m., the seller was no longer seeking 58 for the HarborView Bond or 58-8 for the Lehman Bond, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, the seller had already agreed to accept lower prices.

43. Jefferies did not pay the seller 58 for the HarborView Bond, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, Jefferies paid 57-16.

44. Jefferies did not pay the seller 58-8 for the Lehman Bond, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, Jefferies paid 56-16.

45. Jefferies did not work without compensation on the HarborView Bond trade, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, on this riskless trade, LITVAK took 16 ticks as compensation for Jefferies, or approximately $60,000.

46. Jefferies did not work for five ticks of compensation on the Lehman Bond trade, or approximately $50,000, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, on this riskless trade, LITVAK took 61 ticks as compensation for Jefferies, or approximately $650,000.

Misrepresented Inventory Trades as Orders or Bid List Trades

47. It was further part of the scheme that LITVAK would defraud victim-customers buying RMBS bonds held in Jefferies' inventory by misrepresenting those as orders and bid list trades with compensation for Jefferies "on-top," taking increased and unearned profits because, on inventory transactions, broker-dealers are not entitled to extra compensation in addition to the price paid. By doing this, LITVAK falsely portrayed himself to victim-customers as their ally in negotiations against non-existent sellers, rather than admitting that he was, in fact, negotiating directly against his victim-customers.

48. To effect his scheme, LITVAK would invent a fictitious seller for a bond that Jefferies already had in its inventory and was seeking to sell to a victim-customer. LITVAK would then falsely describe the fictitious seller's offering price and reaction to LITVAK's negotiating tactics.

49. For instance, on or about December 23, 2009, LITVAK executed his scheme in connection with the purchase by the PPIF Manager for the Wellington Management Legacy Securities PPIF Master Fund, LP of the RMBS bond WFMBS 2006-AR12 1A1 (the "Wells Fargo Bond"), as follows:

a. On or about December 14, 2009, LITVAK paid 70 (meaning $70 per $100 of current face value) for the Wells Fargo Bond, with an original face value of $6,230,000, for Jefferies' inventory.

b. On or about December 18, 2009, LITVAK first offered to sell Jefferies' Wells Fargo Bond to the Wellington Management Legacy Securities PPIF Master Fund, LP. LITVAK misrepresented that he had an order from a third party seller, writing "i have a guy that has 6+mm orig of wfmbs 06-ar12 1a1...my guy would sell to me at 77.... [ellipses in original.]"

The PPIF Manager bid 74, and LITVAK responded by describing his communications with the fictitious seller:

> i will reflect that in big man and see what he says....
> at this point...he really wants me to work it longer (i just got the bonds this am to work)....so he actually gave me the ol "just keep working em at 77" rap.....didnt even give me any room off 77.....fck [*sic*]
> he appreciates it...but has some internal conversations about where he told them he can sell it and at 75 he would not be looking good internally is what he said....
> i thought i could work him over...but he is kind of being a weenie

[Ellipses in original.]

c. On or about December 23, 2009 at 7:46 a.m., LITVAK approached the PPIF Manager for the Wellington Management Legacy Securities PPIF Master Fund, LP again, asking for information about another trade and suggesting "maybe i can use that as leverage to go beat the guy up that owns the 06-ar12 1a1 bonds....as of last nite it sounded like he was starting to warm up to the idea of coming off his level [ellipsis in original]."

d. At approximately 7:48 a.m., the PPIF Manager expressed interest, asking "what's the current size and offer on the 06-ar12 1a1 again?" Approximately one minute later, LITVAK responded "it's 3+mm current and he was offering them at 77..... [ellipsis in original.]"

e. At approximately 8:14 a.m., LITVAK updated the PPIF Manager by making further misrepresentations about the fictitious seller, writing "he is still red-dotted....usually rolls in around now.....so should know soon brotha..... [ellipses in original.]" ("Red-dotted" in this context means that the fictitious seller was unavailable to participate in electronic communications.)

f. At approximately 8:46 a.m., LITVAK misrepresented to the PPIF Manager that he had concluded negotiations with the seller at a price that would result in a four-tick profit to Jefferies, writing "winner winner chicken dinner.....he is gonna sell em to me at

75-28 as i told him to not get cute and just sell the bonds so you can own them at 76....he said cool..... [ellipses in original.]"

50. The Wellington Management Legacy Securities PPIF Master Fund, LP paid approximately $2,300,000 for the Wells Fargo Bond.

51. LITVAK did not engage in any negotiations or communications with the seller of Wells Fargo Bond on December 23, 2009, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, there was no third party seller, since Jefferies already owned the Wells Fargo Bond.

52. Jefferies did not purchase the Wells Fargo Bond from a third party seller on December 23, 2009, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, Jefferies purchased that bond nine days earlier, on or about December 14, 2009.

53. Jefferies did not pay the seller 75-28 for the Wells Fargo Bond, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, Jefferies paid 70 or approximately $2,100,000.

54. Jefferies' profit on this set of transactions was not four ticks, or approximately $3,800, as LITVAK misrepresented to the PPIF Manager. In truth and in fact, as LITVAK knew, Jefferies's profit was 192 ticks, or approximately $185,000.

The Securities

55. Beginning in approximately 2009 and continuing until approximately December 2011, the precise dates being unknown to the Grand Jury, in the District of Connecticut and elsewhere, Defendant JESSE C. LITVAK knowingly and willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the mails, in connection with the purchase and sale of securities, to wit, the RMBS set forth below, would and did use and

employ manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by (i) employing the aforementioned devices, schemes and artifices to defraud, (ii) making untrue statements of material facts and omitting to state material facts necessary to make the statements made not misleading in the light of the circumstances under which they were made and (iii) engaging in acts, practices and courses of business that would and did operate as a fraud and deceit on purchasers and sellers of such securities as set forth below, each constituting a separate count of this Indictment:

Count	Trade Date	Security
1	3/31/10	HVMLT 2006-10 2A1A (HarborView Bond)
2	3/31/10	LXS 2007-15N 2A1 (Lehman Bond)
3	6/22/11	HVMLT 2007-7 2A1A
4	7/1/10	SARM 2005-21 7A1
5	12/23/09	WFMBS 2006-AR12 1A1 (Wells Fargo Bond)
6	5/28/09	INDX 2007-AR7 2A1
7	12/9/09	NYMT 2005-2 A
8	1/7/10	DLSA 2006-AR1 2A1A
9	3/29/10	CWALT 2006-OA3 1A1
10	4/1/10	LXS 2007-15N 2A1
11	11/22/10	FHAMS 2005-AA10 2A1

All in violation of Title 15, United States Code, Sections 78j(b) and 77ff, and Title 18, United States Code, Section 2.

COUNT TWELVE
TARP Fraud
18 U.S.C. § 1031

56. The allegations set forth in paragraphs 1 through 26 and 28 through 54 of this Indictment are realleged and incorporated as though fully set forth herein.

57. Beginning in approximately December 2009 and continuing until approximately December 2011, in the District of Connecticut and elsewhere, Defendant JESSE C. LITVAK devised a scheme and artifice to defraud the United States and to obtain money and property by means of false and fraudulent pretenses, representations and promises in connection with grants, contracts, subcontracts, subsidies, loans, guarantees, insurance and other forms of Federal assistance—including TARP, an economic stimulus, recovery or rescue plan provided by the Government, and the Government's purchase of troubled assets as defined in the Emergency Economic Stabilization Act of 2008—the value of such Federal assistance, or any constituent part thereof, being in excess of $1,000,000.

58. On or about the following dates, in the District of Connecticut and elsewhere, defendant LITVAK knowingly executed and attempted to execute the aforementioned scheme and artifice with the intent to defraud the United States and to obtain money and property by means of false and fraudulent pretenses, representations and promises in connection with such Federal assistance in the following RMBS bond transactions with a TARP-Funded Victim:

a. the March 31, 2010 sale of the HarborView Bond to AllianceBernstein Legacy Securities Master Fund, L.P.;

b. the March 31, 2010 sale of the Lehman Bond to AllianceBernstein Legacy Securities Master Fund, L.P.;

c. the June 22, 2011 sale of the HVMLT 2007-7 2A1A bond to AllianceBernstein Legacy Securities Master Fund, L.P.;

d. the July 1, 2010 sale of the SARM 2005-21 7A1 bond to Invesco Legacy Securities Master Fund, L.P.; and

e. the December 23, 2009 sale of the Wells Fargo Bond to Wellington Management Legacy Securities PPIF Master Fund, LP.

All in violation of Title 18, United States Code, Sections 1031 and 2.

COUNTS THIRTEEN through SIXTEEN
False Statements to the Government
18 U.S.C. § 1001

59. The allegations set forth in paragraphs 1 through 26 and 28 through 54 of this Indictment are realleged and incorporated as though fully set forth herein.

60. On or about the following dates, in the District of Connecticut and elsewhere, LITVAK, in a matter within the jurisdiction of the United States Department of Treasury, a department and agency of the United States, did knowingly and willfully make and cause to be made a materially false, fictitious, and fraudulent statement and representation to a PPIF Manager for a TARP-Funded Victim, each statement set forth below constituting a separate count of this Indictment:

Count	Date of Statement	Recipient	False Statement	Correct Fact
13	3/31/10	Trader at PPIF Manager for AllianceBernstein Legacy Securities Master Fund, L.P.	"[S]o to recap the levels he is offering to me: hvmlt 06-10 2a1a (20mm orig) [the HarborView Bond] @ 58-00."	Jefferies had already negotiated with the seller to purchase the HarborView Bond at 57-16.
14	3/31/10	Trader at PPIF Manager for AllianceBernstein Legacy Securities Master Fund, L.P.	"[S]o to recap the levels he is offering to me: ... lxs 40mm orig [the Lehman Bond] at 58-8."	Jefferies had already negotiated with the seller to purchase the Lehman Bond at 56-16.
15	12/23/09	Trader at PPIF Manager for Wellington Management Legacy Securities PPIF Master Fund, LP	"[H]e is gonna sell em to me at 75-28 as i told him to not get cute and just sell the bonds so you can own them [the Wells Fargo Bond] at 76....he said cool."	Jefferies had actually purchased the Wells Fargo Bond in question on December 14, 2009 at 70.
16	6/24/10	Trader at PPIF Manager for Invesco Legacy Securities Master Fund, L.P.	In electronic chat between LITVAK and seller forwarded to trader at PPIF Manager for Invesco Legacy Securities Master Fund, L.P., LITVAK altered chat in original message to show Jefferies' purchase price of "79-26."	In original electronic chat between LITVAK and seller, chat reflected Jefferies' actual purchase price of 79-24.

All in violation of Title 18, United States Code, Sections 1001 and 2.

A TRUE BILL

/s/

FOREPERSON

UNITED STATES OF AMERICA

/s/ David B. Fein

DAVID B. FEIN
UNITED STATES ATTORNEY

/s/ Jonathan N. Francis

JONATHAN N. FRANCIS
ASSISTANT UNITED STATES ATTORNEY

/s/ Eric J. Glover

ERIC J. GLOVER
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL ACTION NO.
v.	:	3:13-CR-19
	:	
JESSE C. LITVAK,	:	MARCH 5, 2014
Defendant.	:	

VERDICT FORM

I. SECURITIES FRAUD

1. As to the charge in Count One of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

2. As to the charge in Count Two of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

3. As to the charge in Count Three of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

4. As to the charge in Count Four of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

5. As to the charge in Count Five of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

6. As to the charge in Count Six of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

   Not Guilty _____ Guilty ✓

7. There is no Count Seven.

8. As to the charge in Count Eight of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

9. As to the charge in Count Nine of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

10. As to the charge in Count Ten of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

11. As to the charge in Count Eleven of securities fraud, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

II. TROUBLED ASSET RELIEF PROGRAM FRAUD

12. As to the charge in Count Twelve of Troubled Asset Relief Program fraud, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

III. FALSE STATEMENT IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT

13. As to the charge in Count Thirteen of false statement in a matter within the jurisdiction of the United States government, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

14. As to the charge in Count Fourteen of false statement in a matter within the jurisdiction of the United States government, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

15. As to the charge in Count Fifteen of false statement in a matter within the jurisdiction of the United States government, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

16. As to the charge in Count Sixteen of false statement in a matter within the jurisdiction of the United States government, we the jury unanimously find the defendant JESSE LITVAK:

Not Guilty _____ Guilty ✓

You have now completed the Verdict Form. Please have your foreperson sign and date below.

/s/
FOREPERSON

Dated at New Haven, Connecticut on this 7 day of March, 2014.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	CRIMINAL CASE NO.
v.	:	13-CR-19 (JCH)
	:	
JESSE C. LITVAK,	:	JULY 2, 2014
Defendant.	:	

RULING RE: DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR NEW TRIAL (Doc. No. 237)

I. INTRODUCTION

On March 7, 2014, defendant Jesse C. Litvak was convicted of ten counts of securities fraud, one count of Trouble Asset Relief Program ("TARP") fraud, and four counts of making a false statement in a matter within the jurisdiction of the U.S. government. Litvak now moves for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. In the alternative, Litvak moves for a new trial pursuant to Rule 33.

For the reasons set forth below, Litvak's Motions for a Judgment of Acquittal and for a New Trial (Doc. No. 237) as well as his pending Motion for Directed Verdict (Doc. No. 212) are **DENIED**.

II. BACKGROUND

On January 25, 2013, a federal grand jury returned a sixteen-count indictment against Litvak, charging him with securities fraud, in violation of 15 U.S.C. §§ 78j(b) & 78ff (Counts One through Eleven); TARP fraud, in violation of 18 U.S.C. § 1031 (Count Twelve); and making false statements in a matter within the jurisdiction of the U.S. government, in violation of 18 U.S.C. § 1001 (Counts Thirteen through Sixteen). Indictment (Doc. No. 1) ¶¶ 27-60. The Indictment alleged that Litvak, a licensed

securities broker and former senior trader and managing director at Jeffries & Co., Inc. ("Jeffries"), defrauded six Public-Private Investment Funds ("PPIFs") and at least fourteen privately funded entities by making misrepresentations in the purchase and sale of residential mortgage-backed securities ("RMBS"). Id. ¶¶ 1, 11-12 & 33-34. In particular, the Indictment alleged that, as part of his scheme to defraud, Litvak lied about the price at which seller and buyer agreed to sell and buy a security through Jeffries in bid list and order trades, id. ¶ 36, and invented nonexistent sellers with whom Litvak would pretend to negotiate on victims' behalf in inventory trades, where Jeffries already held the security, id. ¶ 47; and that, through this scheme, Litvak increased the profitability of the charged trades, id. ¶¶ 32, 33(a), 34, 36 & 47.

On February 17, 2014, the day before trial, the government moved to dismiss Count Seven, which Motion the court granted. The government's evidence at trial consisted of: (1) time-stamped verbatim online chats ("Bloomberg chats") showing communications between Litvak, co-workers at Jeffries, and victims; (2) trade tickets showing the price at which Jeffries bought and sold a given security; (3) testimony by a Bloomberg employee, Adam Wolf, and a custodian at Jeffries, Tracy Lincoln, as to the nature and accuracy of the Bloomberg chats; (4) testimony by another Jeffries employee, Al Paradiso, as to the accuracy of the trade tickets; (5) testimony by Thomas Carocci of the Financial Industry Regulatory Authority ("FINRA") as to the Series 7 examination passed by Litvak; (6) testimony by victims—Michael Canter of AllianceBernstein, Alan Vlajinac of Wellington Management Company ("Wellington"), Brian Norris of Invesco, Joel Wollman of QVT Financial, Vladimir Lemin of Magnetar, and Katherine Corso of York Capital—as to their negotiations with Litvak and the impact

of his lies on trade execution; (7) testimony by David Miller, former Chief of Investment for the Office of Financial Stability at Treasury, describing the Public-Private Investment Program ("PPIP") through which the PPIFs were established; and (8) testimony by Special Agent James O'Connor of the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP"), who investigated Litvak following Canter's report to Treasury of possible fraud in connection with securities transactions between Litvak and AllianceBernstein, one of the PPIFs.

On February 26, 2014, at the close of the government's case, Litvak moved for a judgment of acquittal pursuant to Rule 29(a). See Oral Motion for Directed Verdict (Doc. No. 212); Def's Trial Mem. in Supp. of Mot. for J. of Acquittal (Doc. No. 210). The court reserved pursuant to Rule 29(b). On March 5, the case was submitted to the jury. On March 7, the jury returned a verdict of guilty on all remaining counts: Counts One through Six and Eight through Eleven of securities fraud; Count Twelve of TARP fraud; and Counts Thirteen through Sixteen of making false statements. See Verdict (Doc. No. 229). Following the jury's verdict, Litvak filed the instant post-trial Motions.

III. MOTION FOR JUDGMENT OF ACQUITTAL

A. Legal Standard

Rule 29 requires the court, upon motion by the defendant, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). However, in challenging the sufficiency of the evidence supporting his conviction, "the defendant faces an uphill battle, and bears a very heavy burden." United States v. Mi Sun Cho, 713 F.3d 716, 720 (2d Cir. 2013) (citation and internal quotation marks omitted). In deciding such a motion, the court must view the evidence in the light most favorable to the government, draw all inferences in favor of

the government, and defer to the jury's assessment of the witnesses' credibility. United States v. Hawkins, 547 F.3d 66, 70 (2d Cir. 2008). The jury verdict should stand so long as "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mi Sun Cho, 713 F.3d at 720 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). In deciding a Rule 29 motion, "the evidence must be viewed in its totality, as each fact may gain color from others," and the court must exercise care not to substitute its determination of the weight of the evidence, and of the reasonable inferences to be drawn therefrom, for that of the jury. United States v. Cassese, 428 F.3d 92, 98-99 (2d Cir. 2005).

B. Securities Fraud

To convict Litvak of the crime of securities fraud charged in Counts One through Six and Eight through Eleven, the jury had to find that the government had proven beyond a reasonable doubt the following three elements:

> (1) In connection with the purchase or sale of the security identified in that count, [ ] Litvak—
>
> (a) employed a device, scheme, or artifice to defraud, or
>
> (b) made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or
>
> (c) engaged in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller;
>
> (2) [he] acted willfully, knowingly, and with the intent to defraud; and
>
> (3) [he] knowingly used, or caused to be used, the mails or any means or instruments of transportation or communication in interstate commerce in furtherance of the fraudulent conduct.

Jury Charge (Doc. No. 225) at 46; see 15 U.S.C. § 78j; 17 C.F.R. § 240.10b–5 ("Rule 10b-5"); 3 Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal,

Instruction 57-20. Litvak contests the sufficiency of the evidence as to the first and second elements, specifically, the government's proof of materiality and intent to defraud.

1. Materiality

To find that the government had proven beyond a reasonable doubt the first element of securities fraud, the jury had to find that Litvak's lies were material under the circumstances. In the context of securities fraud, materiality means that Litvak's lies "would have been significant to a reasonable investor in making an investment decision," that is, that his lies "significantly altered the total mix of information available." Jury Charge at 49; see United States v. Vilar, 729 F.3d 62, 88-89 (2d Cir. 2013) ("[T]he long-established law of [this] Circuit . . . is that, when the government (as opposed to a private plaintiff) brings a civil or criminal action under Section 10(b) and Rule 10b–5, it need only prove, in addition to scienter, materiality, meaning a substantial likelihood that a reasonable investor would find the omission or misrepresentation important in making an investment decision, and not actual reliance."); Ganino v. Citizens Utilities Co., 228 F.3d 154, 161-62 (2d Cir. 2000) (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); 3 Sand et al., supra, Instruction 57-21. The court's full instruction on materiality was lengthy in light of the importance of this element to this case. See Jury Charge at 49-50.

In arguing that proof of materiality is lacking, Litvak claims that his lies could not have been material, given that his victims were professional investment managers and that, in the RMBS market at issue, they rarely had access to the information about which Litvak lied. See Def.'s Mem. in Supp. of Mot. for J. of Acquittal ("Def.'s Mem.") (Doc. No. 237-1) at 13-16. The government does not contest these facts, only the

conclusion that Litvak argues one must necessarily draw from them that trade execution and transaction costs are per se incidental, i.e., not material, to such investors.

Litvak has offered this argument regarding the insignificance of his lies to sophisticated investors in the RMBS market several times, including in his pretrial Motion to Dismiss the Indictment (Doc. No. 52). However, there is no bright-line test for materiality, which is a mixed question of fact and law for the jury. TSC Indus., 426 U.S. at 450. Thus, the court left this determination, in the first instance, to the jury. The same argument presented by Litvak here was presented to the jury at trial, and the jury clearly rejected it in their verdict.

Having reviewed the record, the court concludes that the trial evidence sufficiently supported a finding of materiality. First and foremost, Litvak's victims testified that his lies mattered to them because his lies affected the price they paid for the underlying securities. For example, Michael Canter of AllianceBernstein, one of the PPIFs, testified that Litvak's lies about cost and compensation harmed the fund's bottom line—that is, that the amount above what Litvak agreed to take as compensation should have gone to the PPIF, that a higher acquisition cost made the investment less profitable, and that, had Canter known the true acquisition price for the security and how much compensation Litvak was actually taking "on top," he would have sought to negotiate a better deal for the PPIF. Trial Tr. at 423-29. Other victims testified to similar effect. Id. at 787-88 (Vlajinac), 870-78 (Norris), 1086 (Lemin), 954-55 (Wollman) & 1199-1200 (Corso). One after the other, these victims testified that the false price information given to them by Litvak—information to which they conceded they typically did not have access in the RMBS market—became part of their calculations and

influenced their negotiations with Litvak; that Litvak's actual compensation (measured in 1/32s of a dollar referred to as "ticks") not only contravened their explicit agreements with him but also went, in some cases, well beyond the normal range of compensation to a broker of four to eight ticks; and that they would not knowingly have agreed to compensate such amounts "on top" for the bid list and order trades and certainly would not knowingly have agreed to additional compensation for inventory trades. As one victim attested, "every tick counts." Id. at 878 (Norris).

Moreover, the Bloomberg chats showed protracted negotiations over price, and a rational jury could have inferred materiality from the lengths to which Litvak went to deceive his victims. Michael Canter testified that, upon discovering Litvak's lies and confronting him, Litvak apologized and explained that "it was a hard year and guys were doing whatever they needed to make money." Id. at 388. A rational jury could have inferred that Litvak himself lied in order to make money and that, absent a potential profit, he would not have provided false information to his victims.

As Litvak stresses, and as is undisputed by the government, unlike the stock market, the RMBS market is not transparent, and Litvak's victims, all finance professionals, chose which bonds to invest in based on sophisticated yield models.[1] In Litvak's view, such facts necessarily render his lies immaterial. The court disagrees. While these victims had other powerful investment tools, and while buyer and seller in

---

[1] The lack of transparency in the RMBS market and the nature of LItvak's negotiations with his victims also distinguish the instant case from Feinman v. Dean Witter Reynolds, Inc., 84 F. 3d 539 (2d Cir. 1996), which dealt with the stock market. There, while the transaction fees, as contained on the trade confirmations, were claimed not to reflect actual costs, the fees were correctly stated, and the market was not otherwise alleged to have been distorted as a result. Id. at 541-42. Here, in contrast, the transaction costs for bid list and order trades—as agreed-upon markups or commissions in numbers of ticks—were embedded in the price, and the evidence showed that price was a heavily negotiated term and that the markups Litvak represented himself to be taking were false.

this market ordinarily lack access to the other's price information, there was ample evidence at trial that, in misstating his acquisition price in bid list and order trades and holding himself out to be buying from a fictional seller in inventory trades, Litvak exploited the opacity of the RMBS market to his victims' detriment and to Jeffries' and his own advantage.

Taken together, this evidence was sufficient to support a finding of materiality. Thus, the court concludes that, as to the first element of securities fraud, the jury's verdict has an adequate evidentiary basis.

2. Intent to Defraud

Litvak next challenges the sufficiency of the proof as to the second, or mens rea, element of securities fraud, arguing that the government failed to prove intent to defraud. In the context of securities fraud, "[t]o act with 'intent to defraud' means to act willfully and with the specific intent to deceive." Jury Charge at 52; see United States v. Vilar, 729 F.3d 62, 93 (2d Cir. 2013); United States v. Kaiser, 609 F.3d 556, 570 (2d Cir. 2010); United States v. Schlisser, 168 F. App'x 483, 486 (2d Cir. 2006); 3 Sand et al., supra, Instruction 57-24.

In challenging the sufficiency of the proof as to his intent to defraud, Litvak would have the court rewrite the jury charge to require proof, in addition, that he acted "for the purpose of causing [his victims] some financial loss." Def.'s Mem. at 18 (emphasis added). Litvak argued for including this language several times.[2] In the court's view, such language misstates the requisite mens rea. Vilar, 729 F.3d at 93 (rejecting that

[2] Litvak recapitulates here his argument that the government elected, in the "speaking" portions of the Indictment, to proceed exclusively on a theory of economic loss. Def.'s Mem. at 12 (citing Indictment ¶ 29). While the Indictment includes a loss allegation, the court does not share Litvak's view that this allegation transformed the intent element of the crime of securities fraud charged.

intent to defraud requires intent to steal in securities fraud). However, having been directed by Litvak to a Sixth Circuit case, United States v. DeSantis, 134 F.3d 760 (6th Cir. 1998), the court inserted into the jury charge on "intent to defraud" broader language, as follows: "The misrepresentation or omission must have had the purpose of inducing the victim of the fraud to undertake some action." Jury Charge at 52; see DeSantis, 134 F.3d at 764 ("[T]he misrepresentation or omission must have the purpose of inducing the victim of the fraud to part with property or undertake some action that he would not otherwise do absent the misrepresentation or omission.").

The circumstantial evidence at trial adequately supported a finding of intent to defraud, as charged by this court. The government introduced numerous Bloomberg chats demonstrating that Litvak knowingly lied and benefitted as a result. For example, there was evidence that Litvak knew the actual price at which the seller was selling the HVMLT bond to Jeffries and yet misrepresented and inflated the price when selling the bond to Michael Canter of AllianceBernstein. Gov't's Exs. 13A & 17. There was evidence, including Special Agent O'Connor's testimony and Litvak's own apology to Canter, that the lies made the charged trades more profitable and that this increased profitability was a motive for Litvak's lying. Trial Tr. 388 (Canter); 1399-1423 (O'Connor). Further, a rational jury could have inferred from the fact that Litvak misrepresented price information characteristically unavailable in the RMBS market that his purpose in providing this information was to induce his victims to agree to the price he was representing as the actual price from the counterparty and not to engage in further negotiation, as they might otherwise have done, absent the lie.

Such evidence sufficed to support a finding that Litvak acted with the intent to defraud. Litvak's challenge to the sufficiency of this evidence relates only to the asserted lack of proof that he intended to cause his victims a financial loss. The intent element of securities fraud, however, requires no such proof. Vilar, 729 F.3d at 93.[3] Evidence that Litvak's victims were satisfied with the price at the time and unaware of a better price elsewhere does not negate proof that his lies were the product of a conscious objective and had the purpose of inducing victims into accepting his made-up prices. A rational jury could have concluded that, absent Litvak's lies, his victims could have negotiated a better deal with him.

Having reviewed the trial record, the court determines that there was sufficient evidence for a rational jury to convict Litvak of Counts One through Six and Eight through Eleven of securities fraud and that the jury's verdict on these counts must, accordingly, stand.

C. TARP Fraud

To convict Litvak of the crime of TARP fraud charged in Count Twelve, the jury had to find that the government had proven beyond a reasonable doubt the following four elements:

(1) There was a scheme or artifice to obtain money or property by means of materially false or fraudulent pretenses, representations, or promises, as charged in the Indictment;

[3] The trial evidence may also be sufficient to support a finding of intent to cause financial loss. However, the court did not charge the jury as to financial loss because, in the court's view, such instruction is not required for securities fraud. Further, the concept of financial loss is ambiguous under the circumstances of this case, and an instruction as to financial loss risked confusing the jury by conflating long-term soundness of the investments with immediate injuries in connection with the process of negotiating and executing a given trade. There is no dispute that Litvak's scheme pertained only to the latter, that is, trade execution, and not to whether the RMBS bonds were ultimately profitable.

(2) This scheme or artifice took place in a form of Federal assistance, including either through the Troubled Asset Relief Program (or "TARP"), an economic stimulus, recovery, or rescue plan provided by the government, or through the Government's purchase of a troubled asset as defined in the Emergency Economic Stabilization Act of 2008;

(3) [ ] Litvak executed or attempted to execute this scheme or artifice (as set forth in paragraphs 1 and 2 above) knowingly, willfully, and with specific intent to defraud; and

(4) The value of such form of Federal assistance, or any constituent part thereof, was at least one million dollars ($1,000,000).

Jury Charge at 59; see 18 U.S.C. § 1031(a); cf. Sand et al., supra, Instruction 18-8.[4] As with securities fraud, Litvak challenges the proof of materiality and intent to defraud, under the first and third elements of TARP fraud, respectively. In addition, Litvak challenges the proof of the second element—that is, that Litvak's scheme took place in a form of federal assistance.

1. Materiality

To find that the government had proven beyond a reasonable doubt the first element of TARP fraud, the jury had to find that Litvak's lies related to a material fact or matter, that is, "a fact or matter which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement to make an investment decision." Jury Charge at 60.[5]

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[4] This court appears to be the first to have charged a jury on TARP fraud under the Major Fraud Statute, as amended in 2009. The standard Sand charge is tailored to procurement fraud. The court substantively modified this charge to address the circumstances of the instant case, which are specific to the PPIFs established under TARP.

[5] Although the wording of the materiality instruction here differs from the court's instructions on materiality under securities fraud and false statements, this language largely tracks the standard language in Sand and in the parties' proposed jury instructions. See 1 Sand et al., supra, Instruction 18-10; Gov't's Proposed Jury Instructions (Doc. No. 92) at 39 ("A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision (e.g., with respect to a proposed investment)."); Def.'s Revised Proposed Jury Instructions (Doc. No. 183) at 55 ("A material fact is one which would reasonably be expected to be

The transactions alleged to constitute TARP fraud in Count Twelve are the same as those alleged to constitute securities fraud in Counts One through Five. The same proof supporting a finding of materiality in securities fraud, see Part III.B.1, supra, suffices to support a finding of materiality under TARP fraud as well. From such evidence—particularly, the PPIF managers' testimony—the jury could reasonably have found that Litvak's lies concerning price were capable of influencing the PPIFs' negotiations and, hence, that his lies related to facts which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement to make a decision. Trial Tr. at 423-29 (Canter), 787-88 (Vlajinac) & 870-78 (Norris).

In challenging the proof of materiality, Litvak argues that his lies could not have mattered to Treasury because, under PPIP, decision-making authority over these investments was delegated to PPIF managers, who were not required to report to Treasury, and did not report to Treasury, brokers' markups or commissions on trades. Def.'s Mem. at 10. Of course, in the RMBS market, such information is ordinarily inaccessible to anyone but the broker. While Litak and the government each characterize Treasury's role relative to the PPIFs somewhat differently, this issue relates, in the court's view, not to materiality but to the second element of TARP fraud—that is, whether the trades took place in a form of federal assistance.

For purposes of TARP fraud, materiality requires only that the facts about which Litvak lied be the sort that reasonably would be expected to matter to a reasonable and

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of concern to the United States Treasury in relying upon the representation or statement."). The court circulated a draft containing similar language on February 7 and this exact language on March 2. On neither occasion did the parties object or propose other language regarding materiality under TARP fraud.

prudent person in relying upon these facts to make a decision, in this case, as to the purchase of a given security at a given price. Taken as a whole, the trial evidence was sufficient to support the jury's finding of materiality.

2. In a Form of Federal Assistance

With respect to the second element of TARP fraud, the jury had to find that Litvak's scheme took place in a form of federal assistance, including through TARP or the government's purchase of any troubled asset as defined in the Emergency Economic Stabilization Act of 2008 ("EESA"). Jury Charge at 62; see 18 U.S.C. § 1031(a); cf. 1 Sand et al., supra, Instruction 18-12. Litvak argues that, whereas the government's investment in the PPIFs qualified as the government purchasing a troubled asset, subsequent purchases of RMBS bonds by the PPIFs did not, because such purchases were not within Treasury's control. Litvak claims that his lies thus necessarily fell outside the scope of section 1031. The court disagrees.

It fell to the jury to determine whether the government had proven beyond a reasonable doubt that Litvak's scheme took place in a form of federal assistance. The court charged the jury on the law, as follows:

> [U]nder EESA, the Secretary of the Treasury may establish "vehicles that are authorized, subject to supervision by the Secretary, to purchase, hold, and sell troubled assets." EESA defines public-private investment funds (or "PPIFs") as financial vehicles established by the Federal government and funded by a combination of funds from private investors and funds provided by the Secretary or appropriated under EESA. These vehicles were created to purchase troubled assets.
>
> PPIF managers are required to retain all books, documents, and records relating to the PPIFs, including electronic messages. And the Special Inspector General of the Troubled Asset Relief Program (or "SIGTARP") of the Department of Treasury may access all books and records of the PPIFs, including all records of financial transactions. It is the duty of SIGTARP to conduct and coordinate audits and investigations of the

> purchase, management, and sale of troubled assets by the Secretary of the Treasury under the TARP program.
>
> EESA defines "troubled assets" as including residential or commercial mortgage-backed securities originated or issued on or before March 14, 2008, the purchase of which the Secretary of the Treasury determines promotes the stability of the financial markets.

Jury Charge at 62; see 12 U.S.C. §§ 5202, 5211, 5231 & 5231a.

David Miller testified at length about the PPIFs based on his experience as former Chief of Investment for the Office of Financial Stability at Treasury. In particular, Miller testified that that Treasury set up the PPIFs, devised their form, selected their managers, dictated which types of assets they could buy and sell, and oversaw their performance. Trial Tr. at 161-64 & 201-02. In addition, PPIF managers attested to their understanding that they owed fiduciary duties to the government, that they were investing on the government's behalf, and that they were bound by rules imposed by Treasury. Id. at 392 (Canter), 773 & 779 (Vlajinac). Miller testified as well to the extent of Treasury's supervisory authority, which included the ability to get trade-level data from the PPIFs, stating that Treasury's goal in establishing such oversight was to prevent fraud, waste, and abuse. Id. at 162-63. Taken together, such evidence was sufficient to support a finding that the charged trades took place in a form of federal assistance.

In challenging the government's proof of this element of TARP fraud, Litvak relies heavily on Miller's testimony, on cross-examination, that "subsequent purchases by the PPIF managers . . . were not government acquisitions of the troubled asset." Trial Tr. at

192. However, this testimony must be read in light of the record as a whole.[6] While it is arguably helpful to Litvak in isolation, in the context of the court's instruction on the law and the weight of the other trial evidence—including the other substantial testimony by Miller himself—the jury reasonably could have discounted this testimony, crediting those parts of Miller's testimony with which it is arguably at odds. United States v. O'Connor, 650 F.3d 839, 855 (2d Cir. 2011) ("'It is the province of the jury and not of the court' to determine whether a witness who may have been 'inaccurate, contradictory and even untruthful in some respects' was nonetheless 'entirely credible in the essentials of his testimony.'" (quoting United States v. Tropiano, 418 F.2d 1069, 1074 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970))). Furthermore, the statute does not limit in which forms of federal assistance the scheme must be found to have taken place. 18 U.S.C. § 1031(a) ("any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, including [TARP] . . . or the government's purchase of any trouble asset" (emphasis added)). Even assuming the jury construed Miller's isolated

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[6] Miller's testimony here came at the end of a series of questions focused on a SIGTARP audit report that discusses the selection of PPIF managers. Def.'s Ex. 920. As explained in that Report, Treasury determined that, because it established the PPIFs as limited partnerships, they were "investment counterparties" rather than contractors or financial agents and were therefore exempt from the Federal Acquisition Regulation ("FAR"). Id. at 29-30.

This legal determination regarding the application of FAR to Treasury's selection of PPIF managers is of limited relevance to Litvak's criminal case. Nothing in the report mentions, let alone prevents, prosecution of fraud in connection with the PPIFs' purchases of RMBS bonds. Further, as to whether such purchases constitute federal assistance for purposes of criminal liability under section 1031, the language of the Major Fraud Statute—"any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," 18 U.S.C. § 1031(a)—is clearly meant to be broad and inclusive. The use of "any" undercuts the argument for imposing a narrowing construction. Salinas v. United States, 522 U.S. 52, 57 (1997); cf. Fischer v. Untied States, 529 U.S. 667, 678 (construing similar language in section 666 as "reveal[ing] Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs").

Moreover, Miller, who is not a lawyer and was not qualified as an expert witness, disclaimed having any personal knowledge of this audit report, and the court instructed the jury that, where a witness like Miller testifies about the law, such testimony should be regarded only as his understanding and must be disregarded if it differs from the court's detailed instructions on the law at the end of the trial. Trial Tr. at 145.

testimony here as credible evidence that the charged trades did not qualify as the government's purchase of troubled assets, the totality of evidence was sufficient to support a finding that these trades transpired in a form of federal assistance, whether a form enumerated in the statute or some "other form of Federal assistance." Id.

It is undisputed that Treasury left day-to-day investment decisions to the PPIF managers and that, although subject by law to more stringent oversight, the PPIFs were designed to look like private funds. Trial Tr. at 161-62, 174, 176-79 (Miller). Further, with respect to at least one transaction, there was some evidence that an RMBS bond purchased by a PPIF manager might have been allocated between the PPIF and another non-PPIF account. Id. at 1564-65. Litvak argues from these facts that construing section 1031 to reach his lies would allow trades to become crimes after the fact, depending on how the PPIF manager allocated the money. Def.'s Mem. at 27-28. While the court is mindful of the potentially broad scope of forms of federal assistance cognizable under section 1031, Congress clearly limited the reach of section 1031 by requiring both that this federal assistance have a minimum value of $1 million and that the fraudulent scheme be executed knowingly, willfully, and with specific intent to defraud. Because the issue raised here by Litvak concerns, in reality, the latter element—not whether Litvak's scheme was in a form of federal assistance but whether he knew it was—the court addresses the issue under proof of intent. See Part III.C.3, infra.

As to the second element of TARP fraud, upon review of the record, the court concludes that there was sufficient evidence, even in the face of Miller's arguably

conflicting testimony, to support a finding that Litvak's scheme took place in a form of federal assistance.

3. Mens Rea

To find that the government had proven beyond a reasonable doubt the third, or mens rea, element of TARP fraud, the jury had to find that Litvak acted knowingly, willfully, and with specific intent to defraud. Jury Charge at 64. Litvak challenges the proof of both knowledge and intent to defraud.

As amended in 2009, the Major Fraud Statute reads, in pertinent part:

> Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,
>
> in any . . . form of Federal assistance . . shall [be guilty of a crime].

18 U.S.C. § 1031(a). In this case, the government elected to proceed exclusively under the second of the two alternative intent prongs.

a. Knowledge

With respect to the knowledge required under TARP fraud, the issue is one of first impression. The court construed "knowingly" to extend to the part of the statute that follows the two specific intents. As the court instructed the jury, Litvak's knowledge must have encompassed the fact that the scheme took place in a form of federal assistance. Jury Charge at 64-65. In challenging the proof of knowledge, Litvak argues that the evidence was lacking that he knew that his counterparties were transacting for the government and that, possibly in some cases, their trading status could even have

been decided after the fact, if they allocated a bond to different PPIF and non-PPIF accounts. Def.'s Mem. at 27-28.

There was ample evidence, however, that the execution of Litvak's scheme in trades involving PPIF money was not unwitting or accidental but knowing, regardless of any speculation as to the one individual trade, which might have been allocated between PPIF and non-PPIF accounts after the fact. The Bloomberg chats showed Litvak discussing PPIP and the PPIF managers by name, see, e.g., Gov't's Exs. 303, 306R, 314R & 337, and Michael Canter of AllianceBernstein testified that he had explicit conversations with Litvak about the PPIFs, Trial Tr. 360-64, 366-67.[7]

Such evidence was sufficient to support a finding that Litvak knowingly executed the scheme in a form of federal assistance.

b. Intent to Defraud

With respect to intent to defraud, the court instructed the jury that, in the context of TARP fraud, "to act with 'intent to defraud' means to act willfully and with the specific intent to deceive, for the purpose of depriving another of money or property, including material information necessary to make discretionary economic decisions." Jury Charge at 64. Based on the same circumstantial evidence supporting a finding of intent to defraud under securities fraud, see Part III.B.2, supra, the jury reasonably could have found that Litvak's lies were made for the purpose of depriving his victims of money or property, including material information necessary to make discretionary economic decisions. In effect, Litvak challenges not proof of intent to defraud, as that element

[7] Indeed, Canter testified to yelling at Litvak when confronting him about his lies: "Are you freaking crazy doing this to the United States Treasury Department. Because of this, I'm going to have to report this." Id. at 390.

was charged by this court, but the charge itself, which Litvak would rewrite to require proof that his lies "were made for the purpose of deceiving and economically harming the United States government specifically." Def.'s Mem. at 28. The "intent to defraud" instruction under TARP fraud was the subject of extensive discussion at the charge conference, and the court's charge on this element reflects its considered view of the law in this Circuit.[8]

As already noted, the amended Major Fraud Statute provides for two alternative specific intents: "intent—(1) to defraud the United States; or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1031(a). The government chose to proceed solely under the money or property prong. However, the standard Sand charge reads: "To act with intent to defraud means to act willfully and with the specific intent to deceive, for the purpose of causing some financial loss to another." 1 Sand et al., supra, Instruction 18-11. The court modified the language regarding financial loss, over strong objections by Litvak, because, in the court's view, that language incorrectly states the law governing prosecution of major fraud under the second of the two intent prongs, 18 U.S.C. § 1031(a)(2). In construing other criminal statutes which employ "money or property" as an alternative prong, such as the mail and wire frauds statutes, 18 U.S.C. §§ 1341 & 1343, the Second Circuit has held "property" to include a right to control one's assets and information necessary to make discretionary economic decisions, United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007); United States v. Rossomando, 144 F.3d 197,

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[8] Given that the closest statutory analog to the TARP fraud statute is the bank fraud statute, 18 U.S.C. § 1344, the Supreme Court's recent decision in Loughrin v. United States, No. 13–316, slip op. (U.S. June 23, 2014), would appear to support the court's charge in this regard. See id. at 4–5, 6.

201 n.5 (2d Cir. 1998); United States v. Dinome, 86 F.3d 277, 284 (2d Cir. 1996). The court's charge on "intent to defraud" tracks this case law.

The trial evidence sufficiently supports a finding that Litvak acted with specific intent to deceive, for the purpose of depriving his victims of money or property. Hence, based on the trial record, a rational jury could have found each of the elements necessary to convict Litvak on Count Twelve of TARP.

D. False Statement

To convict Litvak of the crime of false statement charged in Counts Thirteen through Sixteen, the jury had to find that the government had proven beyond a reasonable doubt five elements:

> (1) On or about the date specified [in that count,] Litvak made a statement or representation;
>
> (2) This statement or representation was material;
>
> (3) The statement or representation was false, fictitious, or fraudulent;
>
> (4) The false, fictitious, or fraudulent statement was made knowingly and willfully; and
>
> (5) The statement or representation was made in a matter within the jurisdiction of the government of the United States.

Jury Charge at 70; see 18 U.S.C. § 1001; 2 Sand et al., supra, Instruction 36-9. Litvak contests the sufficiency of the evidence as to the second, forth, and fifth elements.

1. Materiality

Although the court's charge on materiality differed here from the related charges under securities fraud and TARP fraud, the evidence supporting a finding of materiality in those other contexts was sufficient to support a finding of materiality under section

1001 as well. See Parts III.B.1 & C.1, supra.[9] Indeed, Litvak's argument on materiality is identical to the argument under section 1031—that is, that his lies did not matter to Treasury. Def.'s Mem. at 9-10. In the court's view, this argument does not bear on materiality and is properly addressed under the fifth, or jurisdictional, element. See Part III.D.3, infra.

2. Knowledge

Litvak's challenge to proof of knowledge under section 1001 is likewise identical to his challenge under section 1031. However, unlike TARP fraud, the crime of making a false statement requires no proof that Litvak knew his lies were in a matter within the jurisdiction of the U.S. government. United States v. Yermian, 468 U.S. 63, 75 (1984) ("[P]roof of actual knowledge of federal agency jurisdiction is not required under § 1001."). As a matter of first impression, the court construed knowledge under section 1031 to cover TARP fraud's jurisdictional analog—that the scheme was executed in a form of federal assistance. With respect to section 1001, however, the court does not write on a blank slate, and it is well settled that "knowingly" in this statute comprehends "only the making of 'false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency." Id. at 69. Litvak does not challenge the proof that he knew his statements were false, and the circumstantial evidence was clearly sufficient to support a finding of such knowledge.

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[9] To be material under section 1001, Litvak's lies must have had a natural tendency to influence, or must have been capable of influencing, the decision of a reasonable decisionmaker in a matter within the jurisdiction of the United States government. Jury Charge at 72; see United States v. Gaudin, 515 U.S. 506, 509 (1995); United States v. Whab, 355 F.3d 155, 163 (2d Cir. 2004); cf. 2 Sand et al., supra, Instruction 36-11.

3. Jurisdiction

To find that the government had proven beyond a reasonable doubt the fifth element, the jury had to find that "it was contemplated that the statement or representation was to be utilized in a matter which was within the jurisdiction of an agency or department of the United States government." Jury Charge at 75; see United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973). The court instructed the jury:

> To be within the jurisdiction of an agency or department of the United States government means that the statement must concern an authorized function of that department or agency. Not everything concerning an agency or department is within the jurisdiction of the United States. The phrase "within the jurisdiction" differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body. A federal department or agency has jurisdiction when it has the power to exercise authority in a particular situation, regardless of whether the Federal agency chooses to exercise that authority or not.
>
> A false statement may fall within the jurisdiction of the United States government even when it is not submitted to a Federal department or agency directly and the Federal department or agency's role is financial support of a program that it does not itself directly administer. The use of federal funds by itself does not put the matter within the jurisdiction of the United States. However, where the deception at issue is made to a private party receiving Federal funds, such deception may be within the jurisdiction of the United States government if it affected a Federal department or agency because of that department or agency's responsibility to ensure that its funds are properly spent.

Jury Charge at 75; see Candella, 487 F.2d at 1229; United States v. Davis, 8 F.3d 923, 929 (2d Cir. 1993) (citing United States v. Rodgers, 466 U.S. 475, 479 (1984)); United States v. Ross, 77 F.3d 1525, 1544-1545 (7th Cir. 1996); United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983); cf. 2 Sand et al., supra, Instruction 36-14.

Litvak argues that the PPIFs were purely private entities, in which Treasury's role was limited to that of an investor. Def.'s Mem. at 31. As a matter of law, however, Treasury had the statutory authority under TARP to establish and fund the PPIFs as

"vehicles that are authorized, subject to supervision by the Secretary, to purchase, hold, and sell troubled assets," 12 U.S.C. § 5211(c)(4); 5231a(e), and there was ample evidence that Treasury, in fact, created the PPIFs as such vehicles, determining the types of eligible assets in which the PPIFs could invest, and exercising oversight in various forms, from conducting audits and requiring reports to holding monthly meetings, Trial Tr. at 161-64 & 201-02 (Miller). Further, Miller testified that Treasury's oversight, which included the ability to get trade-level data, was designed to prevent fraud and abuse in the program. Id. at 162-63. Finally, from Canter's testimony—in particular, his confrontation with Litvak about Litvak's lies—a rational jury could have concluded that the PPIF managers understood themselves to be acting on Treasury's behalf and to be governed by its rules. Id. at 390, 392. The fact that Treasury delegated day-to-day investment decisions to PPIF managers does not negate the evidence establishing Treasury's supervisory authority over the PPIFs. Such evidence was sufficient to support a finding that Litvak's lies were made in a matter within the jurisdiction of the U.S. government.

In sum, a rational jury could have found each of the elements necessary to convict Litvak of Counts Thirteen through Sixteen of making a false statement under section 1001. Accordingly, the jury's verdict on these counts must stand.

IV. MOTION FOR NEW TRIAL

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Litvak moves the court, in the alternative, for a new trial. Under Rule 33, a "court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. Pro. 33(a). A district court "has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33

authority 'sparingly' and in 'the most extraordinary circumstances.'" United States v. Ferguson, 246 F.3d 129, 134 (2d Cir.2001) (quoting United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir.1992)). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." Id. In exercising its discretion, the court may weigh the evidence and credibility of witnesses. United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000). However, the court may not "wholly usurp" the jury's role, id., and should defer to the jury's assessment of witnesses and resolution of conflicting evidence unless "exceptional circumstances can be demonstrated." Ferguson, 246 F.3d at 134.

Litvak identifies no extraordinary circumstances which would warrant a new trial here. Having examined the record, the court concludes that no such circumstances are present, that the jury's verdict is adequately supported by the record, and that the interests of justice do not require a new trial. Accordingly, the court denies Litvak's Rule 33 Motion.

V. CONCLUSION

For the reasons set forth above, the court **DENIES** Litvak's Motion for a Judgment of Acquittal and for a New Trial (Doc. No. 237). Pending before the court is also Litvak's Oral Motion for Directed Verdict (Doc. No. 212), which Motion is likewise **DENIED** for the reasons stated in Part III of this Ruling.

SO ORDERED.

Dated at New Haven, Connecticut this 2nd day of July, 2014.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

United States of America Government v. Jesse C. Litvak Defendant.	July 23, 2014 10:00 a.m. 3:13cr19(JCH)

141 Church Street
New Haven, Connecticut

SENTENCING HEARING

B E F O R E:

THE HONORABLE JANET C. HALL, U.S.D.J.

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THE COURT: Good morning. Give me one second, please, to get organized.

Good morning again to everyone. We're here this morning in the matter of the United States of America vs. Jesse C. Litvak, Docket Number 3:13-CR-19.

If I could have appearances, please.

MR. FRANCIS: Good morning, your Honor. For the government, Jonathan Francis and Christopher Mattei. Also with us at counsel table is SigTarp Special Agent James O'Connor and Senior Investigator Robert Marston.

THE COURT: Good morning to all of you.

MR. SMITH: Good morning, your Honor. Patrick Smith for Mr. Litvak. Also representing Mr. Litvak is my partner, John Hillebrecht and Ross Garber.

Mr. Litvak is present in court.

THE COURT: Yes. Good morning to all of you.

As I said when I began, that we're here today in connection with the sentencing of Mr. Litvak following his conviction on a number of counts by a jury several months ago.

I will just state for the record that I have reviewed the PSR, the addendum, the second addendum including the correspondence with counsel, which itself included attachments. I reviewed all of that. I reviewed the government and the defendant's sentencing memorandums and

their replies thereto to each other's, including all of the attachments.

I, of course, have observed the trial evidence, testimony by witnesses, cross-examination thereto, and I have gone back in preparation for the sentencing and reviewed some of that testimony. I have not reviewed all of it, but I have reviewed some of it to refresh my recollection. Also, obviously, counsel have cited me to various cases and to articles. I've reviewed those as well.

Is there anything else that I should have reviewed that I haven't generally referred to as having reviewed? Is there something I've missed?

MR. SMITH: We had a motion to supplement the record.

THE COURT: Yes, I was going to deal with that in a second. I have reviewed those attachments already, and I granted it, but I don't think it's been docketed. I assume there's no objection.

MR. FRANCIS: There is no objection, and there's nothing further from the government.

THE COURT: All right. Then that takes us to the issue of sentencing, which I will just state briefly that it's my obligation here today, Mr. Litvak, to impose a sentence upon you, after considering all of the factors that are set forth by law in a section of the law known as

3553(a), and it is my intention to do that today. I may not specifically refer to every one of them. I am mindful of them all, but if I don't, it is because I considered it, and I don't find it particularly significant, I guess I will say. However, I will spend quite a bit of time on the ones that I do, which are the nature and circumstance of the offense, your history and characteristics and then the need for the sentence. Of course, the guidelines are also very important and I need to start with those.

Before I turn to the guidelines, I want to be sure, Mr. Litvak, that you had the opportunity to read what is called the Presentence Report prepared by Officer Lopez and had an opportunity to discuss it with counsel before today.

THE DEFENDANT: Yes, your Honor, I have.

THE COURT: All right. And counsel was able to answer any questions you had about it?

THE DEFENDANT: Yes.

THE COURT: All right. Thank you very much.

I think we'll start with the PSR so that we can then get to the guidelines and then to the other factors. With respect to the PSR, does the government have any objections to the PSR to the extent it sets forth facts which could be relevant to the sentencing?

MR. FRANCIS: No objection, your Honor.

THE COURT: How about from defense?

MR. SMITH: We do, your Honor.

THE COURT: Yes.

MR. SMITH: And they are set forth in our June 10th letter.

THE COURT: Well, let's just go through, if you would, as to which ones -- assuming you press them all, we'll go through all of them. But if we could go by paragraph so I can hear argument and then rule on them.

MR. SMITH: With respect to the Paragraph 8, your Honor, we'd ask --

THE COURT: Yes.

MR. SMITH: -- the term "toxic" be stricken from the Presentence Report. It is inappropriate under the circumstances in this case. In particular, given the nature of the securities, how they perform, toxic refers in the context of the credit crisis to essentially securities that went to zero, and the securities performed. All of them performed.

THE COURT: I think the probation officer had reported that he had not responded to your objection in the sense of altering the PSR. Does the government have an objection to altering the language?

THE PROBATION OFFICER: To assist in this analysis of the PSR, I would just refer the parties and the court to the second addendum to the PSR, and in the third paragraph,

the second addendum, I tried to adequately outline Mr. Litvak's objections paragraph by paragraph.

THE COURT: Yeah. Okay. But you --

THE PROBATION OFFICER: But I have not made any revisions to the PSR.

THE COURT: Does the government object to the deletion of the word "toxic"?

MR. FRANCIS: I don't think it is that significant, Judge, taking out the word "toxic," because then the sentence doesn't make any sense. But you could make a deletion of the end part of that sentence.

THE COURT: Right, beginning with "that"?

MR. FRANCIS: That's correct, your Honor.

THE COURT: Ray, why don't we do that.

Your next one, sir?

MR. SMITH: Well, Paragraph 9, your Honor, we just want to supplement the offense conduct description with the information we set forth in Paragraph 9 that describes the relationship between the Treasury, the PPIPs and the PPIP managers.

THE COURT: I don't know that that's particularly pertinent to my -- to sentencing facts. I mean, facts that would be pertinent or important to me in sentencing. I'm aware of the information you set forth. It is attached as an addendum. I'm not inclined to adopt it.

MR. SMITH: We had the same issue on Paragraph 10, your Honor.

THE COURT: Yes.

MR. SMITH: I guess what I'd do then is move on to Paragraph 11, which I do think is substantive --

THE COURT: Okay.

MR. SMITH: -- with respect to the issue of loss, which is really where we're getting to.

THE COURT: Yes. Well, yeah, we're going to get to the guideline calculation, I guess, sort of a legal argument. You object, though, to the characterizations?

MR. SMITH: Well, I think in particular the statement in the second line in our objection to Paragraph 11 which argues that the victims' investments were less profitable. We don't think that statement is correct. And again, this will just dovetail into the loss arguments.

THE COURT: Yes. I guess, Ray, in your addendum --

THE PROBATION OFFICER: Excuse me, Judge.

THE COURT: Go ahead.

THE PROBATION OFFICER: So in the addendum, I do actually reference Paragraph 11.

THE COURT: Right.

THE PROBATION OFFICER: And I understand the objection to be to the characterization or the numerous characterizations derived from the conduct, and defendant'S

objection letter is attached to the PSR in which he is offering his --

THE COURT: Right. I guess I will reserve on 11 because it is really going to go to loss arguments. So I shouldn't decide it until I hear from counsel. So let's -- we'll reserve on 11.

MR. SMITH: And your Honor may wish to do the same with respect to Paragraph 13, which is -- it goes to what the impact was on the counterparties and whether the transactions were more profitable or not. It does have this issue in here which the government features in their submissions, however, by citing back to the PSR on the cost plus, which again we'll get to. We don't --

THE COURT: Yeah, I think we'll reserve on that for now. It is going to get resolved when I decide about loss.

Anything else that you press?

MR. SMITH: Well, just move right to 19 and 20, your Honor, which goes to the economic harm issues.

THE COURT: Yes.

MR. SMITH: And whether or not there was a reasonably foreseeable pecuniary loss or harm to the counterparties, to the victims. We don't think the evidence fairly shows that. We think that Paragraphs 19 and 20 more accurately depict the economics of the transactions between the parties, namely this was a scheme as proved by the

government that masked Jefferies' profits on the transaction, but didn't otherwise create any harm or economic loss for the counterparties.

THE COURT: Let's reserve on that.

Anything else you press?

MR. SMITH: Again, all in the same categories, 21, 22 and 23, which go to loss calculations. I do think Paragraph 23 does have the loss issue set forth in it, namely, you know, that's where we find the loss calculation.

THE COURT: All right. I will reserve on those.

Anything else?

26 is acceptance issue, I guess, which we'll need to argue about as well. So I will reserve on that.

MR. SMITH: And 30, these are all guidelines calculations.

THE COURT: Yeah, don't tell me an objection to guideline. I'm just asking about the facts that are set forth right now.

MR. SMITH: We wanted to -- and I think this may be picked up by the second addendum, supplement the information with respect to Mr. Litvak's son Isaac.

THE COURT: Was that incorporated, Ray, or not?

THE PROBATION OFFICER: Yes.

MR. SMITH: I mean, that information has been

conveyed to your Honor.

THE COURT: Yes, I reviewed the various reports. I think -- what do you say? Ray, do you say you make it?

THE PROBATION OFFICER: Your Honor, it is lengthy, it is helpful and it is incorporated by way of attachment to the PSR.

THE COURT: Okay. I will adopt the additional information in your 55, but I think that's what Ray has done in his addendum.

MR. SMITH: So I think the last factual issue then before we get into the guidelines analysis and recommendations is Paragraph 63. It has to do with ability to pay and Mr. Litvak's net worth.

THE COURT: Yes.

MR. SMITH: The PSR incorrectly assigns Mr. Litvak certain assets that belong to his wife, Dr. Renee Litvak. One is the Charles Schwab account, which was listed as part of Mr. Litvak's net worth as an individual asset.

THE COURT: Is that the fourth item on Paragraph 63? That one, or the fifth?

MR. SMITH: I'll tell you, it's the amount of $533,000 approximately as of the time --

THE COURT: How is the ownership of that account?

MR. SMITH: That is an individual account in Dr. Litvak's -- Dr. Renee Litvak's name. Mr. Litvak has no

ownership interest in that account.

THE COURT: And how long has that been -- has that always been the case since the account was opened?

MR. SMITH: That's been the case since the account was opened. And Mr. Litvak's name was not removed from it at any time.

THE COURT: The source of the amounts in that account were not from Mr. Litvak?

MR. SMITH: Some of the -- well, Dr. Litvak earns a livelihood. She's a dentist. And my understanding is the money came from Dr. Litvak. I can't say with certainty that no money Mr. Litvak brought into the household was never transferred into there, but it's my understanding that's Dr. Litvak's account.

THE COURT: Okay. Actually, that was the technical issues I had within your financial statement in which -- I think it is called a short form. I could have that wrong. The item for spouse's wages is zero, but the line above that's called gratuities seems to be an income number.

MR. SMITH: Those were reversed.

THE COURT: What other adjustments do you suggest or correct on the Paragraph 63?

MR. SMITH: Well, Paragraph 63 lists the apartment on East 78th Street as an asset owned by Mr. Litvak. What happened in 2011, before November, before the issue of

AllianceBernstein first came to light, purely for estate planning purposes, a trust was set up. It's the Renee Litvak Living Trust, and Renee Litvak is the sole beneficiary of that trust. Jesse Litvak had no ownership interest in the property on East 78th Street. That was done for estate planning purposes back in 2011.

THE COURT: I'm puzzled how Mr. Litvak earned -- I don't know -- multiples of what I think his wife earns, and yet the house was transferred? I guess it is a nontax event because it is below the spousal exemption?

MR. SMITH: I'm not saying that Mr. Litvak didn't pay for it.

THE COURT: Oh, I am saying he probably was the source of the payment.

MR. SMITH: I think it is quite common to avoid -- and lawfully avoid state tax as part of estate planning to place a primary residence in the trust and have the primary wage earner not be a beneficiary of the trust. That was done in a way that many others do it. Those were the purposes. It had nothing to do with any future law enforcement issues or potential creditors down the road. It was done for estate planning purposes. So it is not a marital asset. It is an asset that's owned by the trust with Dr. Litvak as beneficiary. That's just factually the way it is set up.

THE COURT: Go ahead.

MR. SMITH: Just an update on the residence in Quogue, your Honor. That residence was, in fact, sold. The mortgage was paid off. The mortgage was approximately $770,000. The proceeds on the sale after the mortgage payoff were split up equally between Dr. Litvak and Mr. Litvak, and approximately $1.3 million was wired at closing to their respective accounts. So now the update would be that Dr. Litvak's -- I think it is her Schwab account now has that higher balance reflected in it. And Mr. Litvak is in possession of the 50 percent of the net proceeds from the sale of the Quogue house, that's $1.3 million. That's Paragraph 63, your Honor.

THE COURT: And so is it your position that his net worth currently is approximately $1.6 million?

MR. SMITH: No, your Honor, it is about 3 million. He has these other assets that are largely 401K assets and life insurance policies. So if you look at --

THE COURT: So if I took out 3 million and a half a million of that Dr. Litvak's sole owner and I took out half the net value of the Quogue house, that seems to add up to 4.9. And Ray only had it 6.5. So I got 1.6. I don't know how you got 3 million.

MR. SMITH: If you take the residence out, the $3 million there.

THE COURT: Oh, that's the mortgage with the

residence also. I forgot. So that's a net of 1.9. Okay.

MR. SMITH: Just in terms of the significant assets that are in Mr. Litvak's name, which I think is the relevant factor here. You have the -- in Paragraph 63, the third item under other asset type, the Fidelity investments $732,000. That's a Roth IRA. So Mr. Litvak paid the tax to convert a traditional IRA to a Roth IRA some years ago. That's his. And then there's -- these life insurance policies, if you go to the actual financial statement, you see that some of these life insurance policies are actually Dr. Litvak, Dr. Renee Litvak policies. But this larger one of $543,000, that's a Jesse Litvak life insurance policy with a cash surrender value there of $543,000. And then the 1.3 million approximately from the proceeds on the Quogue house. So those are the significant assets plus, you know, some of the property and other things that they own. So it comes out to about roughly $3 million.

THE COURT: All right. Attorney Francis, any comment?

MR. FRANCIS: Yes, your Honor. With respect to the Schwab accounts, I think your Honor touched on with some of your questions. I think one thing that would be important to know is when these accounts were opened. And we don't have that information. If all Mr. Litvak is doing is just taking money out of his right pocket and putting in his left

pocket, that's not meaningful, regardless of whose name is on the account.

With respect to the house or the apartment on East 78th Street on the upper east side, our information is that that quote unquote estate planning transfer was done after Mr. Cantor discovered Mr. Litvak's fraud and told him he's going to have to report him to Treasury. If that's true, then it would appear there were some badges of fraudulent transfer here. And I think those would need to be further explored. But on its face, it's problematic, that around the same time he's being discovered, he's transferring his largest asset, or his second largest asset, to his wife's trust supposedly for estate planning purposes.

And with respect to selling the mansion in the Hamptons, that's great that they were able to liquidate it. However, just because you own a house with your wife doesn't mean you split the proceeds of that. They're joint tenants. The entire -- the entirety of that is his money. It is an asset they called jointly. And so the 11.3 number seems to be 50 percent of what the actual value to him was as 2.6. And the fact that he put half of it in his wife's account and half of it in his account is -- once again, that's just putting -- just taking two $10 bills and putting one in your right hand pocket and putting one in your left hand pocket. That's all it is.

So although if it is true that there are -- some of these life insurance policies, for instance, are property of his wife's, this number may need to be adjusted slightly. The millions of dollars of deductions that Mr. Smith advocates for are unwarranted. His net worth, by my calculations, is in the neighborhood of $8 million.

THE COURT: How do you get to eight? I'm at 6.5.

MR. FRANCIS: I'm sorry. The assets. The assets is in the neighborhood of $8 million. So once you deduct the liabilities, his net worth is in the neighborhood of $6 million.

THE PROBATION OFFICER: Just to be clear, your Honor. In examination of the financial statement that Mr. Litvak is required to complete directs that -- it is a total joint marital analysis. So whether an asset is in his wife's name or his name isn't dispositive, he's required to report total.

THE COURT: Right. But as to this part of the PSR which is titled ability to pay --

THE PROBATION OFFICER: But I think the analysis of his ability to pay includes the joint marital assets.

THE COURT: I guess the question I would raise -- first question, Attorney Smith, is what was the date of the trust that now holds the New York residence for the benefit of his wife?

MR. SMITH: I don't have the exact date, your Honor. I know the planning process was --

THE COURT: You don't have a copy in your files? Your client doesn't remember?

MR. SMITH: My clients do remember, and they remember with certainty that the trust was concluded prior to November 2011.

THE COURT: What was the intention when they -- when this was transferred, who had the mortgage obligation to pay $11,000 a month for this property? Was the mortgage -- was the note a joint note? Did Mr. Litvak's 5 million plus income per year go towards paying that mortgage, or was that paid by the $18,000 per month income of Dr. Litvak?

MR. SMITH: It was paid out of marital assets that's now Mr. Litvak's income. And --

THE COURT: And I guess -- go ahead.

MR. SMITH: The estate planning idea is that, you know, were Mr. Litvak to die unexpectedly, that the apartment would not pass through Mr. Litvak's estate.

THE COURT: No, I understand that. I understand that. But I guess -- I think I'm in agreement with the probation officer that I should consider marital assets. It doesn't mean I'm going to view it as every dime available and deciding that's the fine I'll impose. But I don't think it's a -- particularly given the disparity in income historically

between the two of them in terms of gathering these assets.

I guess the only question remaining is when did the assets go into the Schwab account. Were those in the time period, for example, that Mr. Litvak was at Jefferies?

MR. SMITH: I do believe that's the case, your Honor. We'll have an issue we'll discuss later whether any of the money that he earned at Jefferies is fairly traceable to the offense conduct.

THE COURT: That's a different question.

MR. SMITH: In terms of the ability to pay, I think what we're looking at is when your Honor gets down later in the proceeding to come up with a number, I think what Mr. Litvak has available to him will be the assets that are in his name.

THE COURT: That may be, but then the government may wish to proceed with a fraudulent transfer action if it were to get a copy of the trust agreement, which we don't have, and to align it with the dates of the discovery, it may decide that was a fraudulent transfer. If it wasn't, then I guess Mr. Litvak won't be paying the fine. He won't have the assets. The government can't proceed against him.

MR. SMITH: I just think that's an issue for another day. We just wanted to bring this up for the PSR to fairly state what assets are in whose name and --

THE COURT: That's fine. When was the Quogue house

purchased?

MR. SMITH: The Quogue house was purchased in 2009, I believe, and it was certainly purchased with, you know, funds that Mr. Litvak earned in large part -- let's just assume the entirety of it, in terms of the down payment. There was a substantial mortgage on it. With funds that Mr. Litvak earned at Jefferies.

THE COURT: I'm not going to change what the officer has reported here in 65, which, as he says, it calls for marital assets. I will, Ray, ask you to add at the end -- you can add an indication that the first Schwab account is in Dr. Litvak's name solely and that the residence was transferred to a trust where she benefits solely sometime in 2011.

MR. FRANCIS: Judge, although I don't have the trust documents, I don't know when the trust was created. According to the title search, the property -- part was transferred into the trust on October 29, 2011.

THE COURT: When was that material sent that led to this whole thing exploding? I can't remember.

MR. FRANCIS: November 12. November 12th, I believe.

THE COURT: So that doesn't help you, does it?

MR. FRANCIS: I'm sorry. Let me -- may I consult?

THE COURT: He was terminated in December.

MR. FRANCIS: You are right. You're right, Judge. I'm sorry. I was -- I had the wrong three-day weekend. So if November 12th the material was sent from Jefferies to AllianceBernstein, they discovered it and that would be two weeks before, in which case my argument would not pertain.

THE COURT: As I recall the trial evidence, he was terminated not that long after it was discovered?

MR. FRANCIS: It was December 20 something.

THE COURT: Yeah, right. I'm recalling it was November. But again, we'll note that in the PSR and I'll -- you know, when I decide ability to pay, I will decide what I'm going to do about that. But I think as far as what's in the PSR, that's fine. So at this point, we should turn, I think, to the loss question because, obviously, I have got various paragraphs that I haven't ruled on because of that issue.

So it is interesting. I mean, you have the objection to the PSR, Attorney Smith, but it is obviously the government's burden to prove it. If you don't mind, I will start with you on the issue.

MR. SMITH: I think confining ourselves to guideline application purposes --

THE COURT: Yes, that's what we're talking about. I'm not talking about whether the guidelines are appropriate or whether loss should be somehow viewed slightly differently

than how it might be calculated. I'm talking about what is the issue before me right now is in determining the guidelines, which I am supposed to try to do, I need to determine the only issue it seems to me in that calculation is is there a loss enhancement, and, if so, for how much. So that's what I'd like to speak with you about at this point.

MR. SMITH: Bearing in mind that the --

THE COURT: I have read anything that has been submitted.

MR. SMITH: The basic point, is given the government's concession that the bonds traded at fair market value and there was no issue with respect to that, in other words, in return for cash, each victim received a fairly valued asset. So if he paid a million dollars for a bond, you got back a bond that was fairly valued at a million dollars. And that the negotiations and the misrepresentations that were in the negotiations and upon which the jury's verdict was based, did not go to enhancement or financial loss, that they mattered for reasons other than those issues. But that on day one, a transaction date, the clients, the counterparty, the victims here were completely whole. And --

THE COURT: I have to stop you. I am struggling with -- and I'm not sure I'm right, but I struggle with the concept that somebody who is lied to is paying fair market

value. The fair market value that day is what a willing seller and a willing buyer were wanting to pay. The willing seller -- I mean this is not every transaction, but many, put the fair market value below the price paid by the buyer. I have trouble with the idea that we can use fair market value as what the buyer paid for it, when there's fraud. The seller's fair market value wasn't 60, it was 58, for example, in one of the trades.

MR. SMITH: I think fairly standard, your Honor, the fraud here is a false statement in the price negotiations that sent a false signal to the other side. And that had there been no false statement, the negotiations may have turned out differently. I think that's the important point to emphasize here, may have. Whether or not the negotiations would have been more beneficial --

THE COURT: Tell me the answer to this question. What was your client's intention when he lied? What did he intend to happen? He intended to cause the buyer to view the fair market value as the number he put on it because he said that's what a willing seller will sell at, right?

MR. SMITH: The bonds trade at fair market. I think the --

THE COURT: You can't keep saying they traded at fair market because I'm not persuaded that's fair market. I don't have an example. I have too much paper. But let's

take a particular trade. How about that? Can you tell me one, Attorney Francis, just one of the straight up buy-sells. You know, the buyer will sell at 60 but really the buyer was going to sell at 59. Not an inventory one, not one of those.

MR. FRANCIS: Count Three, your Honor, is a pretty clean one.

THE COURT: I don't know which one Count Three is. So I'm looking at your loss calculations. Can you tell me --

MR. FRANCIS: Tab 3.

THE COURT: Tab 3.

MR. FRANCIS: Tab 3 is Count Three.

THE COURT: Okay. So there, the seller's fair market value was 67 and 15 ticks, right? Is this a fair way to look at it? Is that what that column means, the buy price?

MR. FRANCIS: Right, that's the price Jefferies paid to the seller.

THE COURT: Right. So why isn't that the fair market value?

MR. SMITH: Because Mr. Cantor testified he knew what he paid for that bond, he'd do that trade again tomorrow. And he believed he was paying fair market value.

THE COURT: I'm talking about the seller's side. I mean, why do we only look at the buyer's side for evidence of

fair market value? Fair market value is a willing buyer and a willing seller. We had a seller here who put a fair market value on that bond of 67 and 15 ticks. Why isn't that the fair market value?

MR. SMITH: Well, because fair market value for -- these are liquid RMBS bonds at the time was not a pinpoint price, it was a range.

THE COURT: It was -- it was what the seller -- someone pinpointed it. This was the price Mr. Litvak, I will sell your bond.

MR. SMITH: Well, your Honor --

THE COURT: That's the trouble I have with -- with your argument and your use of the phrase fair market value. The definition requires a willing buyer and a willing seller, and here the two didn't meet. The seller put a fair market value of X and the buyer, because of the misrepresentation, put a fair market value of X plus.

MR. SMITH: Well, your Honor, from the buyer's perspective, and that's what matters on the example that Mr. Francis just put out on Count Three. The buyer came up with its valuation and made an assessment of what it was willing to pay, and it paid it. A sophisticated investor doesn't overpay for a bond. That's clearly what Mr. Cantor said. So at the end of that transaction on Count Three, at the transaction price, the bond was fairly priced and

AllianceBernstein put into its portfolio at the market and market as of that day at market. So it could have turned around the next day, sold that bond at market if it could find a buyer for it and there would have been no economic harm at all.

THE COURT: If it could find. That's pure speculation.

MR. SMITH: We're focused on the exchange of cash for an asset. The asset was fairly valued, and that's the victim testimony. Mr. Cantor said, Mr. Lujenac said, other witnesses said. They came up with their own valuations, they believed the price was fair and they paid willingly --

THE COURT: But the seller is telling us that the market is less. And so the fact that somebody does analytics and says, well, if you buy this house within the range of 200,000 to 220,000, that's a good buy. I don't know any buyer that -- you know, they may be happy if they think that the 220 is the best that they're going to get. But if they know they can get 200 -- buy it for 200, who doesn't view they've lost money.

MR. SMITH: Your Honor, it is not my intention to revert back here to issues that were argued and lost at trial, but this does relate to what is the bid and spread on an asset like this.

THE COURT: What's the what?

MR. SMITH: The bid and spread. What -- the difference between what a seller sells for. And so the broker/dealer sits in the middle, charges a lower price. You know, pays a lower price, sells at a higher price. That intermediation cost, that transaction cost doesn't mean that either side is paying something other than a fair market value price, but one is a bit higher than the other. And the more liquid the asset, the wider it is.

The point here is that at the time the transaction is concluded, the buyer takes a fair market valued asset into the inventory and the cash is exchanged. It did not suffer a financial loss. It booked no financial loss.

THE COURT: What about Mr. Norris? He said that he would have wanted to know that Mr. Litvak bought the bond at 79 and 16 ticks, and despite the fact that he paid more for it. He said absolutely I would have known it. And then when asked why would he want to know it, because he would have demanded that money, the difference, for his own client. The answer is yes. There's several others I could -- not every one. Cantor didn't say that. But certainly, there's evidence in the record that would support a reasonable inference, I think, you know, we might not know that every -- I mean, as you say, your hypothetical at page, I think, 23 of your brief is that the buyer doesn't necessarily have a right to know what is being paid for the bond or what the

seller is selling it for. He could have been silent and he would have committed no crime. But that's not why we're here. We're here because he wasn't silent.

And I would -- I guess I would ask you to respond to this thought. I think I started by asking this question. Is there any other inference to be drawn from what Mr. Litvak did than he wanted to put the spread in his pocket?

MR. SMITH: Well, I think the inference to be drawn is that --

THE COURT: His being Jefferies. I don't mean him personally.

MR. SMITH: Jefferies. So the intent was the bond is going to trade at a fair market value price, and the upshot of the conduct is that a somewhat higher percentage of the transaction price is going to Jefferies than the victim knew. That mattered, as the jury found. Right? It might have influenced the negotiations. And your point about Mr. Norris, had he known that, he may have negotiated differently.

THE COURT: It mattered in the market in the sense that somebody, I can't remember who, testified that, you know -- I don't know, he paid 20 ticks over what the seller -- he said nobody pays 20 ticks in this market. You know, I think I heard testimony that the commission, sort of the add-on for the broker was somewhere in the 4 to 8 range typically. And

that's what typically, in all of these transactions I heard about, was negotiated. So you know, what other conclusion I can draw but that the buyers lost money.

MR. SMITH: Well, I think the conclusion you can draw fairly from the evidence and the conclusion your Honor I don't believe is supported, is that Jefferies made more money. What we're talking about here is a gain to Jefferies. And I'm not arguing with the jury's verdict on this point for sentencing purposes.

THE COURT: No, I understand.

MR. SMITH: They said that the statements matter.

THE COURT: It was material.

MR. SMITH: They were material. They may have influenced negotiations. These were facts that the investors would have wanted to know, but that doesn't mean that the investor suffered a financial loss. The two are distinct concepts. So we have more gain to Jefferies, a somewhat larger slice of the pie, if you will, of the principal amount being paid on the bond than they were led to believe.

THE COURT: Well, how about Mr. Wollman who said what would you have done if he knew Mr. Litvak was lying. He said, I would have offered to pay a lower price. What effect for your clients would that have meant? He would have bought the bonds at a lower price. Are you suggesting that in these circumstances, Mr. Litvak would have said, if you don't let

me put 20 ticks in my pocket, for example, not Mr. Wollman, the one before, I won't sell this bond to you, I won't arrange for the seller to sell it to you. Is that what he would have done here, reasonably?

MR. SMITH: I think what he would have done if we have an example in our -- in our papers is that you could have negotiated differently, not made an explicit false statement but rather used different words to convey a similar concept and we wouldn't be here.

The point we're trying to make, your Honor, is that it's -- the loss is speculative. We have to say what would have happened. Isn't the question to Mr. Wollman that you just put is what would have happened, asking Mr. Wollman to speculate about how things would have gone differently. We don't -- bond traders, all the time, I think we learned, don't disclose their cost. They are not obliged to. And it's just as likely as not that they would have been silent about a cost and different tactics that didn't involve overbuys. Rather, the types of gray area statements that we heard about from Mr. Eveland, if you recall, on the witness stand.

So it's the government's burden here to prove loss, your Honor. You started with me, but it's the government's burden to prove loss and not a speculative statement about what would have happened.

THE COURT: I still don't know that I have an answer from you as to what was Mr. Litvak's intent in lying.

MR. SMITH: He was intending to get the deal done, make the counterparty victim feel good about the trade and to make the trade more profitable for Jefferies.

THE COURT: So as a result of the lie, Jefferies gained, right?

MR. SMITH: Jefferies did gain, but knowing that the trades were at market and a fair market value -- and this goes to Mr. Litvak's intent -- the victim did not lose. There's a lot in the government's -- a lot about zero sum gains. I don't really understand that. What you have there is cash being exchanged for a fairly valued asset. Jefferies makes more than advertised. That's a problem. But that's a gain, not loss under Section 2B1.1.

THE COURT: Is it your view that there is not one person's testimony that I heard at trial, one victim from which I could reasonably infer that they suffered a loss? We might not know what it was. In other words, the deal might have been done at half the difference or a quarter of the difference, but that they suffered a loss? I can't make that reasonable inference?

MR. SMITH: If given the fair market value conception by the government, I don't think the answer to that question is yes. I can't think of a victim on that

witness stand who said I overpaid for that. I don't think the hindsight questions put to Mr. Wollman really cut it. And remember, these sophisticated market participants who were here in this courtroom understand that these bonds traded in a wide range.

THE COURT: How about Mr. Lemin? If you had known that that price that they bought it for was 60 and a half, would you have paid 20 ticks on top to pay 61.04? No, we don't pay 20-tick commissions, no.

MR. SMITH: He would have negotiated differently.

THE COURT: That's my question.

MR. SMITH: And Magnetar still got a fairly-priced asset.

THE COURT: That's not my question. My question is: Can I not reasonably infer, based on Mr. Lemin's testimony that there is a loss in the case, not how much, but a loss? He would not have paid 20 ticks.

MR. SMITH: Not a financial harm that is recognized by the guidelines. We're talking about pecuniary harm, right? Intent of loss, actual loss. Magnetar was out of pocket cash and got back a bond that was worth what they paid for it.

THE COURT: All right. Attorney Francis.

MR. FRANCIS: So, your Honor, Mr. Smith said a lot of things. I want to respond to them serially.

THE COURT: That will be good.

MR. FRANCIS: I will do the best I can. He started off with the fair market value. I don't think fair market value means what Mr. Smith is advocating. How can it be a fair market if there's fraud in it? That just doesn't follow. And as your Honor pointed out, with the fair market value we have some data what the fair market value on a particular day is. Now, I think what Mr. Smith is trying to convey is just the idea that everyone got what they paid for. They didn't try to buy a Corvette and get a Pinto. But, of course, if -- otherwise, Mr. Litvak wouldn't have been able to perpetrate a fraud over three years. He would have been caught the first time. So I just don't think that really pertains to the issue of whether or not there's loss here.

He also raises a point about -- and I think this is -- goes into our argument about zero sum gain. He says he doesn't know what that means. I'll use different words. The money came from somewhere. You can see that Mr. Litvak's intent was to make more money for Jefferies. So where did that more money come from? It came from his victims, or his victims' investors. I mean, it had to come out of their pocket. And as your Honor pointed out, Mr. Lemin says, we don't pay 20 ticks. Well, he did pay 20. He thought he was paying 4 and he paid an extra 16.

THE COURT: Let's assume there's a loss such that

the table is triggered. What proof do I have that the loss is measured by the delta, are you arguing that's actual loss to the victim when we don't know what transaction would have happened if the truth had been told? Or are you arguing it's an intended loss? Are you arguing that we're going to shift over to proof by gain? And that -- again, you have the same problem on the gain side you have on the loss. How do you know what transactions would have occurred at what price if the truth were told?

MR. FRANCIS: So --

THE COURT: And you're assuming to get -- I'm sorry. Just to be clear so you know what I'm worried about. You're assuming that for every transaction that you have put in front of me, which by the way I need to hear from Attorney Smith about the argument that the ones not at trial are speculative. I forgot about that issue, but I will come back to you.

But as to all the transactions the government urges, you are getting to the number you get to in the loss table and based upon the assumption that every transaction would have occurred at the normal commission price, as evidenced in the negotiation, plus the sale price told to Mr. Litvak. You are taking the delta in every transaction, right?

MR. FRANCIS: That's true.

THE COURT: A hundred percent.

MR. FRANCIS: Although I wouldn't say it's an assumption. I would disagree with your Honor that it's an assumption.

THE COURT: So what's the proof upon which I find that that is, in fact, the loss here?

MR. FRANCIS: So to figure out what the loss is, I think your Honor's first question is which of three methods do we use. I think you can use method one, which is actual loss. And I can describe that for you and I will. Or method three, which is gain. Because once we get over the hump of is there a loss, then figuring out the amount of that loss, your Honor has a couple of different options. We don't urge it as intended loss.

THE COURT: Why isn't that a better way to go here? That when Mr. Litvak got -- I keep wanting to say on the phone -- on these chats. When he told the buyer, I can get it for you at 60 when, in fact, the seller had just said I will sell at 59, why isn't the reason he made that statement and done with the intention to cause the seller to pay the 60 plus his commission?

MR. FRANCIS: You're absolutely right, your Honor. There's no reason why -- it is an intended loss. It's intended loss, but then it actually happened. That's why I think of it as actual loss. But, yes, the --

THE COURT: No. See, that's the point I started

with with you is you are going to tell me, I guess, what evidence is in the record that I can infer that every one of these transactions would have occurred at exactly that delta, the 59 to 60 is the measure of the loss, as opposed to when you go with intended loss, that's a function of what he did and what I draw an inference from, he intended to put that point in his pocket or he intended to cause the buyer to give up that point.

MR. FRANCIS: You have convinced me, your Honor. It could be intended loss as well. So --

THE COURT: Well, explain to me why you think it is actual then.

MR. FRANCIS: Okay. So we're back to method one, actual loss. If we look at the chats, which are contemporaneous, verbatim Mr. Litvak's words with his victims. They agree upon a certain amount that is the plus, in the cost-plus deal. You know, I bought it at X, will you pay me 4 ticks. But he's lying about what X is, right? So you don't have to assume that there would have been further negotiations or anything. Once Mr. Litvak took it upon himself to speak, he had an obligation to speak truthfully. All you look at is the difference between the truth and the lie. That's the delta.

THE COURT: Right. But the argument of Attorney Smith is, okay, let's look at the lie. The lie is the guy

was selling at 59. What's the proof that we know that had the buyer known the truth, not the lie, he would have bought it at 59 plus the 4 ticks?

MR. FRANCIS: Well, I think your Honor can draw a logical inference that if someone is offered an item at one of two prices, one being higher and one being lower, they're going to take the lower price. More than that, you've got victim testimony that they would not have paid the higher price had they not been lied to.

And third and finally, I don't think that this method that Mr. Smith urges is accurate. What he is basically saying is we would need to run a simulation of the universe to know exactly what would have happened in every fraud instance had the fraudster not lied. That's unworkable. That -- that's not -- he labels it speculation. That's not speculation. That's just the wrong way to think about it.

What your Honor can do is look at what is the value of the lie told and did money come out of the victim's pocket in an amount commensurate to that lie? In this case, every single time Mr. Litvak lied -- we say there's 76 instances, they take issue with 24 of them, but I'll use my 76 number. 76 times he told a lie, and he did it in order to make a specific amount of extra commission ticks. In some instances, more than a point. Having done that, the fact

that the money actually flowed means that's the measure of the loss. His victim overpaid by that much.

Now, Mr. Smith gets agitated when I used the words like overpaid because he thinks I'm referring to some market metric. I am saying had the victim been told the truth, had Mr. Lemin been told the truth, he would have saved his investors 16 ticks. He wouldn't have paid 20 ticks, he would have paid the 4 that Mr. Litvak represented he was paying. That's why you can use the actual loss.

THE COURT: Who testified at trial that had they known the truth, the deal would have been done at 59 and not 60?

MR. FRANCIS: Well, I don't think anyone testified, because we wouldn't have asked that question. And then had we, we would have gotten --

THE COURT: In a hypothetical.

MR. FRANCIS: Yeah. I don't think anyone can provide you with that, although I believe it is a logical inference. And I think every fraud case presents this scenario.

THE COURT: This may be a little bit early for me to raise this, but it's an important issue for me. So I want to be sure I don't forget to ask you about this, Attorney Francis.

You represented to the Court at Page 23 of your

brief that the fraud guidelines were established after long study and careful conclusion, unlike the crack guidelines in Kimbrough, the loss guidelines, you know, have apparently -- the contrast would be that unlike crack, which has no empirical data national experience, the fraud guidelines do. I don't see that in Kimbrough. And I see cases in the Second Circuit, at least in conferring opinions, that say exactly the opposite, that there is not an empirical basis.

When I go back and look at Justice Breyer's reason for the loss table, he said if we took the empirical data available to us, everybody would get probation. That is not the right and just result. Therefore, we're going to write a loss table that causes people to get imprisonment sentences. Then Congress, of course, has put its finger on the scale and upped those two or three times. I've got it somewhere. But whatever, it doesn't matter. To where we are now. But I don't know of any empirical data that supports the loss table. Am I mistaken?

MR. FRANCIS: My understanding, your Honor, and I can be mistaken about this, but I don't believe I am or I wouldn't have put it in my brief. What I was trying to do was draw a distinction between the crack guidelines where Congress has forced on the commission -- the sentencing commission a certain table as opposed to what's going on in the loss guidelines. Those have been -- although there was a

mandate to put them in place, those have been adjusted over time. I'm aware of Justice Breyer's comments. I'm aware of the Second Circuit opinion concurring opinions. I understand that there are people who disagree that the results of the guidelines of 2B1.1's loss table accurately maps where it should go.

I think my point -- and maybe I inadvertently overstated it, is that these guidelines were not imposed on the commission. The commission looked at the data in front of them and put these guidelines in place, this loss table in place in order to capture the distinction between different kinds of fraud as measured by the magnitude of the loss.

THE COURT: I have two responses to that. That's true, but the table now in place is not the guideline sentencing commission's table.

MR. FRANCIS: True.

THE COURT: The second point I have is you cited me to 109 of Kimbrough. The only language I can find there is that the court is saying in Kimbrough that the commission fills an important institutional role, it has the capacity courts lack to, quote, base its determination on empirical data and national experience guided by a professional staff with appropriate expertise.

I don't see anything in this opinion that tells me the loss tables in Chapter 2 were arrived at that way, the

current loss tables, that you want me to apply. Am I wrong?

MR. FRANCIS: I don't believe so, Judge. I don't have Kimbrough in front of me. Perhaps that citation is incorrect.

THE COURT: Diahann, do you want to give counsel Kimbrough?

MR. FRANCIS: Your Honor, I believe that if to the extent my citation is incorrect, obviously, that is inadvertent. But I believe that the point --

THE COURT: But you state in your brief, quote, the fraud guidelines were established after long study and careful consideration.

MR. FRANCIS: I believe that's accurate with respect to the original form of the guidelines. I understand they've changed over time. But my understanding is that they were originally imposed and they were originally put in place by a sentencing commission in order to -- based on their review of the cases in order to draw the distinction between frauds.

THE COURT: So should I apply the '80s loss tables then, the first loss table? Because that's the one you are talking about. But you are writing about it in the brief where that's not the table you are asking me to use. You are asking me to use a table adopted -- well, this one was after -- in '03 or whatever, but -- or later, but it's basically the '02 table as applies to this case. And I don't think you

can make the argument that you have made to me.

Indeed, I would suggest -- and I'm sure you have read this case, but I guess let me put it this way. I suggest you not make this argument to Judge Underhill because you probably -- maybe you haven't read his concurring opinion in Corsey, but he specifically notes -- and I think he's accurate -- that they could not base it on empirical study.

MR. FRANCIS: I have read that decision, Judge. Of course, I don't think that your Honor should apply the old guidelines. I don't think that's appropriate. I don't think that's what the statute calls for.

THE COURT: Then why tell me that the table is based on empirical and long study?

MR. FRANCIS: I think we were just drawing a distinction between the crack guidelines and the fraud guidelines, where the fraud guidelines didn't come out of some mandate from, you know, external to the sentencing commission. Work has been done on the fraud guidelines. Now, where they've ended up, I understand the people have -- including Judge Underhill, have issues with the way that the table ended up. But I think we're talking more about the genesis of the fraud guidelines.

THE COURT: Attorney Smith, do you want to address for me the argument you make that the -- I'm going to call them the non-trial losses that the government includes in

their calculation? I think you described them as speculative. I can't remember. There's three adjectives you hung around them, and I'm not sure -- I don't think you really -- speculative, incomplete or imprecise. That's your brief at 24, but I don't really know in what ways they are or what your argument is.

MR. SMITH: Just based upon the evidence that the government provided to us and what they cited in support of inclusion in the relevant conduct, that you don't have the type of crystallized clear misrepresentations that were the subject of the proof at trial. We have --

THE COURT: In other words, there are no chats that are comparable to the trial one?

MR. SMITH: There are chats. They are just not so clear-cut.

THE COURT: Give me an example.

MR. SMITH: An example is Number 35, Mr. Litvak says I'm assuming I can buy his piece a tick or two cheap to 96. It is not a clear statement. It's evidence like that, your Honor. You know, it's vague. It's not clear. And that's the point. And what it involves here, your Honor, is approximately $1.9 million of relevant conduct that would take us from 6.3 million that the government is saying down to about 4.4 million.

I understand the government's not prepared to go

forward with a restitution order today. And I think this is probably more of a restitution issue than anything else.

THE COURT: Well, does it affect the table?

MR. SMITH: No, it doesn't affect the table because it's over two-and-a-half -- I think -- if I may suggest, your Honor, to disregard the difference for purposes of imposing the sentence and making a finding. Then we can take this up when -- if and when we get to the restitution issues. I think we put a chart in that says why we think these are speculative.

THE COURT: Where is that?

MR. SMITH: I think we attached it as an exhibit.

THE COURT: Which one?

MR. SMITH: I will get you that exhibit number in just a minute, your Honor.

THE COURT: Is it F? No. Did the government give me not only the -- you know, a chart that's like what it was -- what creates the delta that leads to the 1.4 loss, but did you give me the chats?

MR. FRANCIS: Yes, we did, your Honor. We submitted through Probation a sizeable binder of the chats that backed up everything that's in our loss calculation table in April or May, I have another copy.

THE COURT: I don't -- I didn't get -- I mean, if it isn't in the PSR or attached to the PSR, I didn't get it and

therefore I didn't review it.

MR. FRANCIS: May I approach, your Honor?

THE COURT: Sure.

MR. FRANCIS: (Handing.)

THE COURT: But what about Attorney Smith's suggestion it is not going to affect the guideline calculation so I can just find the loss to be in the range of that? And then I guess -- I don't know what we're doing on restitution because -- I almost issued an order to you, sir, but I was advised by the Probation Office that the tone of it wasn't very nice. But I read your brief about how you don't know yet about restitution, you are going to get an update. The problem is how do I decide a fine if I don't know the restitution amount? I mean, if the restitution here -- and this is hypothetical -- was $20 million, I'm not going to impose a fine, right? So I need to know the restitution issue before I can decide about a fine. I can't put off the fine for 90 days like the statute says I can restitution. But anyways, I didn't issue the order so I will just ask you to explain to me how I'm supposed to decide a fine today if I don't know restitution?

MR. FRANCIS: Thank you for not issuing the order, Judge. I think Mr. Smith mistakenly says we're not prepared to go forward on restitution. I can tell you what the number is today. However, it's to Mr. Litvak's benefit

to wait a little while because Jefferies continues to pay back.

THE COURT: Is there any question that they're going to pay back everything?

MR. FRANCIS: There is. Whether or not they intend to. They said they intend to, but whether or not they are able to reach settlement with everyone. Mr. Litvak --

THE COURT: But aren't they liable? I mean, his actions were as their employee. Isn't their pocket a little bit deeper than his? Isn't it reasonable to assume that if they don't reach an agreement, the victim is going to go against Jefferies if they go against the defendant? But who are they going to collect against is likely they are going to collect and they're going to collect against Jefferies.

MR. FRANCIS: Absolutely. And I wouldn't want to opine on, you know, some civil action that hasn't been filed yet, but absolutely. I believe that they intend to pay it all. I think they are trying their best. There's $2.1 million of outstanding fraud loss.

THE COURT: Of the 6.3 number?

MR. FRANCIS: Out of the 6.3 that has not been paid, although Jefferies' counsel informs me that they are in the process of negotiating further settlement agreements today and tomorrow, and so that number may well go down presumably. But I mean, it is absolutely the case that restitution is

likely to be very small, if anything, as compared to the fine we're advocating for or as compared to the total loss amount.

And just one point of correction, your Honor, because I think it will help you in looking at that binder. It's not -- the defense has not taken issue with all of our relevant conduct transactions that we didn't talk about at trial. They've only taken issue with -- I think it was 24 of them. So they effectively conceded that there are -- I say there's 76 instances of fraud, and I think they say that there's 52 transactions that are -- I don't want to put words in Mr. Smith's mouth -- that are relevant conduct.

THE COURT: And so should we go through the difference of those two figures? What did you say 52 says --

MR. FRANCIS: So it would be --

THE COURT: 24.

MR. FRANCIS: Of the 24 different, we could do that, your Honor. But for purposes of today, and the reason we didn't -- we haven't pressed this in our papers is, point one is, is there a loss. If there's no loss then there's no restitution. So we need a ruling from your Honor on that. You know our position. It's a strong one. There is substantial loss here.

Then I think that issue of is there 52 or 24 can be done on the papers with respect to a restitution order because for your Honor's purpose today, the issue is -- in

thinking about the fine, the ability to pay. And at a maximum, the restitution order will be $2 million. As of today, it is $2.1 million. That's the maximum it could possibly be. And I believe the number will get smaller. And likely, the longer you put off resolving restitution, the smaller that number will be so in comparison to Mr. Litvak's substantial personal wealth, he has the ability to pay a fine.

THE COURT: Attorney Smith, you've identified -- is he correct that it is 24 that you question?

MR. SMITH: It is Exhibit F to our sentencing memo.

THE COURT: That's why I asked you if it was F. So I could look at F. I could then go look at this binder. I can look at what the chats were and decide if it was clear or a fudge, in effect, you know, maybe I could get them with this, whatever. I mean --

MR. SMITH: That's correct, your Honor. I think that --

THE COURT: And it goes to restitution, not to loss.

MR. SMITH: I do agree with Mr. Francis that could be resolved on the papers.

THE COURT: Okay. Well, the issue before the court is we're on the guidelines as a factor and we're on the

question of whether there was a loss under the guidelines, which is a specific offense characteristic under Chapter 2.

The government and the probation officer agrees, suggests that an enhancement of an 18 level increase is appropriate because the loss is between 2.5 million and less than 7 million. The court, over the objection of the defendant, will adopt Paragraphs 11, 13, 19, 20, 21, and 22.

At this point, Ray, 23 will -- I don't know what to tell you how to deal with that, but it should really be -- I'm not finding the 76 are all part of the loss. What I'm going to find in a minute when I explain my reasoning is that the loss is between the two-and-a-half and the 7 million, but I may sustain, in effect, objections to certain of the trades in Exhibit F of the defendant. So I think maybe for purposes of the probation report is what you say is that their -- the government provided additional -- evidence of additional losses, some of which were not objected to by the defendant, which are the 50 something. I presume they total a certain number, and that number could be in Paragraph 23. And that will -- certainly puts it over two-and-a-half million, right?

THE PROBATION OFFICER: Yes, your Honor.

THE COURT: The reason for my conclusion in this regard is -- I will start with the basic as to the guidelines. The guidelines provide in Chapter 2, 2B1.1(b)(1) that, quote, if the loss -- insert the language from a

relevant offense -- exceeds $5,000, increase the offense level as follows. And then provides a table that we have talked about listing various bracketed amounts of loss and corresponding increase in the offense level.

Loss is defined in the guideline in an application Note 3A as, quote, pecuniary, that is monetary, harm, end quote. Before I can determine a loss amount, however, I have to determine that there is proof of a loss, as Attorney Smith correctly argued. And, of course, the burden of proof is on the government and the standard is by a preponderance of the evidence, not beyond a reasonable doubt as it was at trial. There's a been a lot of argument in the briefs, obviously we had a fair amount this morning as well, in that Mr. Litvak argues there is no loss here. And the government argues there was a loss, and that it was 6.3 million. I have just found that at some -- at least for purposes of the sentencing some lower number than that, but certainly it is a significant number.

The resolution of the issue, I think, is found in the Application Note 3, Part A, to this guideline, which provides that the loss is the greater of the following, actual loss, that is pecuniary, that is money, harm, that Mr. Litvak's conduct actually caused or which was reasonably foreseeable to occur for a person in Mr. Litvak's situation. Or alternatively, intended loss, that is pecuniary or

monetary harm, that Mr. Litvak knew or reasonably should have known under the circumstances was a potential result of the offense.

I think I can find both actual and intended loss present. Actual loss, I would base upon reasonable inferences drawn from testimony at trial. In particular, the court has already quoted from Mr. Lemin and Mr. Wollman in which, obviously, they were testifying on the element at trial, which was materiality. But I think their testimony evidences, as well as other testimony, that talked about normal or typical commission amounts or tick amounts over the sale price that the amount that Mr. Litvak was falsely raising the sale price to be was a loss to the buyer. The court concludes from at least Mr. Lemin and Mr. Wollman's testimony certainly is enough to reasonably draw the inference that they would not have done the trades at the price that Mr. Litvak offered to them had they known the truth instead of being misled my Mr. Litvak.

And I think part of Attorney Smith's argument is, well, we don't know what would have happened, they would have maybe walked away or negotiated a better deal. But the fact of the matter is that they suffered a loss. Where a good does not trade on an open market, such as is the case here, a fair measure of loss is the difference between the price at which an otherwise well-informed trader is fraudulently

induced to exchange a good, and the price at which the trader would had they not been aware of the truth of the matter to the person who is speaking the fraud have been willing to execute that good.

I draw some help from the Second Circuit's decision in the case USA vs. Boccagna, which is admittedly interpreting the issue of value under the Mandatory Victim Restitution Act. And they talk there about how fair market value is often the best measure. But as I think I've explained in my questioning of counsel, I struggle with the idea of fair market value being evidenced by a price paid by a person who has been misled, lied to. As I say, I think the seller's offer price is evidence of fair market value. We certainly know in each of these instances that the buyer would have bought at a price lower than what they bought at. So in my opinion, the seller's price, which that willing seller was willing to sell at and the buyer, I think I can reasonably infer by a preponderance of the evidence, that every buyer here would have paid less than they actually paid. I think that's pretty reasonable. Therefore, I know they suffered a loss. That's proof of loss, in my opinion.

Here, I mean, we don't know the actual price that would have satisfied Mr. Wollman or Mr. Lemin had Mr. Litvak not defrauded them. It seems to me their testimony is sufficient for the court to reasonably conclude that they

suffered a loss, that is it suffices to conclude that the prices at which they would have been willing to trade with Mr. Litvak, had they known the truth of the matters to which he spoke, would have been more favorable to them than the prices at which they actually executed transaction with Mr. Litvak. Therefore, I believe that under the guideline there is evidence of loss.

So then the question becomes -- the other issue of whether if it is not an actual loss, because as Attorney Smith argues, it's somehow speculative what would the deal have been done. The alternative under the guidelines is intended loss. And as I've suggested in my questions, I think that Mr. Litvak intended the buyer to lose in the sense of paying more than they otherwise would have had to pay had they known the truth. He intended a loss of the difference. He intended, in effect, to induce his buyer to complete the transaction at a worse price than they otherwise would have because he wanted them to believe that his offer price was a fair one. He believed that his lies about that offer was available that -- I'm sorry. Let me back up.

By making the lie, he can accomplish his goal, in effect, his intention to extract for his company more money than the buyer would otherwise have been willing to surrender, and he knew that. He knew, I conclude, even though he didn't testify, that he was in this business long

enough what normal average commission prices were, so he knew he was, in effect, getting the buyer to pay to his company in many cases well over what they ever would have considered paying. For example, if you take Trade 2 on the government's table, he intended the AllianceBernstein trader to believe that Jefferies was actually buying the security at the price he gave and that AllianceBernstein would thus be willing to buy at that price, plus a typical commission of a few ticks, whereas he did not believe that AllianceBernstein's trader would be willing to buy the security at the higher price if he hadn't made the misrepresentation.

I understand Attorney Smith's argument, and he's absolutely right. If Mr. Litvak had not said anything, we wouldn't be here. But the fact is he did say something, and that is why as an alternative you can find intended loss. Because I think it is a reasonable inference why did he say it? He said it because he wanted to extract, in effect, a super profit for Jefferies.

So the court concludes that there was, again, an intended loss. And so the question then reverts under either of those two prongs, how do we estimate the loss. As Attorney Smith has argued, and the government's counsel, I mean, we don't know. We don't know because that's not what happened. But the fact is we will never know in fraud situations what would happen in reality. It is always

inferences to be drawn, it seems to me. And fortunately, I guess for the court, under the guidelines, if there is a loss, first of all, I only need to make a reasonable estimate of that loss. That's Application Note 3C. Further, if I can't calculate the loss, I can look to the gain. In this instance, though, I think it is really both of them are the same.

I believe -- it is my conclusion that where a trader's fraudulent actions, his statements, fraudulent statements induce a buyer, in this case generally, victims generally, to execute a trade at a price at which they would not otherwise be willing to trade if they knew the truth. The court concludes that it can determine a fair measure of loss by looking to the -- what I call the true value, which is what the seller is willing to buy at and about which Mr. Litvak made false representations. So the difference does become -- whether looked at as actual loss, intended loss or gain, the delta between what Mr. Litvak represented and what was the actual true situation.

There's a Second Circuit case from '09, U.S vs Nash at 338 at Appendix 96, and the quote is at 98. Cases involving fraud, a district court may presume the defendant intended the victims to lose the entire face value of a fraudulent instrument, which, of course, is not this case. I don't think that the defendant can rebut that presumption by

presenting evidence to demonstrate he actually intended to cause a lesser loss. It seems to me that in this instance it is not -- as Attorney Smith has argued, it is not that the instruments were fraudulent. Indeed, he put forward a lot of evidence about what wonderful buys they were. The problem is they weren't quite as wonderful as they could have been absent fraud. And so it's my view it is a reasonable inference to estimate the loss here, the loss as used in the table, by either -- because it's the same number in my view, the actual intended or the gain.

And I have also looked at U.S. vs. Confrito, which is a Second Circuit case about five years ago, which the Circuit talks about the flexibility that the court has in estimating loss, perhaps for just the reason that Attorney Francis points out, and that is that when you have fraud, you never have what would have happened happen. And so we can't say that, yes, for sure this transaction would have occurred, but I think it is a reasonable inference to conclude based on all the trial testimony of all the victims, in particular the ones I cited, that the transactions would not have occurred at the prices that Mr. Litvak, in effect, induced them to pay because of his lie, but rather would have occurred at what the seller was willing to sell plus a normal commission.

So that allows me to conclude for purposes of the guideline calculations that the base offense level here under

2B1.1(A)(1) is 7 for securities fraud, that 18 levels are increased because the loss is between two-and-a-half million and less than 7. I don't believe there was an objection to 2B1.1(B)(19)(a)(i), that Mr. Litvak was convicted of a violation of securities fraud while he was associated and was licensed as a broker.

Further, I don't think there's a dispute even as to the ones the defense contests, there are at least 35 victims. Well, there are at least under 2B1.1(B)(a)(1), it is not B and A. B -- yeah, that's a typo, Ray. Yeah.

THE PROBATION OFFICER: B2A.

THE COURT: It is 10 or more, increase by two. I think even disregarding the objected to transactions, there are more than 10 victims. I think there were at trial even, certainly what the trial proof was, if not the charge proof that was -- the guilty verdicts were returned on. So the two level are added. That results in an adjusted offense level of 31.

Attorney Smith, you are pressing on the court acceptance of responsibility. So before I can finish the guidelines, I need to hear you on that. You argue in your memorandum that Mr. Litvak has never denied what he did. And I don't understand why you spent three-and-a-half weeks at trial. He denied he intended to defraud anyone. You just argued this morning, for example, that nobody was really

hurt. I don't understand how that's acceptance of responsibility.

MR. SMITH: Well, I think there is a distinction between the factual conduct and what to make of it.

Between the factual conduct, the statements whether or not they were false, and then what the significance of those were. So we defended the case, I think it was clear that misrepresentations were made, the statements were made that were false. And I think by the time, you know, all the evidence was in and we summed up, there was very, very limited instances where I disputed the government's proof that some --

THE COURT: Why did it take three weeks to try? We had eight or 10 witnesses testify on materiality and be vigorously crossed by you.

MR. SMITH: That's a separate issue from the statements. So the statements were false.

THE COURT: But that's part of the crime. He doesn't accept responsibility that they were material.

MR. SMITH: There were legal defenses, your Honor. Materiality is a mixed question of law and fact. You know, we believe we had valid materiality arguments, you know.

THE COURT: I understand that. He had a right to go -- I don't -- I'm not criticizing. I am not adding points because he went to trial. You are asking me to find he's

accepted responsibility. And the exception when you go to trial, I think, is a very narrow one. And I don't see how he fits through it.

MR. SMITH: I will leave with this what we put in our papers, your Honor. We think he fits that narrow class of cases where he exercised his constitutional right to go to trial and asserted legal defenses to the government's charges, basically saying that the law doesn't apply to his conduct. His conduct, he always acknowledged and took responsibility for. He defended the case on, yes, we made these misrepresentations on these days, but we stopped short of saying that that constituted criminal fraud under the circumstances because materiality and intent to defraud don't arise from the circumstances. And I think -- I don't want to belabor the point, your Honor, but I think he's eligible.

THE COURT: I meant to ask when I came out, obviously Mr. Litvak has a right to address the court today. And I want to be sure he understands he has that right. Do you, sir? Mr. Litvak, do you understand you can address the court today?

THE DEFENDANT: Yes.

THE COURT: Okay. Thanks.

MR. SMITH: We have advised him not to exercise.

THE COURT: Not to do it. I assumed that's what you would do. I received a letter yesterday, one of the letters

of the many letters that have been submitted on his behalf, and the writer of that letter said he was ready to accept responsibility -- he thought, the writer thought Mr. Litvak was ready to accept responsibility, but I don't -- I don't -- and I'm not asking him to do this. Please do not misunderstand me. I mean, but my view of him right now as he sits here and you argue on his behalf, so I have only ever heard from you so I can only take what you argue as what his position is that he did not commit a crime. Is that correct?

MR. SMITH: I think that's correct, your Honor.

THE COURT: That's fine.

Does the government wish to be heard?

MR. FRANCIS: I don't think it is necessary, your Honor. Mr. Smith misrepresented what went on at trial. He fought us on facts and on the law, and the fact that we prevailed, you know, for him to say, oh, at closing we gave up all these arguments we admitted during the trial. As your Honor points out, that's what the three weeks was about, or the two weeks prior to the closing arguments. So I think it's -- I don't think Mr. Litvak is eligible under the guidelines. We'd specifically point you to the pretrial conduct of which there was no acceptance.

THE COURT: The court needs to rule on this before it can determine the guidelines. Mr. Litvak argues he's entitled to the two-point reduction. Obviously, I couldn't

give him the third even if I was inclined to because no motion has been made. But the two points under 3E1.1A, the guidelines provide that, quote, if the defendant clearly demonstrates acceptance of responsibility for his offense, end quote, his offense level is to be decreased by two levels. Generally, a defendant who puts the government to its burden of proof at trial is not entitled to a reduction of his offense level for acceptance.

The Application Note 2, which is quoted in U.S. vs. Castano, which is a Second Circuit case from back in 1993, reads, quote, this adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt is convicted and only then if it's guilt and expresses remorse. There is a rare exception under Application Note 2 where a defendant may clearly demonstrate an acceptance for his criminal conduct even though he exercises his constitutional right to a trial, end quote. If, for example, he admits the relevant conduct but changes the applicability of a statute to his conduct, or admits the conduct and that the statute prohibited the conduct but makes a constitutional challenge to a statute.

I don't believe that Mr. Litvak has done either of those things. Nor do I believe that he's demonstrated clearly an acceptance of responsibility. Again, he does not

have to do that. But we're talking about whether I should reduce his guideline range by two levels because he has. And it is the court's conclusion that he has not. He did not admit the elements of his conduct. He didn't admit, for example, that the materiality. He didn't admit intent. And so he absolutely is entitled to his trial. He's entitled to challenge what the court has done and what the jury has done on appeal, but the judgment I need to make right now is has he accepted responsibility for this offense, and the court could not make that finding, let alone clearly make that finding. So the court determines that a two-level reduction in the guidelines for acceptance is not applicable.

So the adjusted offense level is 31. The total offense level is 31. The defendant has no criminal history so he's clearly in Category I. The guidelines -- under the current guidelines for that offense level and criminal history is 108 to 135 months.

Other than your objections to loss and acceptance, Attorney Smith, is the guideline calculation otherwise acceptable? Not much left to it, but there's no other objection I have overlooked?

MR. SMITH: No, your Honor.

THE COURT: And for the government?

MR. FRANCIS: No objection, your Honor.

THE COURT: So that brings us really, though, to --

well, that brings us to the other elements of 3553(a). I guess I will hear from Attorney Smith on those, or I will turn it over to you, sir, to present to the court whatever it is you wish to present or argue. Again, understand, please, that I have spent a lot of time reviewing everything that was filed.

MR. SMITH: I understand, your Honor.

THE COURT: Okay.

MR. SMITH: Your Honor, we submitted our papers and we sort of separated this into two pieces, one is the recognized departure grounds and then we make a variance argument on 3553(a) that the factors are closely related. So I think my remarks apply to both.

THE COURT: I think probably -- and I don't know, maybe I'm wrong about this. I view this as sort of the arguments about what's wrong with the guidelines, shall we say, are really addressed in the nature and circumstance aspect of the factors. In other words, that level is not appropriate to what happened here for all the reasons you can argue.

MR. SMITH: I understand. I do think there's -- we want to call it a wrinkle or not, I think the loss overstates the seriousness of the offense arguing, which is circumstances and seriousness defense argument.

THE COURT: That's right.

MR. SMITH: It's an encouraged departure ground under the guidelines.

THE COURT: Do you want me to make a departure decision or -- which you have a right to make me do. I mean, in other words I have to determine guidelines. I generally -- I will confess, I generally don't do that. I just do the guidelines. Sometimes I will make a departure, I mean if it's Fernandez, you know, if there's a plea agreement, I'll do it there. But usually I will take the arguments you are making and put them into the 3553(a) analysis. But if you want a departure analysis on the record, I guess I will do it.

MR. SMITH: Well, I think you can do it in the way your Honor's most comfortable. I do think it adds force to the argument about the seriousness of the conduct that under the guidelines the commission has recognized and court's have recognized is this special argument about loss overstating the seriousness of the offense. And now that your Honor has made the loss finding, I do think that really does apply here.

The -- what we have are victims that -- and bearing in mind, your Honor made -- the loss finding that you made did not suffer a true out-of-pocket loss.

THE COURT: Okay. Before you launch into your argument, could you tell me which departures you want me to

rule on? I assume extraordinary family circumstances.

MR. SMITH: I want you to -- yes, I'd like you to rule on --

THE COURT: Loss overstates.

MR. SMITH: And loss overstates the seriousness of the offense. Those are just the two.

THE COURT: All right. And if I forgot, please remind me when you're done. Because I'm just going to hear your argument as a piece with appropriate interruptions, but I am not going to have you argue departure by itself and then go to the factors, if you don't mind.

MR. SMITH: So with regard to loss, unlike most investment fraud cases, heartland investment fraud cases, there's no loss of principal here. There's no sale of security that had a diminished investment value or no investment value. I think the real difference here is -- and the difference between a scheme that's designed to take an investor's money and give nothing in return, like a Ponzi scheme or policy boilerroom operation, those are vastly different and more serious schemes than the scheme Mr. Litvak was convicted of.

Even if we do see a loss here, as your Honor has found, I do think that the idea that the asset that was returned or transferred to the victims in connection with the transaction was a performing asset that was -- bear in mind

our prior discussion on fair market value -- had the value on the trade date that was a fair market value. I think we have a submission on that in terms of the proffer on the excluded expert evidence, and we would have proved up that these were fair market value prices. So on day one --

THE COURT: Let me just say I reviewed that in connection with the motions at trial. I mean, I have not gone back and reread the reports, obviously. You have put the argument in your brief, but I'm refreshed by what I had already reviewed.

MR. SMITH: We just think that the fair market value is a range of prices, and I think when you have a buyer that -- bearing in mind your Honor's comments about fraudulent statements that a borrower gets the asset within a range that has been previously compensated buying the asset, is very different from a scheme designed to bilk someone out of their money by causing them to engage in a transaction that is either a complete loss or a large loss as of day one. Just a vastly different set of circumstances and a different type of offense.

We just don't think that the type of conduct that Mr. Litvak engaged in raises to the level of heartland fraud cases that are really contemplated by the guidelines in fashioning a table that punishes to the extent that it does based upon dollar value. I think one of the markers of that

here, your Honor, is lack of real victim impact. Lack of true economic impact on the victims that mattered. You know, to the victims --

THE COURT: You don't think it matters to me as a taxpayer that my buyer, the person buying bonds for me using, in part, my money got a deal that was more costly than it should have been but for fraud.

MR. SMITH: Respectfully, your Honor, I don't think taxpayers were a victim of this offense.

THE COURT: I didn't say victims. You said -- well, I guess you argued victims don't matter.

MR. SMITH: We're talking about the funds.

THE COURT: Why doesn't it matter to the fund?

MR. SMITH: I think I want to compare the funds.

THE COURT: He's negotiating over three or four or five ticks of his commission when we're talking about a whole point sometimes or more. If it mattered to him how many ticks he got on his commission to the tune of 1 tick or 2 ticks, you don't think 30 plus ticks matters to the buyer?

MR. SMITH: I think when we look at the type of entities that were the victims, these investment funds had billions of assets in them. And your Honor found loss. Did that loss matter to the financial health and well-being of the fund, the entity?

THE COURT: If what you are arguing is it's not a

little old lady who's lost her lifesavings and has no money to pay for her prescription medicines, no, they are not that type of a victim. But does it matter to the victim? I don't know how you can say it doesn't.

MR. SMITH: Matter in an important way that would have altered the operations, financial well-being of the fund. I don't mean to be flip in any way, but it's -- the differences really amount to a rounding error at the fund performance level. They don't move the meter on the performance of the fund. And when you layer on top of this, your Honor, that the investments themselves were quite profitable. If you just look at --

THE COURT: They would have been even more profitable, though, but for the fraud.

MR. SMITH: Vanishingly, marginally more profitable. These bonds were valuable opportunities that Mr. Litvak presented to the various counterparties and they were valuable in the sense that there was not a lot of supply of these bonds at the time to be able to get into the funds. The modest point here your Honor is for AllianceBernstein, if you look at all of their dealings with Mr. Litvak and Jefferies that have arisen out of this investigation and analyzed -- and we did the analysis, you know, in our proffer of the evidence -- the bonds that Mr. Litvak sold, even accounting for the overpayment that your Honor's put your

finger on in making your loss finding, these performed better than the average investment in the AllianceBernstein PPIP fund by a significant margin. The fund returned approximately 18 percent. But when you backed out the fact that it was a leveraged fund, the average investment in the fund returned 9 percent, because there was 200 percent leverage.

The bonds that Mr. Litvak sold to AllianceBernstein, the Harborview Bond, the Lehman bonds that you heard about at trial, by the time they were sold when you take into account the principal and interest payment and the gain on the resale, the annualized return on those was in the neighborhood of 14 percent. These were fabulous performers. And to say that when you put in the alleged overpay, that is something we can't really quite calculate, the difference in the return is marginal. Maybe it's a tenth of a point or a quarter of a point. It doesn't add up to much.

THE COURT: Well, it's real money.

MR. SMITH: It is money. Real money on that scale, the victims -- and you gave the little old lady argument, it just doesn't have the type of impact that other core heartland fraud schemes have on their victims.

I think one of the telltale signs, your Honor, we don't have -- we don't have victims here to explain to your Honor how they were adversely affected by the offense conduct

here. We don't have victims that you often see in fraud sentencings complaining about how the defendant's conduct harmed them, how they were hurt. They are not here. They are not motivated to be here, because while it is money, it doesn't end up in the larger scheme of things matter to them. What we have instead are representatives of victims submitting letters, including the letter that you saw from Red Top investors, which had been the victim on Count Seven and remained a victim for purposes of the indictment. In fact, you have two of the Red Top investors here in court today to show their support for Mr. Litvak. Peter McMullin and Rob Marr are here in part because they believe that your Honor should afford Mr. Litvak leniency at sentencing.

You also saw letters from other representatives of victims, Chris Rice from EBF put in a letter. So we have -- on the victim impact side of things, we don't have an outcry on the part of the victims that what happened here was particularly bad or wrong or that Mr. Litvak is deserving of punishment. We have, I think for purposes of sentencing, we have indifference, at most, and we have support at some. And I think that does speak volumes in terms of the victim impact. It's just the money, as your Honor has said, but the money given the large, large sums in these funds, it's not money that impacted their returns to the funds and their investors. So when the government goes the next step and

says that the pension fund, et cetera, were impacted as well, well, your Honor, they weren't because the returns to those investors from investing in these funds were not impacted other than in such a tiny amount as something that nobody would care about once all was said and done.

I think I noted the large outsized returns that the investors made. They all made money off these bonds. They were performing assets and they performed well.

I think the other thing that takes this out of the heartland, and it's a factor that we really tried to emphasize in our papers is we don't see direct personal gain to Mr. Litvak. We just don't. The government was not able to prove that at trial. The testimony of Mr. --

THE COURT: It wasn't a subject matter of proof at trial. I mean, there was testimony, was there not, that his annual income was fairly low, if I recall. I have seen that somewhere anyways. I don't remember from trial. But obviously, his actual income was quite substantial in these three years. The difference is a bonus, right?

MR. SMITH: That's correct, discretionary bonus.

THE COURT: In fact, he received a bonus, right?

MR. SMITH: He did receive, yes.

THE COURT: And we have testimony from his supervisors as to what percentage of profits was used to determine the amount of the bonus, don't we?

MR. SMITH: No, I don't think we do. I don't think that was clear at all. I think what we had from --

THE COURT: How about this testimony? Based on your experience as a trader, what is the rule of thumb? Expect 10 to 20 percent of that profit as a year-end bonus.

No, there's no rule of thumb. I think generally speaking the range is anywhere from, you know, 5 to 12 percent.

Question: But it could be higher?

Answer: It could be.

So we have at least 5 to 12 was established in testimony. That's the transcript at 1933.

MR. SMITH: Well, we have to have the -- what your Honor has indicated, no rule of thumb. As your Honor will recall, Mr. Eveland said that there were three main factors that impacted bonus determination. That was performance of the firm, performance of the group and then performance of the individual trader's book. And all --

THE COURT: I had the sense, though, the first two had already been determined when they ended up with a pot of 44 million to distribute one year, half of which went to traders like Mr. Litvak. I mean, this is not -- the extent of the increase in profits resulting from the fraud was to hit the bottom line profit line of Jefferies, if not at 6.3, at least maybe 4.5 if we take out your disputed transactions.

That was not insignificant with respect to his total profit. It could be as much as 10 percent or maybe 8 percent at the low end. A twelfth of 5 million or a twelfth of 4.8 million is not a small amount of money. Maybe it is to you, but not to most people.

MR. SMITH: Well, it would be to me, your Honor, but the point here is I don't think the math is that straightforward and simple. It was a discretionary determination. And when you look at the --

THE COURT: You tell me -- you think it is reasonable for me to conclude based on what's in front of me, that the additional profits to Jefferies from Mr. Litvak's lies had no effect on his income in the three years in question? You want me to conclude that?

MR. SMITH: I think it has an ennoble impact on -- and hasn't been proven up so that your Honor could --

THE COURT: So why did he lie? What did he intend to do? We already had this discussion about his intention. I mean, why do you lie about this if you don't intend to yield greater profit for your company which, in turn, will have some benefit to you?

MR. SMITH: Well, that's --

THE COURT: If things line up. And they did line up in these years. They did overall good performance. They did have good section performance, so there was a pot of money.

And that pot of money was determined by the profits. Am I missing --

MR. SMITH: Your Honor, I'm not going to dispute that there was a desire to earn more money for Jefferies, and indirectly down the road, you know, the hope having a bigger bonus, yes. I don't think we can trace the money out that neatly and cleanly. And further response to why were there misrepresentations made, I think that's another sort of circumstance issue I will get to after I focus on the loss which has to do with the culture of Jefferies, supervisory approval, widespread instances of the conduct of others at Jefferies that were involved in it. I think that the culture at Jefferies on Wall Street really gave, in effect, Mr. Litvak's judgment on whether or not you could do it this way and whether you were encouraged to do it this way. So I think the why question is not a neat and simple he did it for more money. I don't believe that to be the case.

But just focusing in on the mitigating factors on why loss overstates the seriousness of the offense both the departure ground and for the 3553 argument, I think the two powerful mitigants were the de minimus victim impact combined with this is not money in Mr. Litvak's pocket directly. I mean, a typical fraud scheme, the defendant winds up with the proceeds of the scheme and is free to spend it on himself. We can't say that that happened here. And I would encourage

your Honor not to make that conclusion.

Then the -- under the heading of de minimus impact, there's just the sort of robust investment performance of the victims, who I think have sort of voted with their feet not to be here and explain to your Honor why this scheme necessarily harmed them. So that's -- those are the points we want to make in addition, just to highlight from our papers on seriousness of the offense conduct.

I do want to talk a little bit about the family circumstances issue because I think those factors are very real here. And you know, while we -- I do want you to make this departure finding, I think it does go into the broader context of Mr. Litvak, who he is, the nature of the support he's received throughout this proceeding, which I think is quite rare.

As your Honor knows, Mr. Litvak's in-laws were here, they are here in court today. Marc and Daniela are here in the front row, as is Dr. Litvak, his wife. Mr. Litvak's parents, Steve and Nancy Litvak, were here every day of the trial. They are not here, as your Honor may have noticed. And I just want to tell your Honor briefly why that is. Mr. Litvak was diagnosed with cancer about 10 days or two weeks ago and needed emergency. He desperately wanted to be here and wanted to put off the surgery, but was persuaded not to. And so he's home recuperating from that surgery and that's

why he's not here.

Mr. Litvak also enjoyed broad support at the key moments in the trial in these proceedings. I think as you can see from the full gallery here today, we have many friends, family members, former colleagues of Mr. Litvak here to support him. You've seen well over a hundred letters in support which talk about the unique character that Mr. Litvak has, the impact that Mr. Litvak's life has had on theirs. I think Mr. Litvak's father is not here to say it himself, but I think the phrase he used is that Jesse is just good at being human. And that just comes across from this really broad-based measure of support, which it is something I think we don't see in the typical criminal case and it's something that judges do call out in imposing a more lenient sentence. And I would just flag briefly the sentence that was imposed in U.S. vs. Ferguson, which was a case that was prosecuted in this district.

THE COURT: I'm familiar with that.

MR. SMITH: That the broad support that the defendant in that case enjoyed from the community, from the family, from co-workers. And I would add in this case, even from victims is something that we hope your Honor will take note of.

I want to focus back now on Jesse's son, Isaac. I think it is clear and hopefully undisputed, that Isaac

suffers from a learning disability that related back to a hearing defect that he had at birth, that the family has taken steps to address that. And Isaac has progressed reasonably well, but it is perhaps an ironic upshot of Mr. Litvak's circumstances that in the two-and-a-half years he's been out of work he's become the principal caregiver to Isaac and Isaac has become even more attached to Jesse and has done better. And what we see from the submissions is that during the period when the case was being tried, Isaac acted out, as did his sister Sasha, she acted out as well. And that's disruptive circumstance for the children, in particular Isaac.

So what I think we see from the outpouring of support for Jesse is that he's a special person who has tremendous character and an ability to help others. And the numerous anecdotes of Jesse thinking of others first and helping others and keeping others in mind, the charitable works that he's undertaken and support for various projects. But just the ability on a human level as a role model, as a friend, as a family member, a spouse, a parent, to have a positive impact.

When you take that specialness that Jesse has, an ability to affect others, and then you focus it down on Isaac and his ability to make a difference in that child's life, I think, your Honor, it really ought to influence how much

additional punishment is really necessary in terms of incarceration and it should weigh on your Honor's decisions that how much jail is necessary. And each additional day in jail beyond what's really necessary and adequate to the task is a day when Mr. Litvak will not be able to bring to bear his talents as a human being to help his son Isaac to continue to progress and overcome his learning disabilities. So I think that's a factor that I would hope that your Honor would weigh heavily especially in fashioning an appropriate sentence.

And whether that's done in the form of departure under the guidelines or just as a variance factor, it serves no useful purpose to incarcerate Mr. Litvak for additional time when Isaac will suffer and Sasha will suffer as well and the family will suffer. I do think that circumstance is exceptional and we should have Mr. Litvak's talent brought to bear where he can do most good. I think you saw as a sense but generally in the letters, please put, you know, Jesse on community service, let him go out and do some good, impose some sort of alternative sentence. Those are all great suggestions. We're very realistic here, your Honor. I know you are going to impose some term of imprisonment. We suggest the 14 months as a max. I think you rejected the acceptance argument. That's 18 months.

Your Honor, a lower -- a sentence that goes beyond

single digits, low single digits in terms of years in light of impact on Isaac and the family is one that we just don't think would be fair and just under the circumstances.

The government spends -- so I know you have read everything very carefully, your Honor, and I think just in terms of support and the annotations to Mr. Litvak's character, it may not square with what you saw in the courtroom in terms of what you heard from witnesses, it may not square with my comments on Mr. Litvak's behalf that he is just not prepared to admit to conduct. Bear in mind you said he didn't have to.

And I don't want you to feel that Mr. Litvak is a recalcitrant defendant who doesn't get it somehow. I think he completely gets what happened. And I think the point that I want to convey is that somehow you can have someone who operated in this industry like Mr. Litvak -- and this goes back to the point I made earlier about culture, about supervision, about encouragement. Think about the proof at trial we heard from Bill Jennings encouraging with the word boom what Mr. Litvak was doing, the training he received in the environment that was Jefferies, which I think we saw in spades was toxic in a sense.

I think that Mr. Litvak could operate in that environment understanding sort of what the rules of the road were in terms of compliance there, and fairly I believe that

I can do these things. Might have been the compliance sense and the securities, what the SEC might do sense, be wrong, but I cannot be at the same time committing a federal crime that will land me in prison. So it's the difference between acknowledging the conduct what he said and did and the misrepresentations that were made and what the upshot of that conduct was.

I do think that when you think about that point I'm just making and put it back against the character that we now see coming through in terms of all of the submissions, I hope it helps you better understand and put into context what the man was thinking and the fact that there's tremendous goodness in his heart, goodness in his character that will hopefully be a fact that your Honor considers in imposing sentence.

THE COURT: I'm going to ask a few questions. Please don't interpret this as -- you know, this is my focus, but these are the questions that come to my mind in response to what you are arguing. Doesn't necessarily mean my reaction to what you are arguing.

To the extent you want me to view the guidelines as an inappropriate measure of what happened here, in effect, all of the things in 3553(a), and that the guidelines are off because loss isn't a good measure. You have a lot of, you know, good company for that argument, but the struggle I'm

having in this case is that I have in the past expressed that same view in connection with sentencings where loss has -- well, in this case it's -- usually I will say the loss is sort of too heavy a factor and the guidelines here, it's like a tsunami. It just overtakes the guideline. 60 percent of the guideline calculation is loss. So I'm sympathetic to the argument that the guidelines are challenged in their ability to help the Court make a judgment here.

But the problem I think for your side of the courtroom today on this issue is when I have in the past said, okay, just pure raw numbers are not the way to look at what happened, what the nature of the circumstances is or how serious this is. What I usually then turn to is things like how many times did the defendant do this, how many victims were there, how long did he engage in this conduct. Those kinds of things. My classic example is if you lie to a widow with total assets of a million dollars and you lie and get the million dollars from that widow, and -- or Attorney Francis lies to five widows who have a net value each of $200,000 and he's able to take the 200,000 from the five victims. Generally, I think I would say I would view Attorney Francis' conduct more seriously than your conduct. It is very comparable. I don't want to split hairs. But I think things like how often you do it and how long you do it are -- can be measures that help us determine seriousness or

nature and circumstances when sheer dollar totals maybe lead us astray. The problem here, those factors aren't in Mr. Litvak's favor.

MR. SMITH: Well, look, three's -- the number of transactions are -- I think we're either in the 50-ish range or the 75 range for a count purpose over a two or three-year period.

THE COURT: Right. So once every week -- no, once every other week. Something like that.

MR. SMITH: I think it is less than that. The spectrum that I think would be more helpful to your Honor is in terms of quality of the fraud and what's happening is you could put a Ponzi scheme, a Madoff-type fraud which was made up of many little frauds on the individual victims over a period of time that resulted in devastating out-of-pocket loss and harm to the victim, and then without diminishing the seriousness of what Mr. Litvak was convicted of, which was lying to counterparties in the circumstances that mattered. That was the jury's verdict. But say that is just less serious than a scheme that's designed to steal someone's principal and sell an investment that is worthless or will never have a return. You could substitute boilerroom operation in there. So while there's numerous instances of the conduct, it's numerous instances of conduct that's mild in comparison, or less serious in comparison to heartland

frauds or more serious frauds. And it is just -- on the white collar offense spectrum, it strikes me as one that's just not close to the average of seriousness.

And when you do take into account then -- and this is why we spend so much time doing comparable sentencing analysis, and I think a pretty thorough scrub of cases in this district and cases in other districts where the government has taken a position that a very serious offense requires a certain sentence, we see almost uniformly below guideline sentences imposed. And in some circumstances, quite mild in comparison to what the government is asking for here. And I think noted Ferguson before, but you had -- Ferguson is a case of $500 million in actual loss. So a figure that really, really dwarfs what the conduct is here. The guidelines were essentially life. I think the Court quite appropriately thought that was just an irrational result. It did have the government take the position I think in a press articled that was cited, that there's nothing more serious than an accounting fraud of a public company given the scope of who it hurts, and he had a sentence imposed of only 24 months.

Now, obviously, every case is different than -- so the comparisons are imperfect. But as we go one to the other, we see, you know, for -- for conduct that the government, by its own words definitionally says is far more

serious than this, we see a thoughtful sentencing decision of 24 months under the circumstances and essentially a complete disregard for the advisory guidelines.

I'm not -- I don't think that the guidelines in this case should be a starting point for your Honor's sentence. They are advisory, are not binding and they don't have to be a starting point. You have to consider them, but I don't think they are a benchmark that really applies at all in these circumstances given the nature of the conduct.

THE COURT: Could I ask one question? And obviously, I'm going to talk when I get to discussing the factors and my views of the sentence decision in this case about the support and all of letters they've written. But I would like to ask if you could tell me the time period in which what is reported at Paragraph 53 of the PSR approximately occurred. It had to be after April of '08, but I don't have it and the probation officer didn't have it in his notes.

MR. SMITH: 2009, 2010.

THE COURT: '09 and '10. So Mr. Litvak's son was born but not yet diagnosed at that time?

MR. SMITH: I think that's the case, your Honor. I would say on that, that that was a single event in Mr. Litvak's life.

THE COURT: No, I understand. I don't wish to

overstate it or whatever. I just wish to understand the temporal context for it. I didn't mean to cut you off, sir. If you want to argue about it, you can.

MR. SMITH: No, no, I think that's enough on that.

So we put the comparable cases in there, your Honor. I think the experience in recent years is that sentences significantly below the low end of the guidelines are imposed in cases that are more serious than this in terms of the conduct, in particular the victim impact. And I think that in cases where the guidelines sort of trend towards an irrational result because the dollars add up, the court's readily recognize that. The Butler case out of the Southern District and the Parse case out of the Southern District, which I think you cited, your Honor, are great examples of that.

THE COURT: What was the second one, Parse?

MR. SMITH: Parse.

THE COURT: The one with the P. Yeah, I know.

MR. SMITH: Tax shelter fraud case in front of Judge Pauley.

THE COURT: Yeah.

MR. SMITH: Where the tax loss was, you know --

THE COURT: Astronomical.

MR. SMITH: -- was around 6 billion. The defendant had personal gain to the tune of $3 million.

THE COURT: Which he then put in the fraud scheme.

MR. SMITH: And he crammed that in the tax fraud scheme. The guidelines were sort of an absurd result, nothing like here, 292 months on the low end. The government requested eight years and Judge Pauley imposed a thoughtful and modest sentence under the circumstances of only 42 months despite the central and long role.

Now, to your Honor's point about repetitive sort of ongoing conduct, in Parse, they certainly engaged in that over the life of that scheme. But Judge Pauley, I think thoughtfully put him into the context of the overall conduct and took into account the other 3553(a) factors that came to what was a just sentence in that case.

Butler is a case that involved a fellow at Credit Suites who sold auction rate securities. And I think the point there is one I've already noted today, your Honor. It's the culture in terms of an encouragement to commit --

THE COURT: The government's answer to that is going to be, well, yeah, we have a culture problem, and the only way to cure it is to impose extremely long sentences upon people that are -- albeit only one of many doing it, but are found, targeted and the prosecuted successfully.

MR. SMITH: I'm glad you raised that, your Honor, because I can address that now in anticipation of Attorney Francis's argument.

THE COURT: Right.

MR. SMITH: That is we learned, I think, in substantial detail about the culture at Jefferies and we learned that numerous others at Jefferies, both at the supervisory level and at the colleague level, were involved in the conduct.

So on one level under the guidelines the factor is avoid unwarranted sentencing disparities, and that's why we spent the time and the care that we did in setting forth what we think are appropriate comparables that show that modest sentences under the guidelines have been applied in many instances for conduct worse than Mr. Litvak's, also involved clear-cut direct personal gain.

But there's a different type of disparity here occurring, and has occurred. Mainly, that Mr. Litvak to date is the only one prosecuted for this conduct. The government has made arguments about general deterrence and they made other arguments about the seriousness of this offense, how bad it is, in an attempt to justify the guideline sentence.

But the evidence has been in the government's possession for two plus years with regard to others at Jefferies who engaged in identical conduct independent of Mr. Litvak. I'm not encouraging them to go out and prosecute anybody else, but it is very undermining to their arguments that -- about the seriousness of these crimes when they are

in possession of evidence and have done nothing about it, an almost perverse result.

THE COURT: Well, I guess maybe we should go to Congress and ask for the U.S. Attorney to be funded. Because obviously, prosecuting these cases are not inexpensive propositions, right?

MR. SMITH: That may be, your Honor.

THE COURT: I mean, the government never has to prosecute everybody who commits a crime. We went through this at trial. I mean, you may disagree with me. And it never does.

MR. SMITH: That may be a reason why they are not going forward. But it does set up this disparity that Mr. Litvak --

THE COURT: That's not the sentencing disparity factor that 3553(a) talks about.

MR. SMITH: It is a point that I want to raise to your Honor. Here sits Mr. Litvak convicted of these crimes, and your Honor, in short order, will impose sentence on him. Others who your Honor heard about during the trial -- and I don't mean to name names and I don't mean to encourage them, but they are still working at Jefferies or in the industry. The documentary evidence and proof at trial was that some participated in the acts that Mr. Litvak was convicted of, and others did it independently. They are either working at

Jefferies or working in the industry or otherwise have gone completely unpunished.

So the government's position is that a sentence at the low end of the guidelines is appropriate and all of this other conduct merits no action. And the general deterrence point is, what, single out one guy when there's evidence that others did it. I don't understand that approach and I think it works an unfairness on Mr. Litvak to say we need a stronger general deterrent action, when these other means at the government's disposal, they have decided not to go forward on.

But it just works out if Mr. Litvak has been singled out, here we are, for conduct that in many, many circumstances, your Honor, had come to light of enforcement authorities over the years -- I think we cited numerous examples -- and was not treated as a criminal offense.

The government did outline for your Honor another case out of the Southern District that facially looked similar to this. This is the Leszczynski and Chouchane. That was sentenced in front of Judge Keenan earlier this year, in February. I think it was attach -- the indictment was attached to their reply brief.

THE COURT: Oh, that --

MR. SMITH: That looks similar, but it is actually quite different given that it was stocks and not bonds. That

case didn't involve price negotiations. There are a lot of other factors that distinguish them. But I was actually quite glad that the government pointed that sentence out because even if we assume that the conduct was very similar, the sentences were quite measured in terms of the losses in that case and the proof in that case that the scheme resulted in direct benefits in terms of cash bonuses pursuant to a rigid formula that placed a percentage of the unlawful gain in the hands of the defendants.

So you had something we don't have here, which is a direct personal gain and the ability to use and enjoy the proceeds from the scheme. I think one of the defendants in that case received a 24-month sentence, the other received an 18-month sentence.

And I think, you know, we suggested to your Honor 18 months now that acceptance is out. You know, much beyond that, your Honor, in view of all of the other factors at play here, particularly the family essentials and the circumstances of Mr. Litvak's son Jesse (sic), I think warrant a measured approach to the term of incarceration in this case. And we hope your Honor will employ that measured approach.

I don't know if you want to hear from me now on the fine and ability to pay.

THE COURT: Sure, yes, please.

MR. SMITH: I just don't think this is a clean-the-guy-out kind of case, your Honor. That's essentially what the government is arguing.

THE COURT: Before you get going so I don't interrupt you all the time, could you just -- I will ask the government to address the same question.

Will there be an SEC proceeding and will they seek a monetary penalty and will what I impose make any difference on what that will be, in your experience?

MR. SMITH: The SEC case is stayed. I expect to hear from them now that they may agree to keep the stay in place until the mandate comes down from the Second Circuit.

I expect to hear from them. I think they will want a financial penalty. I haven't had any discussions with --

THE COURT: Will it matter what I impose here to them?

MR. SMITH: I argue that that should be credited.

THE COURT: You'll argue that.

MR. SMITH: I don't think if that ultimately makes a difference.

THE COURT: I'm sorry. Now I stopped your argument, so go ahead. That was the specific question I had on fine but --

MR. SMITH: On ability to pay, your Honor, one of the arguments the government makes is Mr. Litvak has

tremendous earning potential, or had. I would emphasize had. He hasn't worked for two and a half years. He's unemployable in the securities industry. He's unemployable in many industries.

The conviction, when and if final, will result in a permanent bar. So he'll never be able to work in the securities industry again. That's the only career he's known. Right now, Jesse is a smart guy and may be able to fashion something for himself once he's done serving whatever prison sentence your Honor imposes. But that's -- we talked a little bit about speculation. That will be speculation on my part. I have confidence he will be able to do it because I think he's a smart fellow, but we don't know. He has no earning potential.

So the idea that we should take into account what he might be able to earn in the future in terms of ability to pay doesn't make any sense. It's been completely devastated by this case.

Assets on-hand, we went through that, your Honor. I think you have a picture of what's marital assets, what's in Dr. Litvak's name, and what in Jesse's name.

THE COURT: I don't know that I ever heard the end of the issue that delayed the trial of this case, which was the dispute with the company. Did you eventually prevail and they are paying the fees? Is he now obliged to repay them

back if his conviction in upheld? And if so, why didn't that show up as a liability on his financial statement?

If all of that is attorney/client privilege, you can just politely tell me.

MR. SMITH: No, no. It is a contingent liability, your Honor. It's really up to Jefferies if and when the time comes to seek to repay the attorney's fees. There was an arbitration held in the September of 2013. Jefferies was found to -- you are required to do an advancement obligation and they since advanced.

THE COURT: That's what I assumed. I never heard.

MR. SMITH: Under the terms of the bylaws, if the conviction becomes final, Mr. Litvak will owe all of that money back, and not an insubstantial amount. That's just something he'll have to deal with when it comes.

The assets on-hand, you can see now what they are. But in terms of a fine, I don't understand the government's fine recommendation at the max of $5 million. That's equivalent of saying that this is at the most serious end of the spectrum of white-collar offenses. It also seems to me to be one that says that all of Mr. Litvak's remaining assets should be treated as proceeds of the offense of conviction. And I don't think that's a logical conclusion, either.

I mean, crediting your Honor's observation about the bonuses and they were influenced in part by the scheme and

its outcome, even if we were to do that, we couldn't say that, you know, his remaining assets are the proceeds. This is not a forfeiture case. There is no forfeiture allegation. I think appropriately so because the former employer, Jefferies, is the entity that received all the proceeds of the scheme, and then later it made the discretionary bonus decisions. And some of that may have been included in Mr. Litvak's bonuses, but the idea that a $5 million fine here, particularly with the unresolved restitution out there, it just seems to me to be just over the top. I'm not quite sure what's motivating the government in seeking a maximum here, but I think it is an unfair request.

I think your Honor should impose a measured fine in light of the remaining assets, in light of no ability to earn any income to support his family while he's incarcerated, and only speculative ability to earn income after. Dr. Litvak is now left to raise two children and essentially do it on her own out of remaining assets and what she's able to earn. To clean out what's left on Mr. Litvak's side of that seems to me to be, frankly, overkill and an unfair request under the circumstances.

So I think we would ask that your Honor impose a fine that appropriately reflects the seriousness of the offense which, as I've argued, I think is at a lower end of the spectrum of white-collar offenses and that reflects Mr.

Litvak's actual ability to pay in light of all of these other things that are coming down the pike, the restitution order, the SEC, and surely the action by Jefferies to recover the attorney fees that have been paid.

I would like to thank you, your Honor, for your consideration throughout the proceedings. I reserve a little time to respond to Mr. Francis, if I may? I would like to convey Mr. Litvak's thanks to you for your careful consideration of everything that's happened here and for the time that was afforded to Mr. Litvak and us to air out the issues that we aired out at trial. Thank you.

THE COURT: Thank you. Attorney Francis, tell me another case of a nine-year sentence imposed for this kind of conduct? Can you name me one?

MR. FRANCIS: I don't have a case name, Judge, but based on the report handed to me -- I can't think of one. Based on the report that probation provided to us, I think that was requested by your Honor, it seems that sentences of greater than nine years are, I think, 145 months.

THE COURT: I didn't say that I needed you to tell me a case. I can tell you cases. I have imposed sentences well in excess of nine years. I can tell you about Mr. Trudeau, who I sentenced to 15 years because it was his fourth fraud scheme and because I was persuaded that the minute he walked out of any door and he was free to, he would

find his next fraud victim and besides which there was a sizable amount of money lost by people, banks, individuals, people involved in his fraud schemes that never would have committed a crime and then faced a sentence from me. There were a few other characteristics that justified a 15-year sentence, including I guess in the case, the guidelines. I wasn't informed much by the guidelines. I was informed by the facts and circumstances of the offense and his history and characteristics.

I could name other cases where I sentenced, maybe not over eight years, nine years, whatever it is you are asking me to impose here, but I guess I will start with -- I should start with this question: Do you think Mr. Litvak is likely to recidivate? So you think he'll be before another court in his lifetime?

MR. FRANCIS: I don't know whether or not there will be another court. With respect to this crime, I agree with Mr. Smith, he has no capability of committing this crime in the future. He's never going to work in the securities industry again. I sincerely hope -- he's certainly not going to be able to be a broker/dealer because his license is effectively gone.

THE COURT: Right. But do you think that his history and characteristics, including what he did in this circumstance, as a broker, suggest that he's going to commit

another crime? He's a fraudster, as I call them, people who seem incapable of preying upon others and stealing their money.

MR. FRANCIS: I can't say, your Honor, that I know anything about or that the government has any facts in its possession that lead us to think that Mr. Litvak is out there or likely to recidivate.

THE COURT: So I guess I will just sit back and you'll tell me why 108 months is a reasonable sentence and not more than necessary in this case. Because I can tell you when you start, I don't see it. And I think that it -- what's the right word -- by taking that position -- I'm not going to think of the right way to phrase it.

Just you make your argument. I won't bother making my statement that I'm having trouble phrasing in an appropriate way.

Go ahead, sir.

MR. FRANCIS: Thank you, your Honor. I think your Honor identified previously one of the reasons why we had a hard time formulating a sentence that was below the guidelines. The loss in this case clearly is a driver of the guidelines. However, there's things that the loss doesn't pick up and your Honor identified. This is something that Mr. Litvak did for nearly three years. And even using the defense's --

THE COURT: He and apparently other people at his company did for three years. Or do you dispute there's a culture at Jefferies as the defense argues?

MR. FRANCIS: No, of course not. They're clearly --

THE COURT: Do you view it as the same as someone, say, like Mr. Trudeau, who every month for three years probably came up with a new fraud scheme or a new transaction to defraud someone? But in this case, it is not quite the same. It is sort of a practice, a habit. Criminal. I mean, that's part of the problem I have with the defense is the idea that I have the feeling that Mr. Litvak sits there and sort of says, I'm a victim because I got singled out. That's not the way I look at it. I look at it that he committed a crime, at least in the judgment of the jury. That's why we're here.

But it is certainly not like -- I mean, yes, it is three years, but it is not -- well, I don't know. You tell me why it is like somebody who, I don't know, their mother dies but they cash the Social Security check every month for the next three years. Each time they go into People's Bank to deposit that check, it is like in their hands, this is a crime.

MR. FRANCIS: Okay. There's a number of reasons, Judge. So to try to differentiate between this case and Trudeau on the one hand, Trudeau is a uniquely bad set of

circumstances for a defendant as a repeat offender.

THE COURT: I think he would agree with you about that.

MR. FRANCIS: Right. However, on the other hand, this is why the government submits that apples to apples comparison of prior cases is extremely difficult because every defendant is different. Your Honor is obligated to look at them each individually, which is why we think that Bradford Rieger on the other end, who is a closing attorney in the mortgage fraud case that your Honor sentenced who got 24 months. It's a completely difference situation from that as well.

THE COURT: It is.

MR. FRANCIS: So that is why the government --

THE COURT: Most especially in that case, he abused his trust.

MR. FRANCIS: Yes. That's one of many ways in which it's different.

In that case another difference is he was one of several co-conspirators. And although he was a necessary part, he was not the driving force behind the conspiracy. He didn't share in any of the upside. He got a flat fee.

We can do that all day long with different cases. That's why the government says, your Honor, don't try and do these apples to apples comparisons because they are not

apples to apples, they are apples to oranges.

Instead, look at what's before you about this defendant. And then look at what the Supreme Court has said we're to do. Do the guidelines calculation, look at the statutory factors. That's what my office did and we took this very seriously. We knew 108 is a big number. It wasn't something we took lightly, spent a lot of time thinking about it. We went through the statutory factors as well.

For nearly three years, Mr. Litvak is doing that. Using the defense's numbers, he does it on 55 occasions. So it's, what, once every five weeks or something like that that he goes out and commits fraud. How is that different from a Social Security check cashing instance? In every single occasion, Mr. Litvak told a lie to someone who trusted him to execute their trades. You heard from the victims who came in and they testified. Some of them actually, Mr. Wollman, for instance, thought Mr. Litvak was his agent. But in every instance, they all thought they could trust Mr. Litvak. And they wouldn't want to do business with a broker dealer who they didn't think they could trust. They had a lot of choices out there, and they chose Mr. Litvak and Jefferies. And the reason the differentiating factor was their perception that they could trust him. He abused that trust. I don't advocate for an abuse of trust guidelines enhancement or anything like that. That's a fact of what he's doing.

Every single time he told a lie, he did it with a price on it. He got to pick the price.

So this isn't one of these cases where, like, Bernie Evers, where it's an accounting fraud case and the fraud goes out there in the financial statements and market capitalization collapses, and so it's hundreds of millions or billions of dollars in losses that aren't -- you cannot causally link the size of the loss and the lie that was told. It's not that kind of case.

This is a case where at least on 55, we say 76 times, he told a lie and decided how much do I want to rip off this particular victim?

THE COURT: And the victim decided that he was willing to pay the price. If I recall correctly, I could be wrong about this, but there were no other of that bond traded on that day. So it's not like he could have said, hey, I'm not going to Jefferies. I'm going across the street to somebody else.

MR. FRANCIS: We don't know that, your Honor. With respect to bid lists, those weren't bid lists --

THE COURT: I'm talking about what I thought was the majority. At least the ones I focused on at trial where the seller says I will sell at 59 and Mr. Litvak says the seller will sell at 60.

MR. FRANCIS: We don't know what would have happened

had Mr. Litvak not lied. They could have called up Credit Suisse or Goldman Sachs or some other broker dealer and said, hey, can you resource some of this bond for me. They didn't do that because they never got past square one. Mr. Litvak had the bond.

So to say that whether or not that bond was actually sold that day is irrelevant. No one else wanted to buy that bond that day is all that the defense has shown so far. And in addition, that's with respect to 20 bonds, 20 different transactions. There are at least another, what, 35 transactions that they concede were relevant conduct, fraudulent relevant conduct that they haven't said anything about because that wasn't used for the trial. They didn't have an expert do their analysis for that.

So his conduct was predatory. He took advantage of the way the market was structured. I called it a flaw in the market. Mr. Smith didn't like that. So at the very least, it's a fact of the market that Mr. Litvak had superior information to his customers and he abused that superior information. And he capitalized on it. He did it repeatedly over a long period of time. He had numerous victims. Even if we just look at the 55 transactions that we can agree were fraudulent for relevant conduct purposes, I believe it's in the neighborhood of 20-something victims.

We talk about victims in this case. What we mean by

that is the victims of his lie. The recipient of his lie. That's the investment managers and hedge fund managers that were his customers and trusted him.

The money wasn't theirs, or it wasn't exclusively theirs. They had investors. Those people are the people who were hurt. So to have Mr. Smith say, oh, it's not money that anyone would have cared about. That $6.3 million came out of pension funds. It came out of municipal pension funds. It came out of firefighter's, police officer's, teacher's pension funds. That's where the money came from. It came from charitable endowments.

THE COURT: Do you know how much the impact was on the firefighter whose pension was affected?

MR. FRANCIS: I don't know at all because there wasn't one particular firefighter who -- I mean, I don't know where my 401K, what exactly is going on with it in any particular transaction.

THE COURT: No. But if I have 10 things in my IRA, I know in one of them there's a trade and that cost me X dollars more than I probably should have paid for it, and I look at the total amount versus X, I could figure out what the impact would be on me.

I think that Attorney Smith is suggesting that it's minuscule with respect to any one person that you want me to think of when I sentence Mr. Litvak. The firefighter, the

school teacher, you want me to think of those as the victims but you haven't told me -- yes, there's a harm to them. I'm not trying to tell you there's no harm. But, I mean, part of his argument is that as it washed down, the harm is really very, very, very small.

And thus the, whatever the number is, four and a half or 6.3 or somewhere in middle of there, whatever that number is, which of course sounds very large and which the tables make very large, really isn't very large in relationship to the total amounts of money first that the PPIPs were handling and secondly that their clients were handling.

MR. FRANCIS: I respectfully disagree. I don't want you to think about a firefighter. I want you to think about pension funds. I want you to think about charitable endowments.

THE COURT: How much did they lose? How much did the charitable endowment lose?

MR. FRANCIS: It's no one in particular, Judge.

THE COURT: But you want you to think about it.

MR. FRANCIS: I want you to think across the board. This argument that you are phrasing is similar to the argument --

THE COURT: It's actually a question. It's not an argument.

MR. FRANCIS: Okay. The question you are posing to me is similar to the argument that, well, GE is a big company and I only defrauded them out of a million dollars. No one shareholder was really going to care about that. They have a lot of shareholders.

THE COURT: But that is a consideration in many cases, the fact that if loss is disbursed over many people and it becomes -- I don't whether that's the ABA's construct that we look at when it comes down to a few dollars per a million people, that's a different type of fraud than one person or five people who lose a million dollars.

MR. FRANCIS: That's true. It's factor to be considered.

THE COURT: You seem to be wanting me not to consider it.

MR. FRANCIS: No, I want you to consider it. But I also want you to consider the character.

Mr. Litvak knows who invests in hedge funds. He knows who invests in the PPIP funds. He knew when he was taking money from them, and I said, that money had to come from somewhere. That extra profit for Jefferies, he knew he was taking it from those funds. And he knew it was coming from the investors. Regardless of whether he knew it was Joe Smith who lives on Main Street in Wallingford, he knows it's people who have their money in pension funds.

This goes, your Honor, to one of the important things, one of the reasons why this case was so important to the government. The effects of fraud on these markets is significant beyond just Mr. Litvak. If people can't trust the market, where are they going to put their pension funds? If pension funds can't trust that they can invest money with hedge funds and not get ripped off, if the government, the United States, doesn't have faith that it can come to the rescue of a market that was essentially frozen solid in 2008, 2009, and put more than $22 billion of taxpayer money to work there, if it doesn't have faith that it can do that without risk of fraud, then it doesn't work.

The reason these markets exist is not for the benefit of broker dealers and other people, Mr. Litvak and his peers at Jefferies, that's not why we have markets. The reason we have markets is for the benefit of investors. This particular market, the RMBS market has a --

THE COURT: Let's assume I accept every word you just said in the last three minutes, I still have the question, why 108 months?

Yes, I want markets to be transparent and honest, but I still don't understand why the sentence the government urges is necessary in this case to accomplish the need for the sentence and to reflect the other factors. I still don't get it.

MR. FRANCIS: Let me keep going with the rest of analysis we did and the things we thought about in looking at the statutory factors. And, your Honor, maybe 108 -- what we did is we looked at what the guidelines were, 108 to 135. And we said, he some arguments and he has some things about him that lead us to believe that the high end of the guidelines or mid range of the guidelines isn't appropriate.

THE COURT: Let me put it this way: Let's assume I come out here and I had bought Attorney Smith's argument, that there's no proof of loss, or I could not measure a loss, so I used zero for that enhancement. The guidelines end up wherever they end up, much, much lower. Would you still be standing here arguing for 108 months, or are you doing it because that's where the guidelines take you?

In other words, even if I bought that argument as a Judge, I would still consider the amount of money, in my view, involved. I may have made a technical guideline ruling, but I would certainly not sentence Mr. Litvak with the idea there were no dollars involved here. It was a naked fraud that had no monetary consequence to himself, to his company or to the people who were buying these. I wouldn't do that. I would still consider them.

It seems to me you have decided that because the guidelines end up at a certain point, that's the end of the

conversation, or the consideration, I guess.

And I'm still struggling with that.

MR. FRANCIS: Well, Judge, if I have given you that impression, either in something I put in the papers or something I've said here today, I respectfully disagree with that and allow me to correct it.

We do not stop at the guidelines. We did the guidelines first because that's what your Honor has to do. We may come to a different conclusion on this, but we looked at the statutory factors and we took them very seriously. Even under the --

With respect to your question, would we have come out at 108? I think so if we had the benefit of someone like the sentencing commission who had done the work with coming up with a fraud table.

THE COURT: They didn't do the work.

MR. FRANCIS: I'm sorry?

THE COURT: I'm sorry. That's why it was important to me, they didn't do the work. If I'm wrong about that, you need to tell me because I'm going to carry this thought with me, follow it in every loss table case. It's like the crack guidelines.

MR. FRANCIS: I misspoke, your Honor, and I don't disagree with you. If we had the benefit of a loss table.

THE COURT: Based on empirical data. We don't.

MR. FRANCIS: Okay. Under this hypothetical, i'm having a hard time -- I'm not sure what I would have done. But this is a case where every dollar of the 6.3 or the 4.4 million in loss that we can agree on, was intended to be lost. It's causally linked, it's directly, causally linked to the lie he told in each and every of the 55 instances.

So, yeah, I don't want to be --

THE COURT: But how about answering the argument that this is not like a Ponzi scheme or a penny stock fraud or a bait and switch where you sell something, you say it has value and you convince the buyer it has value and, poof, at the end of the day it has no value.

MR. FRANCIS: Right. No, that's true. It's not like that case. But it also, to respond to the argument, Mr. Smith said there's loss of principle. That's just wrong. Maybe all the funds made money, but they would have made more money. To say there's no loss of principle, I mean, frankly, that minimizes beyond what the facts would bear. And Mr. Litvak actually did, he stole at least $4.4 million of investor's money.

Now he did it in a culture, at a place where maybe other people were doing it, too. But to equate his conduct and other people's -- and I know Mr. Smith sort of implies that everyone out there is doing it, so we're picking on Mr. Litvak. Frankly, that argument is offensive.

We have all the evidence and hear the evidence, which was contemporaneous verbatim chats of Mr. Litvak lying and then going and bragging about the lies in some instances.

THE COURT: You didn't find any chats by any other broker that were comparable to that?

MR. FRANCIS: Nothing in the number or the extent of the loss comparable to Mr. Litvak. He's in an elite class of fraudster, to our knowledge. If there were other people, maybe he would have had co-defendants, but under the circumstances --

THE COURT: Well, the company's paid over 10 million?

MR. FRANCIS: I'm sorry?

THE COURT: The company has paid over 10 million in restitution?

MR. FRANCIS: Yes, I believe Jefferies has paid over 10 million. And the reason, my understanding, is the way they are doing that, they are just refunding -- I would speculate it's in order to regain customer good will -- they are just funding the entirety of their profits on a trade that's been identified as fraudulent. They are not trying to calculating what the fraud loss was.

THE COURT: In other words, they are giving back what anybody would accept was a reasonable commission on the deal as well?

MR. FRANCIS: They are giving back all the money they made.

THE COURT: Okay. But I still don't know how get to 10 million on just Mr. Litvak? Especially, if there is still 2 million to go, that's 12 million. That's double what Mr. Litvak's, quote, the loss we have calculated. Now I know there's commission on top. The commission was a fraction of the fraud. Sometimes it's less than a whole point, but many times it was a whole point or more, whereas the commission is anywhere from typically an 8th to a quarter, I think.

MR. FRANCIS: Right. I'm not sure about -- I mean, I can't think of any particular instance, but my understanding is, this is -- they are refunding the money, they are not sweeping in other defendants. Or if they are, it's not -- the bulk of it is Mr. Litvak's fraud. In fact, I'm not aware they are sweeping in other defendants. Although I haven't actually looked at it, so maybe they are, but -- I said other defendants -- other brokers. If they are, that's a fraction of it.

The fact is, in many instances, Mr. Litvak would have been -- Mr. Litvak's victim agreed to pay a substantial amount of commission. And then he took a substantial amount of fraud, fraudulently took a substantial extra amount on top of that. What Jefferies is doing is, instead of just taking the fraud amount, they are taking the entirety of it,

legitimate and illegitimate amounts of money they made and refunding it, and that's how they got to the 10 million.

One of the other things I would like to touch on here, one of things we thought hard about is Mr. Litvak's background. Mr. Smith is right. He's relatively unusual for a convicted felon or criminal to have the extraordinary family support and network of friends that he has.

This is all just in keeping with the fact that Mr. Litvak had every benefit in life that one could really hope to have. He comes from an intact family. He had excellent educational background. He has -- himself he's part of -- he's married. He has children. He has every benefit of family and friends that anyone could hope to have. In addition to which he has substantial wealth. I mean, what I think anyone and what any American would say is exceptional wealth. He makes more than $17 and a half million in three years working at Jefferies, and legitimately.

Now some portion of that money, we argue, was the results of -- sort of an award for fraudulent trades. But even if he hadn't done this, his peers, we have no reason to believe are committing fraud, make millions of dollars. He has a multimillion dollar apartment on the upper east side and a multimillion dollar home in the Hamptons.

This is what Mr. Litvak had to lose. And yet, he went ahead and committed fraud on a regular basis for months,

more than two years. It seems that what Mr. Litvak was motivated by was greed.

THE COURT: Can I stop you for just one second? I thought you said somewhere that -- maybe he didn't say it, Terri. I thought you just said before you started talking about him as an individual and the extraordinary support, that the government had thought about it. Yes, you did say that: One of things we thought about here was Mr. Litvak's background.

In looking at the government's brief, I see one paragraph at Page 20 in your original brief and I don't see it discussed in your reply. So I guess that causes me -- that's why I guess I'm coming at you strongly with the questions about have you done anything other than look at the guidelines. Because I don't think you have really -- it doesn't reflect that you have thought about it in terms of his history and characteristics.

MR. FRANCIS: Well, your Honor, I think what brings us here is his offense.

THE COURT: Absolutely.

MR. FRANCIS: That's where our focus is. We really have no basis to dispute the fact that apparently Mr. Litvak is an excellent son, father, husband, cousin, nephew. Those were what the letters were, friend. But none of those letters address what Mr. Litvak was doing when he was at

work.

The ones that do from other people in the industry, are very revealing and I think are pretty good argument for why general deterrence is so necessary. And that's one of the things we do focus on in our brief.

What people write is things like --

THE COURT: Do you want to give me a page cite?

MR. FRANCIS: Sure. In Exhibit A-38, to the letters, I guess it's in the brief. This person writes -- this is one of Mr. Litvak's friends in the industry. He writes that Mr. Litvak knew this was the way the game is played. That he believes that Jefferies threw Mr. Litvak under the bus and this is, at worst, minor infraction.

THE COURT: Let me stop because there was a question. The defendant argued at Page 2 of his brief that this was the first prosecution of its type. I guess I took that to mean the way this game, meaning these bonds, this market, was played. Is that correct, that this is the first prosecution?

MR. FRANCIS: With respect to these particular bonds, I'm not aware of any others. We attached -- we took issue with that. And I don't thing you need to have this particular RMBS market --

THE COURT: What were the facts in the indictment in that case? I know Attorney Smith touched on it briefly. I

can't say the name.

MR. FRANCIS: It escapes me, too, your Honor. Mr. Smith had it. That was a case, it had to do with stocks. Basically, it was a case about markups where people were taking -- or the defendants were taking an amount greater than what was agreed upon.

What we point out that it is -- really the only reason we cited it for your Honor was just to show that it is not true, to our knowledge, that this is the only case of its type. Other cases like this are prosecuted. But also one of the things that's important is, it's not always the case that you get a reported decision when a case is brought and there's a guilty plea, things like that. That case sort of goes away.

THE COURT: That kind of undercuts your deterrence argument, doesn't it?

MR. FRANCIS: Well, I think in case like this, it makes deterrence more important. Because this is a case where people --

THE COURT: Because the prior cases haven't succeeded in deterring people, so we should just up the ante because then that will deter them?

MR. FRANCIS: No. With respect to this particular market, I'm not aware of any cases. I am only aware of the one other case that has facts similar to this.

Apparently people in the industry continue to operate under the misimpression that what Mr. Litvak did is not a big deal, is not a crime.

THE COURT: He has been convicted, so puts a lie, at least until Attorney Smith gets to gets to Foley Square, to the fact it's not a crime.

The sentence -- I know the government never likes to cite this and the defendant likes to have a banner put up in the back of the courtroom, the parsimony clause, but I still am struggling, sir, with how you can be creditable and argue for 108 months in this case?

MR. FRANCIS: I don't want you to think, your honor, that I'm going to the mat for 108.

THE COURT: But that's what you did.

MR. FRANCIS: No, I recommended 108 because I can't come up with a reason, but i'm not the Judge, I couldn't come up with a reason under the statutory factors why it would make sense to depart to any particular lower number. My office couldn't as well. We talked about this at great length.

Your Honor, you have the facts in front you that we didn't have at the time we made the recommendation. We are not changing it, but maybe if your Honor looks at the facts in front of you and says, well, maybe 108 isn't the right number. However, under any analysis that isn't basically

just proffered by the defense, there needs to be a substantial sentence here to effectuate 3553(a) purposes.

Even under the ADA guidelines or proposed amended guidelines that Mr. Smith brings to your Honor's attention, the numbers would have been 78 to 87, I believe, months. That's a significant sentence, and that's what's required here.

People who are writing letters to your Honor in favor of Mr. Litvak are doing it knowing he has been convicted of securities fraud and they are still saying things like, traders sometimes have to shade the truth. That's on Page A-41. Or on A-80, Jesse is a being made an example by people who really do not fully understand the financial markets.

The jury understood enough to know that what they say Mr. Litvak doing was securities fraud. They rejected the argument that Mr. Smith made. And frankly, it's a cynical argument, that this is just like a pickup game of basketball, and we need to trust these guys to call their own fouls. That was the argument at closing, Judge.

The market does not exist for the benefit of Mr. Litvak and his friends to make money. That's not what the market is there for. It's to allocate capital as efficiently as possible for the benefit of investors. In this particular instance, the investors included the American taxpayers, PPIP

and TARP, and they included pension funds and these endowments.

And to the extent that the suggestion of it was in the papers and now been repeated, so I need to respond to it, that we did something to demonize Mr. Litvak or he's been singled out. The evidence at trial was Mr. Litvak's own words. We never characterized Mr. Litvak at all other than just to say that what he had done was a crime. This argument that he's being singled out, this is offensive, Judge. We followed the evidence and it led to Mr. Litvak. That's how we got to him. There was nothing about Mr. Litvak. I've never heard him say a word that wasn't directed to your Honor, and most of them were not guilty. And I don't intend to testify. I hear you, Judge. I never heard him substantively discuss this at all. No one at the government has.

The fact is we picked Mr. Litvak because that's where the evidence led. For him now to say I'm being singled out, he's like the guy that gets pulled over in a red Ferrari going 120 miles an hour and says, but all of those are guys are going 65. It's not fair. He was the worst of the lie. Someone has to go first, Judge. We needed to prosecute someone first in this market. As your Honor says, maybe there's others that will follow. As Mr. Smith says, maybe there are others that might come. But someone has to go

first. In this case, it's Mr. Litvak. In this instance, it's Mr. Litvak.

THE COURT: I'm moved to ask a question, not because I disagree with what you have just said necessarily, but because what you said leads me to the question. And that is, accepting all of that, what sentence is sufficient for the first person who has been told, no, you really can't go 125 in a red Ferrari on the merit. We don't allow that. That violates our concept of free markets, you are playing, you are putting your finger on the scale. All of it's very wrong, and the jury told you that. I don't know that I should -- I mean -- I guess, how much is sufficient?

When the guidelines were adopted, Justice Briar wrote remarks about the loss table, which I think are very enlightening. I happen, in some significant, not a small measure, let's put it that way, to agree with him.

Judge Cleary, who was a beloved member of this court when I was practicing as a lawyer. Some of the folks in your office will remember him. Probably you could ask John Durham about him. Very, very wise judge. He was a judge long before there was anything known as the guidelines, long before anybody thought about a loss table, empirically based or otherwise.

His view was that in every white-collar criminal that came before him, they needed to go to jail. His

sentences were -- please don't take this as what I'm thinking -- but three months, six months, nine months. Every other district court in the nation, as reported by the Sentencing Commission and Justice Briar back in the eighties, put those folks on probation. Oh, you know, they look like me. They are good people. They have done lots of good things in their lives which caused tens of people to come forward and stand behind them at sentencing. He doesn't need to go to jail. He's already been punished enough.

I think what the Commission said, and rightly so, that's not the right conclusion to reach, that incarceration is a very powerful penalty for white-collar criminals. I think I share the office's comment to me that one of the most powerful things that happened when he did the investigation is the fact that Mr. Litvak understood that had to happen to him. A lot white-collar criminals don't understand that. He's not admitting responsibility. I have a little bit of the same fear you have, that he views himself as a victim. And I'm troubled by that, but that's not fair because I haven't heard him say it, but I'm sort of inferring it.

At the end of the day, how much is necessary to accomplish deterrence of others, to accomplish punishment for what was done. I'm still struggling.

MR. FRANCIS: I see that, your Honor, and I don't mean to make light of it when I say it's hard to know. And

you have a hard job. I have heard you say previously this is the hardest part of being a judge. This is the hardest part of your job. I imagine that's the case.

However here --

THE COURT: That's why I get paid such big bucks.

MR. FRANCIS: That's what I was going to say.

THE COURT: I'm sorry. That was really not appropriate to say, and I apologize to you, Mr. Litvak. It's not a happy or funny day for you. But it's been a long time I have been up on the bench, and I haven't had much sleep lately, so I will chalk it up to that.

MR. FRANCIS: So not to belabor the point, Judge, 108 months, we recognize it's a big sentence. We arrived at it through what we thought was an analysis that made sense. Maybe your Honor uses the same analysis because I don't think our analysis can be any different.

You calculate the guidelines and you apply the statutory factors and come up with a sentence that is sufficient and not greater than effectuating the purposes of the statute. Going through that analysis, we came to 108. Maybe your Honor comes to a difference number.

I think it's important if you do that, if you are going to come to a different number, to inform your decision, this information provided by the sentencing commission apparently to probation, the lowest -- the average sentence

for someone who committed a securities fraud -- and I note that Mr. Smith compares what Mr. Litvak did to a lot of apples and oranges comparisons. He compares to investor fraud or completely different type of crimes -- but taking away the security fraud statute and similar guideline characteristics, people with relatively similar, roughly similar circumstances, the average sentence in the Second Circuit is 100 months. And nationwide, it's 145 months. Even when there's a downward departure or a below guideline sentence, the government doesn't sponsor. Nationwide it's 103, and in the Second Circuit it's 72 months, Judge.

We feel that sentences in those range are appropriate. We're not outside the heartland of the offense. We're are squarely within the heartland of the securities fraudster. We think that the circumstances in front of you, which include everything, including the fact that Mr. Litvak enjoys overwhelming support from his family. That's heartening to see and hopefully that means they will help him not offend in the future.

However, despite that support, he offended in the past, for years. It's hard to say that he's a good man that did a bad thing. He's a good man except for the fraud he committed over a period of years. And the evidence is that he did what he did out of a sense of greed and out of a sense of competition.

There is an element in this case, Judge, that he was trying to get over on his customers. And that's particularly a problem here where his customer's testified they thought he was on their team. They didn't know -- I mean, it's easy to beat someone when you cheat. It's easy to beat someone when you tell them you are on their team, but really you are their opponent.

So just finally, just because Mr. Smith addressed this, although we don't think you should be doing the -- look at the comparable cases, he addressed the Butler case and the Parse case. In their papers they address a lot of cases. We would say that each one of those cases can be distinguished on its facts.

With respect to Butler, in that case Judge Weinstein held that the loss was impossible to determine and the gain was only $250,000. Despite that, he imposed a sentence of 60 months and stripped -- and in his words -- the defendant was stripped of all of his assets because it was a financial crime.

With respect to the Parse case, so that's a tax shelter case where Parse is more like Bradford Rieger. He's a necessary part. He's the investment banker that helps the scheme go, but he's not the one driving the scheme. The people driving the scheme in that case, the attorneys, Jenkins and Gilchrist, who came up with the fraudulent tax

shelter schemes. Paul Daugerdas, he got 15 years. Ms. Guerin, she got eight years. And even there, Mr. Parse got 42 months, which is not nothing for somebody who is doing the job effectively as Bradford Rieger.

With respect to the fine, I don't know what the SEC is going to do, your Honor. That case is stayed, but it's before you. I suppose they will come back and ask to bring that case back to life.

There's no indication that Mr. Litvak has tried to find work if the past two years. I don't know -- as I said, I don't believe he has any likelihood of finding work now in the securities industry. Most people in America don't work in the securities industry and still manage to make money.

So I'm not sure that the fact he's unemployed and won't work in this one particular industry should be dispositive of anything with respect to his ability to pay a fine.

Mr. Smith implies sort of implies some ill will towards Mr. -- the fact -- he's says he's not sure why we came up with a $5 million fine. We assume that all the restitution is going to be paid by someone else. That's money that Mr. Litvak owed. And it's only --

THE COURT: Let -- I'm sorry. I interrupted you again.

I was going to ask you, how much -- what is your

view of his gain?

MR. FRANCIS: Of Mr. Litvak's gain?

THE COURT: Yes.

MR. FRANCIS: There is a couple of different ways you can look at it. One is you can look at Mr. Eveland's testimony, that's 5 to 12 percent he would expect to make. So you can look at 5 to 12 percent of his 17 and a half million dollars total take home that he took.

I note that when your Honor talks about his salary wasn't that much. Mr. Litvak was, I think, guaranteed to make a million dollars a year. And everything on top of that was bonus.

THE COURT: I thought it was much less than that, but maybe he was guaranteed the million and he just didn't get it --

MR. FRANCIS: I think it's phrased as a draw and bonus. But in realty, our information is you always get it, and the bonus would be on top of that.

Another way to look at is, you could look at that Mr. Litvak made $58 million in profits for Jefferies over his time there. If you take my $6.3 million fraud number, then -- so 10 percent of all the proceeds he ever made for Jefferies is fraudulent.

Or you could take Mr. Smith's number, which is 4.4 million in fraudulent proceeds. So it's something less than

10 percent. But a significant percentage of an enormous amount of money that Mr. Litvak made is attributable to his fraud. You can infer from that, I think it's a reasonable inference, that Mr. Litvak's value to the firm was informed and enhanced by the substantial fraudulent proceeds he was bringing in over this time.

As Mr. Smith says, I can't trace a dollar from a fraudulent trade into Mr. Litvak's bank account. That why it's not a forfeiture case. We didn't try to make it a forfeiture case, it's just not.

That's all I have, your Honor, unless you have questions.

THE COURT: I'm trying to puzzle through your argument. The reason you went for the top of the fine was because he's not going to have to pay likely on restitution. And probably, legally, he's jointly and severally liable with Jefferies for the full amount, the 4 to 6 whatever million we're talking about. And perhaps that total amount had some benefit to him overall and his standing with the company. But the fact of the matter is that he likely put in his pocket, as a result of the fraud, I don't know, 700,000, a million.

MR. FRANCIS: The high end would be 1.7 million and at the lower end --

THE COURT: You said he was guaranteed a million.

So it's -- 14 million is what his bonus, extra he earned. So I took 10 percent of that is 1.4, 5 percent is 700,000, that he would have made that much less over three years had he not done what he did.

MR. FRANCIS: That's right, but apparently Mr. Litvak falls in the category of while-collar criminals who think this is a game worth playing. The Second Circuit has explicitly said significant sentences -- enhanced sentences in order to disprove that notion are appropriate.

THE COURT: What case would that be?

MR. FRANCIS: That's in Goffer, which is a case that may have come up during the trial. United States versus Goffer, 721, F.3d, 113, and the jump cite is 132. That's a 2013 case.

THE COURT: With respect to -- I actually share your view of trying to compare, you know, apples and oranges. It's not likely to be terribly helpful, but it sometimes can be.

You spoke about the Parse case in response to the defense counsel's argument. I had thought that the judge in that case had talked about Mr. Parse having a central and long-standing role, not a marginal role like you sort of just characterized it as.

MR. FRANCIS: I would not say either Bradford Rieger nor David Parse had a marginal role. But they were central

in the sense that they are necessary components to a scheme that's originated by someone else. And so that's why I think Mr. Parse's sentence, rightfully was so much smaller than Paul Daugerdar's sentence who was the real driver of that the fraud.

THE COURT: The fraud being over a one half million billion loss in revenue to the U.S.

MR. FRANCIS: That's right.

THE COURT: Why doesn't Judge Wood help me, by her sentence or by reference to her decision in the Gambini case. I'm not sure if I'm saying it correctly.

His guidelines were lower obviously, I know you are going to start with that. It's a bidding scheme for bonds, it's not exactly like this case, but it sort of had an effect on people either getting less or somebody paying more, which is what happened here, than what they should have paid because of the bid rate, if I'm remembering.

MR. FRANCIS: That's right, it's a municipal bid rigging.

THE COURT: And it was part of -- Judge Wood found there was a -- we should call it the toxic Wall Street climate -- it was part of a corrupt culture at the firm. He went to trial. He deprived his sellers of the true value, market value of what they otherwise would have gotten when the bonds went to market.

Why doesn't that case provide me some guidance?

MR. FRANCIS: I suppose everything can provide -- should provide your Honor some amount of guidance. I think, in this case, it's probably not all that helpful to Mr. Litvak. Municipal bond bid rigging is completely different exercise, although he was depriving sellers of money. It was being done in a completely different way. Judge Woods seemed to the indicate that she wasn't sure that the amounts of loss were causally linked to what the defendants exactly were doing. And that the end victims, the municipalities, may not have been, sort of, bearing the full weight of the loss. It's a little hard to tell from the transcript that I read of that.

However, what I did pull out of there was the loss was only 2.9 million, which is roughly half, less than half of what we think the fraudulent loss was here. And there he got 18 months, which is still four months from -- more than what they originally had asked for and what they are asking for now. It seemed, frankly, like a different kind of case as compared to what we have.

MR. SMITH: Your Honor, I hate to interrupt, but some of us need a restroom break.

THE COURT: I'm going to take a break. I don't know how much you have in response.

MR. SMITH: Very, very little.

THE COURT: Can I take that, then we'll take a break.

MR. SMITH: Yes, your Honor.

MR. FRANCIS: Thank you, your Honor. If there's nothing else.

THE COURT: No.

MR. SMITH: I will be brief. The chart, your Honor, we called the sentencing commission yesterday. This is a non-exclusive list of factors you might have applied. It doesn't take into account criminal history.

THE COURT: The sentence -- yeah.

MR. SMITH: I don't think it's a -- it's not a representative sample. Just one or two outside sentencing, we think we identified a couple of sentences that were included in the mix. I don't think it's a guide in terms of the averages.

I would also say that the only way under the ABA guidelines to get to 78 to 87 months on the approach that the ABA put out is to push every button, assess a victim impact, which is inapplicable here. You just can't get to 78 to 87 months on the ABA approach given the conduct. You would have to take the same sort of approach to the issues that the government has taken across the board.

That's really all I have.

MR. SMITH: We'll take a recess until quarter to

2:00.

01:51 PM.

THE COURT: Please be seated everyone.

One question I had for the government before I proceed, and I noted, Attorney Francis, that you wisely retreated, I guess I will say. You made the argument about who were the -- where did the money -- who was impacted by the fraud in terms of pension frauds or charitable organizations, universities, things like that. And I asked you about how much any one of them suffered a loss and you weren't able to tell me. But you then retreated, you didn't want me to call them victims. That's probably because you were conscious of what I had forgotten about, which is Note 20 to the guidelines, right? I mean, if I view them as the victims, which is what you were suggesting I do, kind of not really technically, but kind of think of them, then the loss per person or per entity is quite small and diffuse. In that instance, the guidelines suggest a departure, right?

MR. FRANCIS: The guidelines do. I can't claim that's exactly what I was thinking when I retreated.

THE COURT: I was giving you more credit than --

MR. FRANCIS: I appreciate that, Judge. In reality, I don't think it's fair to call -- I think they are too remote to call them victims.

THE COURT: I agree with you. I don't think it

meets the departure. I can't remember, I think the defendant pointed me to it. I'm not going to depart on that basis. I'm just suggesting that to the extent you asked me to think about them, which I think is not inappropriate for you to do, I'm not saying it's wrong for you to make that argument. All I'm suggesting is it does tend to -- I'm not going to depart, but it may be become something I think about as far as nature and circumstance.

MR. FRANCIS: I think that's right. I raise -- as I tried to express -- I raise it more as a -- I think it's an insight into Mr. Litvak's mindset and the nature and circumstance of the offense, more than you need to calculate the number of victims and do some math.

Also, I mean, we didn't regard those remote victims, quote, unquote, victims, as victims for purposes of the crime victims.

THE COURT: I know you didn't, which I think under the departure, you would have to think of them that way.

MR. FRANCIS: It would be difficult, and also it would raise all kinds of issues about how logistically we would accomplish that. Looking to be forthright, we didn't think of them that way so they weren't --

THE COURT: I was just looking at, at the break, that Goffer case. I actually had read that but before I was not remembering in particular what they had said, which was

the end of the opinion about the sentence, but I'm mindful of that as well.

Ray, your rec is attached to what? Is it attached to the second addendum or the first?

THE PROBATION OFFICER: The first. Should be attached to the PSR.

MR. SMITH: I have a copy.

THE COURT: I may need it. I had it, but I can't find it.

THE PROBATION OFFICER: (Handing.)

THE COURT: Mr. Litvak, you and I have been in a courtroom for a lot of hours. I have not heard directly from you, which is fine, but now is the time for you to hear directly, I guess, from me.

The first thing -- well, as I said at the beginning, what I'm going to do now before I impose sentence upon you and actually finally determine that sentence, is to go through the factors that I mentioned and talked about at the beginning that Congress has required me by law to consider. Their intention in that respect is that if I'm mindful and thoughtful about these factors, that I will, in the process of considering them and weighing them, arrive at what is a fair and just sentence.

Among the factors is one we have already talked about and I'm sure that everybody in the audience was puzzled

by how can we do arithmetic to decide what is a proper punishment for a crime. But a while ago Congress decided that -- in the '80s -- that this was an appropriate way to determine sentences was by assigning numerical values to certain characteristics of an offense or a person's criminal history. And using a table or a chart, come up with a sentencing range. We have done that.

And in this case, based on my findings, your -- Congress would say your sentence should fall within 108 to 135 months. About five or six years ago, the Supreme Court looked at that scheme and said it would be unconstitutional if we required sentences to be in that range. So the way that they decided to solve it was rather than throwing out everything, they said we can have the scheme, but we will not make it mandatory.

So what that means is, I'm required to attempt to determine the guidelines, which I have done. I'm required to consider the guidelines seriously, they are a serious factor to be considered and weighed. But at end of the process of considering all of the factors, it may be that the sentence I impose is within that range because all of the factors drive me to that sentence, but it may just as well be that it's below it or it's above it. It's really a consideration of all of factors that will inform my judgment today and which is what I think is my responsibility is today.

Your counsel asked me to depart from the guidelines, the effect of which is really to make the factor a different range, in effect. If I departed, then I would have a new range, and that would be the factor I would consider.

I want to state clearly for the record, I think counsel asked me to depart on extraordinary family circumstances and that the loss overstates the seriousness of the offense and otherwise overstates what the sentence should be. I recognize that I have the authority to depart on both of those basis. I could, if I wish to, exercise my discretion to do so, depart. Also recognize that there is a record here that might very well support both of those departures, but I'm not going to depart. I'm going to exercise my discretion not to.

And the reason really is that while I think your family circumstances will figure significantly in the sentence I determine, I'm not going to depart from the guidelines on a finding of extraordinary family circumstances. I don't believe that your situation meets the facts of the cases that justify such a departure. And I just don't choose to exercise my discretion to depart.

On the loss table, in effect, the loss numbers assigned due to loss overstates the guidelines or drives the guidelines inappropriately up. I'm certainly in agreement with that argument, but, again, I exercise my discretion not

to depart to a particular range that I think it overstates. Rather I will consider that argument quite significantly, I think I would say, it would be fair to say, in addressing the nature and circumstances of this offense and the seriousness of the offense and how loss plays a role in that. And also probably by commenting a bit on the loss table and things like deterrence of white-collar crimes, et cetera.

So we're still left with the 108 to 135 guideline range. So I will now turn to -- I guess I probably should comment, just because the counsel have addressed it and I need to -- I think I should address it on the record. And this really would probably go to the departure, but also, in some respects, I think I will consider it in nature and circumstances. And that is whether the ABA proposed guideline, the loss table, should be used here, shouldn't be used here, whether it's helpful or not helpful.

Obviously, this case demonstrates that just like the loss table in the guidelines, that there's lots of things to be argued in the ABA loss table. Lots of places where people can disagree. People can value certain aspects or characteristics differently. I have gone through the ABA proposal. I have looked at both parties arguments about what they should tell me about what the loss table amount should be or what the sentence should be. Actually, it's not just loss table, I'm sorry, but what the sentence should be, the

guideline ranges. And I have to say that I am in complete agreement with the drafters of this proposal, some of whom are very highly regarded judges in this circuit, in which the drafters urge the courts not to focus on things that are easily quantifiable. I agree with that. I think that in this case, obviously loss is easily quantifiable, in my opinion, but that it shouldn't overwhelm or cause me to ignore other important but less easily quantifiable characteristics. Having agreed with that, what I think this case -- it could be Exhibit A to this point, is that -- that the ABA proposal is just as difficult to struggle with because it's trying to put numbers on things. Where I think the ABA proposal is helpful to me in this case is that it articulates ways of thinking about factors and how they may or may not be significant in a particular case. That's really my view of what I need to do here. And that is to take the broad factors that Congress has put upon me to consider and to sort of break them down as they are present in this case.

So I'm not going to adopt one or the other of your views of the ABA calculations. I'm very mindful of them. I think, as I say, there's parts of them where what they talk about, like in the culpability area, the things to think about, those are very helpful to me as a sentencing judge. But to try then to decide which box they go in and which,

within that box, number I ascribe to them is not particularly helpful, at least to this judge.

I will start, Mr. Litvak, with my view of the nature and circumstances of what you did. I think, unlike you, I do not view you as a victim. I don't view you as singled out. I don't view you as somebody who happened to do something that everybody is doing and nobody thought was illegal and, bam, all of the sudden you got caught. You lied. Now maybe that's what people do every day on Wall Street. It still doesn't make it legal. Lots of us lie every day in our lives. Fortunately, most of the time it doesn't have much consequence. It's a white lie. But when it has a consequence, when it's material, which this jury found, it's a crime. If you don't think that -- obviously, you don't think it in the sense that you wish to take an appeal and challenge the convictions, but, in my mind, that's a no brainier. If anybody on Wall Street thinks it's okay to lie, I hope that, to the extent any message gets out from this sentencing, I hope that message gets out.

I agree with the government, we want our markets to be open and transparent. And I agree completely with you, that you didn't have to tell this buyer anything. For example, you didn't have to tell them what the price was. When you chose to tell him and you chose to lie about it, that was a crime.

You also did it many times. You did it such that there were many victims in the case. We have no disagreement you have done it at least 55 times over a three-year period. And certainly the loss is at least in the mid 4 million range. It may be that it is not a significant percentage of the overall picture of Jefferies profits or even the profits you brought to Jefferies in this period. But it's, as somebody once said, it's real money. It mattered to you to make the lie because you wanted to benefit from it. You didn't put it all in your pocket, but it mattered to you. I think it's fair to say it would have mattered, and it did matter to the people you were dealing with.

Again, we don't have a precise formula for what your bonus was in relationship to what you did. But I certainly think it's fair to say that, you know, certainly somewhere in the range of 700,000 to a million is what you benefited. It's possible that the last dollar you brought in the door, which I would view as the last dollar, were more valuable in the bonus calculus. I don't know. Could be that they were less valuable. We don't know whether it's 5 percent, 12 percent or 20 percent. But there's no question that you went to work every day to make sales. You went to work every say to earn a commission or a profit for your company because at the end of the year, you thought you were going to make money from that. In my view, that's a significant part of the

circumstance of the crime you committed.

Your counsel has made much of the climate on Wall Street, the climate at Jefferies. I did see evidence that what you did, at least in that one instance that I specifically recall, was applauded. I would view it as an applaud by your supervisor. It sounds like the government has recognized there were others who engaged in conduct like this beside you, but I also heard the government -- and I didn't hear any evidence certainly presented or proposed or proffered by your lawyer that you were, shall we say, the star of this conduct. That while others may have done it and there may have been people telling you, yeah, this is a good thing to do, you seem to have really run with it in a way that others did not at the company.

I guess part of the circumstance of this crime that I can't ignore is the context in which this market was operating. This was a market that was dead in the water. These bonds were going to be nonmarketable, right, but for the government's infusion of money over great debate and disagreement of whether that money should have gone to this purpose. All the sudden there's buyers out there for this market that you could then benefit from by being the broker.

And I don't disagree with counsel that, you know, the United States isn't the victim here. The way it is, say, in a tax case, but you were mindful, I think. I think there

was a chat to this effect, or certainly the man at Canter called it out to you when you -- after you had disclosed what had happened, that this was really government money. This was a market that existed because of taxpayer money. And you were, in effect, taking advantage of it through fraud.

Obviously, everybody on this side of the bar sat through the whole trial and many of the people behind the bar did as well, I know. I should state for the record that the nature of the fraud here was there were occasions when you told the buyer that they could get the bond they wanted and that the seller would sell it at X when, in fact, the price the seller had told you they would take was less than X. There were situations where you told a seller that a buyer would pay X when, in fact, the buyer would pay X plus, but you induced the seller to sell based upon that lower price represented. And there were times, as I recall, where you said to the buyer that there was a third-party seller with whom you were vigorously negotiating and had finally worked out a price when, in fact, it was a bond that was in the inventory of Jefferies, there was no other seller. I'm not sure if that covers every one of them but that's the principle ones that I remember from trial.

I guess the bottom line is the nature and circumstances of your crime was a crime of fraud, lies, repeated lies. It's my view that you were motivated to make

money. That's what you said to the man, is it Canter from AllianceBernstein? Whoever that list was sent to, who called you up. I mean, your answer was something to the effect of you were sorry, but there was a lot of pressure on you to make money. I understand that's a pressure from the company. They want you to make more profits for them, but at the end of the year, those more profits also translate into your pocket, which obviously over those three years, you did very well.

However, I also recognize that your gain, the gain that you did put in your pocket, even if I account for a nonmonetary gain on the level of you benefited in stature or standing at your company because you had more profits certainly doesn't approach the actual loss that I found and that I believe the victims here suffered. As I have already gone through about how much did you gain from this, it's a percentage obviously. It's probably, as I say, somewhere between 5 and 10 percent. I'm sorry. Maybe, as I say, my sense of it is somewhere between 700 and a million dollars.

I think I'm going to stop in -- I'm going to take a slight digression on the nature and circumstances to speak a few moments about the loss table and why I think the guidelines here are very unhelpful. They are unhelpful for some of reasons I sort of hinted at in my questions. They are unhelpful because they effectively overwhelm the

guideline analysis. I mean, I think although the guidelines don't consider all factors that I should consider now under 3553(a), they certainly were designed to consider more than one factor. The aspects of was somebody a leader, was somebody a minor player? Did somebody abuse a trust like a lawyer, or did somebody -- was it a vulnerable victim? Those kind of things, the guidelines tried to put a value on each of those characteristics so that ultimate total offense level was supposed to reflect sort of a panoramic view of the offense committed.

What I think happens here with the loss tables at the levels they are now at, is that the loss aspect of the crime, in effect, overwhelms all the other aspects. As I say, in this instance I think 60 percent of the total offense is attributable to just sheer dollars without any regard for any other characteristic of the offense. Therefore, I don't find the guidelines helpful to me at all.

There's Murphy's law, whatever I want is not in front me. Everything I don't need at the moment is in front of me. I had notes about loss. I mentioned Justice Briar's comments about the loss table as originally adopted, which was at a much lower level than the current ones. Which were designed -- I guess in that sense, those could be said to be maybe empirical. They were designed to reflect the fact that the actual data of sentencing reflected that the chart --

that it should be zero points for loss, for any amount of loss because everybody got a probationary sentence.

And Justice Briar wrote to mitigate the inequities of these discrepancies, the commission decided to require short but certain terms of confinement for many white-collar offenders who traditionally have received only probation. And I would also agree with Mr. Bowman, an oft commentator on the guidelines and sentencing in which he says, an archeological foray as into how the particular numbers of the loss table were chosen is likely to be of little practical use for judges or lawyers.

And I don't lightly -- I'm not, in effect, saying I'm ignoring the guidelines. But I think to the extent that they have been driven to where they are by a loss table which is not based on empirical data and which overwhelms the rest of the guideline considerations such that it's almost without regard to the rest of the characteristics in this case, in my opinion, I need to really scrub through the nature and circumstances and decide what that informs my judgment to be as opposed to be taking a guideline number that's derived in principle part by the sheer dollar amount, which, as I said, while it's a loss, one aspect of it that isn't reflected in the loss table is that it's not money that he put in his pocket. In other words, a defendant who put between two and a half million and seven million in his pocket would get the

same loss table calculation as this defendant who did not do that.

Again, by saying this, I don't mean to say that I'm not mindful that there was that damage to victims. I'm just saying that it is a different case. And the loss table doesn't reflect that.

The other thing is -- about the nature and circumstance I haven't touched on is the victims here. The people whom you were chatting with who represented -- who were managers, I guess, and therefore represented the funds that had been created by Congress and which had both public and private funds -- money. The victims, I would agree with your lawyer, they are sophisticated. They are not, you know, the 90-year old widow who lost every penny of her investment. To the extent that the government asks me to drill down a little bit and think about the impact on the ultimate victims, I don't disagree that I should do that. I think if I did that, I would find the loss as to any one pension or any student whose tuition might go up because the endowment fund at Harvard decreased in value by some amount, the loss is there is going to be pretty small.

I think in this case, the sophisticated nature of the victims and even considering the maybe less sophisticated ones who were behind the managers causes me, again, to question whether the guidelines are terribly helpful in

understanding the nature and circumstance of the offense.

Before I turn to Mr. Litvak's history and characteristics, I think I will address the need for the sentence here. Congress has imposed penalties for violations of the law and has given judges like myself the responsibility of imposing a sentence, not because we want to ruin your life or because we just do it to be mean, I guess. I'm not quite sure how else to put it. It's done because Congress, and I suppose in that sense society, feels that there is a need for the sentence when criminal conduct is engaged in. One of the needs of the sentence is to reflect the seriousness of the offence. The reason for that is if it doesn't reflect the seriousness of you what did, Mr. Litvak, then I don't think people will respect the law.

For example, I would put in the most serious category of offenses if somebody's life is taken or a child is sexually abused. But if somebody runs into a 7-11 and steals $20 and nobody gets hurt, I think we would all agree that's not a very serious crime. They are both crimes, but the sentence -- if a judge were to sentence both of those people the same, I think everyone would agree that's a travesty. That isn't justice. They wouldn't respect the courts or the justice system. Part of what I have to do today is to weigh and consider the need for your sentence to reflect the seriousness of what you did. In that regard, I

think my view is that your sentence is a serious offense. It's not the most serious economic crime ever committed in this country. I think that there's a lot of other names that we could roll off who have caused greater harm to more victims, who are more vulnerable over a longer period of time, et cetera, et cetera. Who, as your lawyer keeps wanting to point out, foisted onto vulnerable victims perhaps something of absolutely no value, created it out of old cloth when, in fact, in your instance your victims received something of value. I agree with the government, they didn't receive what they thought they were receiving and they paid more than they should have paid, but they definitely got something of value.

I always find this -- sentencing is always hard, but I find trying to articulate how this factor comes out in any particular defendant's case very difficult because -- I always keep using the word "serious." As I just said a minute ago, I view your offense as serious. I think it's a significant amount of money. It occurred over a significant period of time. It occurred in a market where the government had stepped in to support. And it's in a market in which we, as people who invest or funds that invest, expect that to be an honest market and your conduct robbed the participants in that market of that honesty.

But as I say, it's not the most serious economic

crime that's ever been committed. I think in that respect, my assessment of the need for the sentence in terms of the seriousness of the offense will be really driven in large part by my conclusions and what I have already said about the nature and circumstance.

The second need for the sentence is to provide adequate deterrence to future criminal conduct. I think I got the government to agree with me -- well, certainly they agreed with me that you won't commit this crime again because you won't be able to commit it. The government has taken away your license and they will not give it back to you. So your ability to commit this crime again is, in my opinion, zero. But I also -- it's my pretty confidentially held view, I am never going to say I am always going to be right, but even with the view that it bothers me a little that you feel like you were singled out or a victim, I don't see you as committing any other crimes. And I think the government kind of agreed with me on that. And I actually happen to think that in crimes like this, that need for the sentence is a very important one. I think I referenced it earlier talking to Attorney Francis. But if I thought that there was any chance you would go out and commit another fraud, the sentence today would be significantly different than what I think it's going to be. But I don't see that as present in this case, as far as a need for your sentence.

The tougher question though is, is there a need for this sentence to provide deterrence generally to other people. As the government suggests, to people who still don't realize that this is a crime apparently. To people who are possibly going to be able to engage in this kind of conduct in the future. Should the sentence be such that it works a deterrent effect upon the public, generally, not just upon you. And on a theoretical basis, the answer to that question for me is a whole-hearted yes. I agree with the government. We want to deter other people. We want them, if they happen to learn of your case, to say, wow, I wouldn't want that to happen to me, so I won't do that. If I thought about doing it, I won't do it. And I think in a -- deterrence is a very difficult factor to deal with because there's very little good research, I think, the government cites me to a Law Review article in which a professor, in effect, collects the literature on deterrent studies. But while the government reads part of it -- and I'm not saying they are misreading it -- but part of it to support the conclusion that the government makes, that generally white-collar crimes -- sentences and long sentences provide the deterrence we need from the public in general, of the public in general. I'm not sure that that's what this article says or what those studies say.

There does seem to be, based upon the studies

reported, some evidence that in some white-collar crimes, there can be deterrence with jail sentences. I think there's less evidence that longer sentences would necessarily lead to more deterrence. In other words, a correlation between the length of the sentence resulting in less crime because there's greater deterrence. I would love for there to be evidence on this question one way or another. I don't know that I have that evidence. I am of the mind, in the antitrust area, there's some old evidence that jail sentences in antitrust cases lead to deterrence. But the problem with that evidence is those sentences, I believe, were typically about six months long. Those were imposed in the '60s in an electrical equipment price fixing case. And what the Justice Department noticed for the next decade is whenever they got records from companies and they went to look at what the price fixing activities were, is that the activity stopped precipitously on or about the date of sentencing in those cases. That supports the government's argument that white-collar crime sentences will deter other people if they hear about them, which those were very widely published. On the other hand, it doesn't support the government's argument that a really long sentence is necessary to accomplish that need. It might be to accomplish other needs or because of other factors present, but I'm not persuaded that I have anything in front of me and my own judgment is that very long

sentences, absent other circumstances and other factors that would justify them, are necessary or appropriate to serve the need for the sentence to provide deterrence to others. I do believe that some jail sentence is appropriate and will serve that purpose. But I don't think it's a sentence in the range of which the government argues, certainly is not needed to deter others from doing this themselves.

The last need for the sentence -- well, is to provide you with needed care or treatment, things of that sort, which I don't think applies in this case.

Another factor that's a challenge in these cases, I would agree with the government, I think I did, but trying to look at other sentences in this area is very difficult. But I'm supposed to try to consider and avoid unwarranted sentencing disparities. That is, that if two defendants commit the same crime essentially in the same way and they have the same background, criminal history, or lack thereof, they should receive essentially the same sentence. It would be unjust if they didn't.

The problem is, and I have come over 17 years of experience to only come to believe this even more strongly than I did when I first went on the bench, there are no two defendants who are alike. I can look and I have looked. I mean, I have the summary that defendant's prepared. I have the summary that was attached, that was also Defendant's

Exhibit H. I have cases cited by the government. I prepared my own chart of cases and sentencings the circuit basically, which is mostly Eastern, Southern and in Connecticut, of similar crimes, security fraud cases. And each one of them is different than your case. And so, on the surface it might appear that there are disparities and they can't be justified because people will say the loss is X, the loss is X here. There were Y number of victims. Well, there's Y victims here. As I tried to point out at the beginning, loss can be accomplished in lots of different ways. And in this case, as I said, while you caused the loss that we talked about, you could have another defendant who not only caused that loss but benefited to that amount of money as opposed to yourself who didn't -- directly, I mean. So I'm mindful of avoiding unwarranted sentencing disparities. I'm not sure there is much more I can say about that other than to just represent on the record that I have spent a lot of time looking at other sentencings. I have gone and reviewed all of the sentencings I have imposed in what could be called white-collar crimes since I have been on the bench. I looked at a lot of other decisions, mostly in New York, but that's where, really, a lot of case have come out of. But I looked elsewhere. But I don't think -- I think the government agrees with me on this -- I don't think it's fruitful for me to sit here and say, well, the Smith case was this sentence,

but here's the four factors that distinguish it. The Jones case was this sentence that's lower, but here's the four factors that make this case more serious. We would be here for a very long time than we have already been here for.

Actually, another factor is the need to provide restitution. I really don't know how to deal with that, Attorney Francis, I think I'm sort of going to assume when I impose the sentence that the chance that Mr. Litvak will have to pay restitution or that I will order an order of restitution in the next 90 days is not probably very high. I think there's some chance he might. I think if there is, it's not going to be a very substantial amount. I don't think it's going to be a very high likelihood. That's troublesome because he could then say to me, how can you decide the fine? What happens if I do get hit with the restitution, shouldn't you change the fine. I guess what I am going to say is that I'm going to impose a fine that I think probably more accurately reflects a punishment for what you did as opposed to reflecting whether you're capable of paying more or you're not capable of paying this much.

The last factor, Mr. Litvak, is -- I think it's the last factor -- is your history and characteristics. I often say to defendants who are in front of me for sentencing that their fortunate to have people behind them for two reasons. One, because it speaks to the fact that -- it evidences to

the Court, I guess is probably a better way to put it, it evidences to me that you have lived your life in a way in which people view you, that you are worth supporting, in effect. People don't come to court for, what I assume for many people out there today in the back behind you, to take a day off of work or drive a distance, whatever it is, but sit here and listen to all of us do what we have done for the last five hours just because they think that would be a good way to spend their day. They are here because they think you are worth supporting.

That tells me two things. One, that you are a person, your history and characteristics are very positive factor here today. It also tells me, I think it's what the government took from it, and that is that -- that you have that support and you will continue to have it. They are here knowing you have been convicted of a crime. Yet they are still here. They are here, in effect, to say to you we're going to help you get through this. Again, not having heard from you, I don't really know what your frame of mind is right now, but I can only imagine if it were me, I would be thinking, how can I get through this? I think that what you need to -- if you haven't, I'm sure you have turned around at the break -- be mindful of the outpouring of support that's there and that will be there for you over the coming years as you need it. You need to draw on it.

I think your case has probably set the record in the number of sentencing letters, I guess, of support that I have received. I think it probably has. I don't want to say that to encourage another lawyer to try to break the record. Sounds like you and your family have a wonderful time in Hampton Beach every summer. I have to say, my grandfather owned a house on Hampton Beach until the hurricane of '38 when the end of M Street was swept out to the sea. I haven't been to Hampton Beach in a long time, but it sounds like you have a very loving and supporting and large family that comes together, that values family, which to me is a very important thing and it tells me that you value family. Obviously, you were this hard-charging Wall Street broker, right, and yet it sounds like every year you found the time to go up there and spend it with your family. I think that's a very positive aspect of your history and characteristics. Not just particularly the vacation, but what the letters represent.

They also tell me that you are a very thoughtful, caring, kind, I guess good-natured, I flagged some and I went back and reread some of them. Those are probably the main themes that come through. I don't know if you read them all. It's kind of like having your wake before you die. I mean, in some respects, you are blessed in that respect. I know you don't feel that way right now. Some people don't hear good things about themselves because they are not good

people. But even good people don't hear good things about themselves just because people don't feel comfortable saying them and there's no occasion to say them.

What struck me is that you are a friend. You are a friend just to be a friend, but you are also a friend when people are in need of a friend. I was particularly struck -- I don't mean to single out one letter over another, they are all very compelling and very thoughtful. I have to say, I don't know whether your lawyer told them to say this or you did, but I appreciate that they inevitably ended with, Judge, we know you have a tough job and we know you have to do it. Please think of what I have said. That's nice, for me anyways. The one I just mentioned is written by Father Noonan, I guess, is on the Noonan side of your family, talking about a situation involving, I think, his sister and the fact that you reached out. I have to say I agree with him, I think that people generally are afraid to reach out to people who are in need and who have suffered some type of loss or bad situation, maybe that's better way to say it. Because you feel awkward and you don't know what to say. You feel that they might not want to talk about it. But he wrote very compellingly about how important that was to her and how thoughtful it was, as I said, and supportive. I think that sort of resonates throughout all the letters, that type of thoughtfulness on your part. So, obviously, I could go on a

really long time as a lot of people went on a really long time. I think in a nutshell, you sound like a person that's a person worth knowing. And a person who, if I could ignore today what brings you before me, is someone who is a good person and I probably would enjoy knowing.

You also, by all measure, sound to be like an outstanding son and son-in-law, I will say, as well. I'm very sorry about your father's situation. I hope that he enjoys a speedy recovery. And with a few bumps in the road, you sound like you have been a very good spouse and obviously a good father.

That brings me, of course, to your son's situation. I didn't find extraordinary family circumstances. Again, I didn't because I just didn't chose to exercise my discretion, but I don't want you to think that I, in any way, that would diminish my view of the challenge that you and your wife face in trying to bring your son along to a life that can be full for him. The difficulty -- the reason why I'm sure the government opposed the departure, among others, is that the case law suggests, and probably appropriately so, that such a departure is only appropriate when the facts are there's a single mother and there's no other relative to be of any assistance. Obviously, unfortunately, all of the letters that were written and all of what I found from Officer Lopez and his investigation is that you have a very loving and

supportive family. Your in-laws have been very supportive of you, your own parents have been very supportive. Your wife obviously has her own career and challenges and has two children, but she's obviously capable as well. I don't think it fit the departure category, but it's definitely something that I'm mindful of. How can I put it? I guess I will put it this way, I spoke to the government about how much of a sentence is long enough to accomplish the goals of sentencing without being too much. And in this instance, the too much part of that sentence is going to probably feel a finger of weight from what your absence from your son's life could mean to him. It doesn't mean -- that's a double negative. There's going to be a sentence of incarceration, but how long it needs to be is informed by lots -- all of the factors, all of the things I have talked about, but it's also informed by the circumstance with your son.

The first thing I need to do is the restitution, which, as I understand the government, is not today asking me to enter an order of restitution. It's asking for the right to submit something subsequently. I guess I will consider that at the time you submit it.

MR. FRANCIS: It might be useful if you put a deadline because I know we have up to the --

THE COURT: You have 90 days, but the last assistant, again, who I had to remind that we were at the

88th day and I haven't heard from him. I hope I don't have to do that with you.

MR. FRANCIS: I was thinking something along the lines of 45 days.

THE COURT: That would be good. If you make the motion, I'm going to have to go back and make findings, right, about the amounts because we kept that open, the number that the defendant disputed.

MR. FRANCIS: My hope is no. Jefferies will have paid such significant amounts that there will be no restitution. We'll alert your Honor to that. I think 45 is enough time to --

THE COURT: Then I'll so order.

I would ask, sir, if you would please rise so I might impose sentence. It's the sentence of this Court to impose upon you a period of incarceration of 24 months. Followed -- and that would be on each of Counts 1 through 6, 8 through 11, 12, 13 through 16. Each of those sentences of 24 months is to be served concurrently.

Further, the Court imposes a supervised release period of three years on each of the counts, also by law required to be served concurrently.

With respect to the fine, it's the sentence of this Court that the Court imposes upon you a fine of $1.75 million. Basically, I'm estimating. It's clearly an

estimate, but an estimate of double, just for purposes of other proceedings, double what I think the gain to you was. So to the extent Attorney Smith wants to use that somewhere else, that's what my thinking is anyways.

Further, the Court imposes a special assessment of $1500, which is $100 per each of the 15 counts as required by law. The sentence is clearly not a guideline sentence. It's a variance or non-guideline sentence. And I haven't disregarded the guidelines, but I view the guidelines as not terribly helpful in this case. I think this sentence is sufficiently long to serve the need for the sentence, particularly deterrence, both general and specific. But also to reflect the nature and circumstance of the offense and Mr. Litvak's history and characteristics.

I want to put on the record that -- and I actually thought about this because I will tell you, at some point in my consideration of this case, I was thinking about the loss being zero. Maybe it was when I finished Mr. Smith's brief, or maybe it was some other time. At some point, I did think about that. And I consciously thought about the fact that sentence would be the same. If the guidelines didn't ascribe a value of loss to this case, in effect, there was a loss. I think of it as a loss. The people who paid the money to Mr. Litvak's company would have viewed it as a loss as evidenced by the testimony that I heard. In that case, I probably --

it would have been an upward departure from the guidelines, but nonetheless, the sentence would have been the same. Because in that instance, as I say, I think that the zero of a loss table calculation would have understated the seriousness of this offense and the nature and characteristics of the offense, just as, in my view, the loss table number used overstates the seriousness of the loss in this case.

With respect to the period of supervised release, the Court imposes upon you, Mr. Litvak, the standard conditions of supervised release, the mandatory conditions. Number one, you not commit crime. Two, you not unlawfully possess a controlled substance. Four, you refrain from the unlawful use of a controlled substance and submit to a periodic test provided by the condition. Six, you make restitution, if it is ordered, and pay the special assessment fine that I have imposed. Eight, that you cooperate in the collection of a DNA sample.

Further, the Court imposes the following special conditions: First, you will participate in a program approved by the probation office for in or outpatient substance abuse treatment and testing. You will pay all or a portion of the cost associated with that treatment based on your ability to pay. Second, you will pay any restitution that is ultimately imposed. And this condition might be

mooted, but if there's restitution that the Court finds appropriate, it will be due immediately and any that remains unpaid at the commencement of supervised release will be paid at a rate of not less than 10 percent of your net income. The monthly payment schedule may be adjusted based on your ability to pay as determined by the probation office and approved by the Court. Three, you hall not incur any new credit card charges above $250 or open additional lines of the credit without the prior permission of the probation office until your criminal debt obligation is paid. You will not add any new names to any lines of credit, not be added as a secondary card holder on another's line of credit, and shall provide the probation office with electronic access to any online management of lines of credit, including lines of credit for any businesses that are owned, operated or otherwise associated with you. Four, you will close any existing savings or checking accounts, transfer your assets into one main account and not add any other account holders to that account, it can include your spouse if there are joint expenses or assets. The defendant shall provide the probation office with electronic read-only access to those online management of that account. The defendant shall provide the final statement from each account that's closed to ensure that no funds dissipated during the closing of existing accounts and the opening of the single account.

Five, the defendant shall permit the probation office to monitor investment and retirement accounts to include coordinating with the account administer to notify the probation office of any activity in the account. Six, you will not encumber any personal homes or investment property without permission of the Court and not transfer, sell, give away, barter or dissipate in any way any assets including personal property without the express permission of the probation officer and notification to the Court.

Until the debt obligation, financial debt obligation of the defendant is satisfied, the defendant shall submit a proposed budget with detailed expected expenses and income to the probation office after which the officer will communicate his or her approval. And the defendant shall adhere to the approved budget and any deviations must be approved before occurring or paying any additional expenses. Receipt of any income or asset not anticipated shall be reported to the probation office within two days of the receipt or your knowledge of the receipt. Such unanticipated income or asset cannot be dissipated without prior permission of the probation office. Eight, the defendant shall retain receipts for inspection upon reasonable notice of expenditures greater than $250. Nine, the defendant shall not possess ammunition, firearm or other dangerous weapon.

I think -- should this go in the judgment, that

supervision. You recommend that it be transferred to the southern district of New York, but it may be that they are not there. Let the Bureau of Prisons deal with it.

THE PROBATION OFFICER: Can I add something. In light of the fine that you imposed, does your wish to consider the question of interest. Also that it be due and payable immediately. And that it be a special condition of supervised release, similar language that you used for the restitution.

THE COURT: Right. All of the conditions apply not just to restitution or, if the special assessment is not repaid, also to the fine. So in terms on the -- that's what I call the financial obligations. So all of those conditions apply until it's paid. The fine is payable immediately. If not paid within 30 days, interest -- do you know what the current interest is?

THE PROBATION OFFICER: I don't know that.

THE COURT: Does the government have a recommendation on that, what the interest would be?

THE COURT: Attorney Sciarrino may help us. I don't know which interest rate is the right one.

MS. SCIARRINO: Pursuant to the statute, interest is based on the T bill rate.

THE COURT: I will say at the legal rate as provided by the statute.

MS. SCIARRINO: Yes.

THE COURT: Thank you very much, Attorney Sciarrino. It's very small right now.

MS. SCIARRINO: It is, your Honor.

THE COURT: Maybe Diahann put in there that the interest will accrue at the legal/T bill rate in accordance with the statute. Somebody will know what that means.

Ray, let me start with you. Is there anything about the sentence that i've imposed that is unlawful or that I have overlooked.

THE PROBATION OFFICER: No.

THE COURT: From the government.

MR. FRANCIS: Your Honor, just for the record, the government would object on procedural and substantive grounds.

THE COURT: That's pretty heavy. What did I do wrong procedurally. I understand you don't agree with the sentence, but if I did something procedurally wrong, I could fix that if you told me what it was.

MR. FRANCIS: I think with respect to your Honor's references to your consideration of the guidelines. I believe your Honor did not give them the weight required under the statute. And particularly with respect to your consideration of the ABA draft rules and the consideration of loss under the guidelines, in particular.

THE COURT: I think it's fair to say, for the record, that I think that the loss tables are not helpful in reflecting what it is I should consider in sentencing. It's not to say -- I hope, if I said this, I want to correct the record, I did not disregard the guidelines. I spent a lot of time calculating them and I found them to be what the government proposed they should be and what the probation officer agreed. But I think having done that, I'm not bound to them. I set forth, as best I could, if it is inadequate, I will try again when the circuit corrects me. I tried, as best I could, to articulate why I think they are not deserving of the weight at the full level of the guidelines that they calculate out to be. I can't really add anything more.

If I, in any way, suggested that I was going to ignore them, I didn't mean to say that. I didn't ignore them. I just don't agree that they reflect an appropriate sentence in this case, and I really don't need to say much more other than to explain why.

So that was the procedural. And then substantive goes to the fact that we'll agree to disagree. Is that it, Attorney Francis?

MR. FRANCIS: I think we'll have to, Judge. If I may raise one housekeeping matter, with respect to the PSR, I understand your Honor ruled on the objections. Can you just

clarify for the record whether or not you adopted the findings.

THE COURT: Thank you. I'm not sure I said that. You're absolutely correct.

Once I went back and adopted whatever, 11, 13, 20, 21, 22 and amended 23, I adopted the PSR as then amended as the finding of this Court in connection with this sentencing, as relevant to the sentencing I think is the correct way to say it. Sorry. Yeah. Thank you.

I need to advise you, Mr. Litvak, that you have a right to appeal this sentence. You have a right to appeal everything that happened in this case. By appeal, I mean you have a right to go to the Second Circuit and to tell them, suggest to them, I guess, that I either made an error, either before or during or after the trial. Or I have made error in the sentencing, or the jury made an error in their verdict. You obviously are represented by counsel. All you have to do is say to your counsel, I want to file an appeal and he will file the notice. I wouldn't be surprised if he's going to file it on his way out of the courthouse. I still need tell you that you should discuss it with counsel now. You need to have that notice filed in no more than 14 days from today. If it's not filled in that time, it is as if you never filed it. And I can't then give you more time to file it. By filing it, it means it has to be received in our clerk office

on the second floor. I want to just be sure you understand there's a very short time period in which to file a notice of appeal. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is there anything that the defense requests further?

MR. SMITH: A couple of items, your Honor. With respect to the designation by the Bureau of Prisons, we request that your Honor recommend the satellite camp at FCI Otisville, which is in close proximity to Manhattan. Given the length of the sentence, the family will remain in the New York Metropolitan Area. If it were longer, they would relocate. I think we're looking at, with that length of sentence, they will probably stay in New York. So we recommend FCI Otisville satellite camp.

THE COURT: The Court will make that recommendation.

MR. SMITH: Your Honor, there's two sort of related requests. One is the surrender date. The other is we'll have a motion for the bail pending appeal.

On the surrender date, we would ask for 90 days for Mr. Litvak to wind up his affairs, if he's required to surrender and bail is not granted. Among other factors, the health of his father, Mr. Litvak, Steven Litvak, plays into this, and we respectfully request a 90-day surrender date.

THE COURT: The government's position?

MR. FRANCIS: The government has no objection to that surrender date.

THE COURT: The Court will order that the defendant -- give me a day of the week in early November, a Wednesday.

THE CLERK: November 5.

THE COURT: Mr. Litvak, the Court is going to permit you to self surrender. I do so because obviously you have appeared here whenever you have been required to. I have a report from probation that you have been compliant, and the government doesn't oppose it. So the Court will allow you to self surrender. What I will do set a deadline date of November 5. If by that time you are not in the custody of the Bureau of Prisons, then you are obliged and ordered to surrender to the U.S. Marshal Service on mezzanine above me in this courthouse at noontime the 5th of November. I expect before that date the Bureau of Prisons will inform you of where to go and when you need to be there. You must obey that instruction. Otherwise, if you don't appear at that time and place, you will be treated as a fugitive and a warrant will be issued for your arrest. I assure you they will find you and you would then face further penalties.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I will also set a no earlier than date

of October 23, just in the case that the Bureau of Prisons was really efficient and designated a date in the next few weeks. The judgment, Diahann, should say he should surrender to the marshal by November 5 to their custody, if not earlier. But at no date earlier than October 23. FCI camp at Otisville.

The other thing I think I need to advise you of, Mr. Litvak, you have been subject to certain conditions and supervision by the probation office, I believe, by the Southern District of New York office and those conditions continue. As you walk out the door, they are going to be the same as when you walked in. If the officer told you to do something or not do something, if you signed a piece of paper that says you must do this or you can't do that, all of those conditions remain exactly the same. Do you understand?

THE DEFENDANT: I understand.

THE COURT: Any violation would be treated seriously by me and would likely result in revoking the self surrender aspect of the judgement.

MR. SMITH: I'm going to make a brief oral application.

THE COURT: I know what issues you are going to raise. The problem I think for you is that even if I charged wrong on TARP, even if I'm wrong on securities fraud, what is the grounds? I will get the statute. What's the

grounds that you are likely to prevail on?

MR. SMITH: I will outline it briefly. I think because your Honor is familiar with it, I don't think it requires briefing. I think we all agree we had plenty of briefing in this case.

THE COURT: I understand your arguments. If you give me a minute, I will find the statute that I had copied for this purpose, which tells me the standard.

MR. SMITH: 3143.

THE COURT: Thank you. That's exactly what it is. You need to show that there's a substantial likelihood that the motion for acquittal or new trial -- that's pending sentence. Pending appeal, you have to show by clear and convincing evidence he's not going to flee. That there wouldn't be any contest. Let the government tell me that.

It's not for the purpose of the delay and raises a substantial question of law likely to result in a reversal, an order for a new trial, a sentence that does not include imprisonment or a reduced sentence that would be less than the total of the time served by the time the appeal process ends. These days is about a year. Especially given the transcripts were done, I think might it be less than that.

MR. SMITH: So we appreciate the findings on the first two issues. On substantial questions, as I think your Honor will know, substantial question means close question.

Because you resolved certain issues against us does not nonetheless mean that the issues are not close. So let me flag what I think the four substantial issues are. One is the sufficiency of the evidence.

THE COURT: On which count? All of them?

MR. SMITH: All counts as to materiality. Across the board. It's an issue we briefed on a motion to dismiss, it's an issue we argued extensively. The Second Circuit case that we cited to you in the Rule 29, Fineman versus Dean Witter Reynolds, this case squarely fits within that. That's 84 F.3d 539 Second Circuit, 1996. We think the circuit may well view your Honor ruling otherwise. That's a close question on materiality as a matter of law and it goes to each count of conviction.

The second issue, your Honor, is whether Mr. Litvak acted with adequate intent to defraud under the circumstances. This is essentially the United States versus Starr argument that we had raised with your Honor at several junctures in the proceedings. And that since the victims got the benefit of the bargain in terms of -- I hate to revisit this. I will be very brief -- fair market value bond at the price they agreed to pay, that this is just not a situation where adequate intent to defraud is shown. I think that's substantial issue. There's just not sufficient basis for economic harm here. And we had this argument at the time of

the jury charge, whether, under the authority we cited to your Honor from the Southern District, the U.S. versus Whitman case, whether the Starr standards, the economic harm standard, should apply under 10(b)(5). We think that's a substantial question that's close and could go the other way. The third is the cluster of evidentiary rulings related to the experts, your Honor, which we think are substantial evidence of good faith. And evidence that would have more appropriately framed, the materiality and intent to defraud issue. We think, respectfully, your Honor, abused the Court's discretion in denying our application to put on expert evidence. That's all contained in the briefing there and the proffer of evidence that your Honor has written on that. And finally, your Honor, the last issue is simply the loss issue. We think that was a close issue. I think your Honor --

THE COURT: That's a sentencing issue. I have just said I would have given him the same sentence if the loss was zero.

MR. SMITH: If the --

THE COURT: That's how unhelpful loss was in this case to me, I guess, if it doesn't say anything else, it says that.

MR. SMITH: We do think it's an issue that could reduce the sentence. We think there are sentencing issues

that we may raise that may result in a reduced sentence. That's the fourth issue.

We think the three issues that we framed are substantial, that's our motion. And we move for bail pending appeal.

THE COURT: I'm about to say something again that I shouldn't say -- I will restrain myself.

MR. SMITH: I'm very mindful --

THE COURT: You are going to have a hard time sustaining the sentence I imposed on appeal.

MR. SMITH: We're very thoughtful and mindful of --

THE COURT: I'm not being critical of you. I'm saying that's not a serious grounds for appeal.

MR. SMITH: I want to be complimentary to your Honor --

THE COURT: You don't need to be.

MR. SMITH: Very thoughtful and mindful of the thoughtful sentence you imposed, but I feel we need to make the motion. Those are the grounds.

THE COURT: Attorney Francis, to the first three grounds, would you respond to those as he has a serious question on getting a reversal or a new trial, whatever on those. I think he argued sufficiency of the evidence on materiality and the intent defraud and I'm sorry --

MR. FRANCIS: Experts.

THE COURT: The proof of the fact there wasn't any really loss here.

MR. FRANCIS: The experts were precluded.

THE COURT: Were precluded, right. Okay.

MR. FRANCIS: So whether or not it raises a question of law or fact, apparently he disagrees, but the standard in the statute is likely of prevailing on these. Your Honor's decisions on these three points are completely consistent with the Second Circuit and Supreme Court. The facts as phrased in order to torture them into being able to make these arguments, your Honor, those facts to obtain unless the arguments they were making were premised on the factual misstatements or misunderstanding of what the circumstances was. It seems there is practically no chance of success on these three arguments, much less likelihood of success. Although they are creative and do justice to counsel's creativity and hard work, they are unlikely to prevail in the Second Circuit. And bail in this circumstance would be, pending appeal, would be unwarranted under the statute. I agree that there's no likelihood of flight to the extent that your Honor posed a question, we have no dispute.

THE COURT: On the first three points raised by Attorney Smith, we have argued about them. I have decided them several different times, most recently in the ruling post trial. You know, anyone can make a mistake and I put

myself right of top of list. Obviously, my goal is not to make a mistake. I don't want people to have to go through this again to start with. Also just because that's just. And so I hope I haven't made any mistakes, but I cannot see a mistake or a combination of mistakes that would result in the reversal of the convictions on all 15 counts. The TARP fraud, I think it's the first charge in the country. I mean, maybe I got it wrong. We sort of -- not made it up. It had to be written by us. But there's other counts that, you know, in many respects it's a fact finding by the jury. And there certainly was sufficient evidence for them to draw the inferences they needed to draw. There was evidence on the record. So I think -- I don't think.

My ruling is to deny the oral motion for release pending appeal because I do not find a substantial question of law or fact that's likely to result in a new trial or reversal or a lower sentence. Obviously, you are able to go to the circuit. They'll take a look at it. If they see something that they think is going to result in a likely or at least a serious question for them, they obviously can give you this relief, but I could not. Again, I'm not -- I know I'm far from perfect, but I just can't any basis on which I can make the finding required by 3143 BB. I don't have a basis to make that finding, so the motion is denied. Is there anything further?

I hate to prolong this, but I think I probably failed to sort of sum my consideration of the factors. And I think the nature and circumstance of the crimes Mr. Litvak committed, particularly in terms of their seriousness, their impact on markets, the impact on the victims, his clients, who as was argued, trusted him. Indeed even to today still trust him. All of that is serious and weighs very heavily in determining my sentence and imposing a sentence upon Mr. Litvak. There is, of course, his history and characteristics, which all, in many respects if you take out this conduct, all weigh very heavily in his favor, in effect, in terms of the balance of these factors. I think the last factor really that's the most important in this case is the whole deterrence issue, which I struggle with every time in a white-collar case. I don't have an empirical study. I don't have data that I have collected, but it's my belief that the sentence should be significantly longer if I believe the person will recidivate or is not a Category I defendant, which is not unusual in fraud cases. There are defendants who commit multiple frauds. In those cases, the need to deter that defendant is significant and therefore the sentence has to be long enough to accomplish. That was not present here, and least not present in my opinion. That didn't really weigh into my determination. The general deterrence issue is the one I really grapple with because of

the lack of good analysis, good data, to show that I'm pretty persuaded, but I don't know that I have any evidence to prove it, but that a term of incarceration is a significant deterrent effect in white-collar crimes. I'm not persuaded that making them long, whatever you define long is, longer than I made it here is necessary to accomplish that in this case. I think sometimes those of us involved in the criminal justice system lose sight, and we have lost sight, certainly in drug cases, of how really long sentences are. I just suggest that you think about what you were doing two years ago and ask yourself what's happened in your life, that will measure to you what a two-year sentence is for this defendant. I think it's long enough to provide the public deterrence, I will call it, the general deterrence that I need to address. Those are really how I kind of weighed and considered and in the end balanced to come out to the sentence that I did.

Unless there's anything further, the Court will stand in recess.

(Whereupon, the above hearing adjourned.)

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Terri Fidanza

Terri Fidanza, RPR

Official Court Reporter

AO245b (USDC-CT Rev. 9/07)

UNITED STATES DISTRICT COURT

Page 1 District of Connecticut

UNITED STATES OF AMERICA

v.

Jesse C. Litvak

JUDGMENT IN A CRIMINAL CASE

CASE NO. *3:13CR19 (JCH)*
USM NO: *21467-014*

Jonathan Francis
Assistant United States Attorney

Patrick Smith/Ross Garber
Defendant's Attorney

THE DEFENDANT: was found guilty on counts 1-6, 8-11, 12 and 13-16 of the Indictment.

Accordingly the defendant is adjudicated guilty of the following offenses:

Title & Section	Nature of Offense	Offense Concluded	Counts
Title 18, United States Code, Sections 78(b), 78ff	Securities Fraud	December 2011	1-6, 8-11
Title 18, United States Code, Section 1031	Asset Relief Program (TARP) Fraud	December 2011	12
Title 18, United States Code, Section 1001	False Statements	December 2011	13, 14, 15, 16

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984. The sentence imposed is a non-guideline sentence based upon the loss tables overstating the guidelines, the nature and circumstances of the offense and the history and characteristics of the defendant. The sentence is sufficiently long to serve the need for deterrence.

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total of 24 months on each of counts 1-6 and 8-16, all to run concurrently, for a total term of imprisonment of 24 months.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of 3 years on each of counts 1-6 and 8-16, all to run concurrently, for a total term of supervised release of 3 years. The Mandatory and Standard Conditions of Supervised Release as attached, are imposed. In addition, the following Special Conditions are imposed:

1. The defendant shall participate in a program approved by the Probation Office for inpatient or outpatient substance abuse treatment and testing. The defendant shall pay all or a portion of the costs associated with treatment based on the defendant's ability to pay as determined by the Probation Office.

2. Restitution to be determined and Order of Restitution entered upon filing of submission, by the government within 45 days. The defendant shall pay any restitution that is imposed by this judgment, payable immediately, and any amount that remains unpaid at the commencement of the term of supervised release shall be paid at a rate of no less than 10% of the defendant's net income per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the Probation Office and approved by the court.

3. The defendant shall pay the fine that is imposed by this judgment, payable immediately, if not paid in full within 30 days, interest shall accrue at the legal/T-Bill rate in accordance with the statute, and any amount that remains unpaid at the commencement of the term of supervised release shall be paid at a rate of no less than 10% of the defendant's net income per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the Probation Office and approved by the court

4. The defendant shall not incur new credit card charges above $250 or open additional lines of credit without the prior permission of the Probation Office until the defendant's criminal debt obligation is paid. The defendant shall not add any new names to any lines of credit, shall not be added as a secondary card holder on another's line of credit, and shall provide the Probation Office with electronic access to any online management of any lines of credit, including lines of credit for businesses/LLC's that are owned, operated or otherwise associated with the defendant.

5. The defendant shall close all other savings/checking accounts, transfer all assets into one main bank account and shall not add any new account holders to that account (the account may include the defendant's spoouse if there are joint marital assets/expenses). The defendant shall provide the Probation Office with electronic "read only" access to any online management of the account. The defendant shall provide the final statement from each account that is closed to ensure that no funds are dissipated during the closing of existing accounts and opening of the single account.

6. The defendant shall permit the Probation Office to monitor investment and retirement accounts, to include coordinating with the account administrator to notify the Probation Office of any activity on the account.

7. The defendant shall not encumber personal homes or investment properties without permission of the court, and shall not transfer, sell, give away, barter, or dissipate in any way any assets, including personal property (ie: motor vehicles, recreational vehicles) without the express permission of the Probation Office and notification to the court.

8. Upon request, the defendant shall submit a proposed budget (detailing expected income and expenses) to the Probation Office, after which the Probation Office shall communicate his/her approval to the defendant. The defendant shall adhere to the approved budget and any deviations must be approved before incurring and paying the expense. Any receipt of income or asset not anticipated by the approved budget shall be reported to the Probation Office within two days of the receipt of the income or asset, or within two days of the defendant's receipt of knowledge that such income or asset will be received, whichever comes sooner. Such unanticipated income or asset can not be disposed of without prior permission of the Probation Office.

9. The defendant shall retain receipts for inspection, upon reasonable notice, any expenditures greater than $250.

10. The defendant shall not possess ammunition, a firearm or other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments (as follows) or (as noted on the restitution order).

Special Assessment:	$1,500.00	$100 on each of counts 1-6 & 8-16, for a total of $1,500 to be paid immediately.
Fine:	$1,750,000.00	The defendant shall pay the fine that is imposed by this judgment, payable immediately, if not paid in full within 30 days, interest shall accrue at the legal/T-Bill rate in accordance with the statute, and any amount that remains unpaid at the commencement of the term of supervised release shall be paid at a rate of no less than 10% of the defendant's net income per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the Probation Office and approved by the court
Restitution:		Restitution to be determined and Order of Restitution entered upon filing of submission, by the government within 45 days. The defendant shall pay any restitution that is imposed by this judgment, payable immediately, and any amount that remains unpaid at the commencement of the term of supervised release shall be paid at a rate of no less than 10% of the defendant's net income per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the Probation Office and approved by the court.

It is further ordered that the defendant will 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 paid.

JUDICIAL RECOMMENDATION(S) TO THE BUREAU OF PRISONS

The defendant shall be designated to the Satellite Camp at FCI Otisville.

The defendant shall self surrender no sooner than 10/23/2014 and no later than 11/5/2014. In the event the defendant does not receive designation by the Bureau of Prisons by 11/5/2014, the defendant must self surrender to the United States Marshal, at New Haven, Connecticut by noon on 11/5/2014.

7/23/2014
Date of Imposition of Sentence

/s/Janet C. Hall
Janet C. Hall
United States District Judge
Date: 7/25/2014

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
Joseph P. Faughnan
United States Marshal

By _____
Deputy Marshal

CERTIFIED AS A TRUE COPY
ON THIS DATE _____
ROBERTA D. TABORA, Clerk
BY: _____
Deputy Clerk

CONDITIONS OF SUPERVISED RELEASE

In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:

MANDATORY CONDITIONS

■ (1) The defendant shall not commit another federal, state or local offense;

■ (2) The defendant shall not unlawfully possess a controlled substance;

☐ (3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. section 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant;

■ (4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter for use of a controlled substance;

☐ (5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine;

■ (6) The defendant shall (A) make restitution in accordance with 18 U.S.C. sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. section 3013;

☐ (7) (A) In a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105-119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) In a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

■ (8) The defendant shall cooperate in the collection of a DNA sample from the defendant.

While on supervised release, the defendant shall also comply with all of the following Standard Conditions:

STANDARD CONDITIONS

(1) The defendant shall not leave the judicial district or other specified geographic area without the 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 the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
(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, or if such prior notification is not possible, then within five days after such change;
(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 substance, except as prescribed by a physician;
(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
(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 the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by 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;
(13) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
(14) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

The defendant shall report to the Probation Office in the district to which the defendant is released within 72 hours of release from the custody of the U.S. Bureau of Prisons. Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant **Date**

_____ _____
U.S. Probation Officer/Designated Witness **Date**

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of October, two thousand fourteen.

Present: RALPH K. WINTER,
REENA RAGGI,
PETER W. HALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

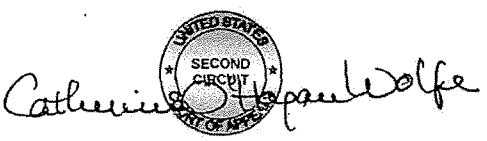
v.

JESSE C. LITVAK,
Defendant-Appellant.

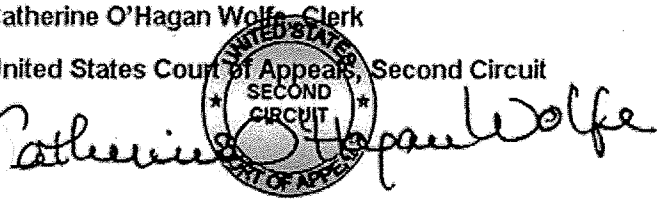
ORDER
No. 14-2902-cr

Defendant Jesse C. Litvak, through counsel, moves for release pending appeal. Upon due consideration, it is hereby ORDERED that the motion is GRANTED because Litvak has raised "a substantial question of law or fact likely to result in . . . reversal." 18 U.S.C. § 3143(b)(1). The conditions of release established by the district court shall remain in full force and effect during the pendency of this appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



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