UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
V.	:	**CRIMINAL NO. 3:13CR00177 (WWE)**
	:	
	:	
JUAN JOSE ALVAREZ DE LUGO	:	**January 27, 2014**

GOVERNMENT'S REPLY MEMORANDUM
SUBMITTED IN OPPOSITION TO DEFENDANTS' SENTENCING MEMORANDUM

This memorandum is submitted in aid of the sentencing of Juan Jose Alvarez De Lugo ("the defendant"). The sentencing is currently scheduled before this Court for January 28, 2014 at 11:00 am. For the reasons set forth in the Pre-Sentence Report ("PSR") and those set forth below, the Government asserts that the defendant should receive a sentence at the middle to the top of the Guidelines' range of 41 to 51 months and be ordered to make full restitution to the victims of the defendant's fraud.

Over a significant period of time, from at least 2005 up to at least 2010, the defendant engaged in repeated acts of fraud, defrauded more than a thirty friends and associates, took in millions of dollars, and used the money to enrich himself and his family, including improving his Branford residence with a swimming pool and backyard patio, paying personal expenses, and sending his children to prestigious private prep-schools and colleges. The defendant stands before this Court having defrauded approximately thirty victims in connection with a scheme in which he falsely represented he would use their investment funds in connection with New Haven residential real estate transactions that would not only to make a 20% return, but also would benefit the New Haven community as part of the livable city initiative. Using a collection of

companies called Arquin Decoraciones LLC, Arquin Development LLC, and Juko Investments, LLC., the defendant lied to people, took their money and spent their money as if it were his own.

I. Brief Description of the Underlying Criminal Conduct

The offense conduct is accurately summarized in the Stipulation of Offense Conduct ("Stipulation") and the PSR at ¶¶ 5-19.

As stipulated to in the offense conduct, from approximately 2005 until 2010, the defendant operated an investment fraud scheme in and around New Haven Connecticut, in which he held himself out as the president of purportedly successful businesses specializing in real estate development. The defendant solicited investments and promised regular returns on investments by issuing investment instruments (i.e. "Promissory Notes") that promised a return on investment of 20% per year. The investment instruments, while securities, were not registered with the Securities and Exchange Commission ("SEC") or with the State of Connecticut Department of Banking Securities Division in any capacity and in fact, at no time were any of the defendant's three companies registered with the SEC or Connecticut Department of Banking Securities Division.

The defendant solicited money from investors (many of whom were his friends and friends of his family) by representing to them that their money would be used to invest in real estate projects. He falsely claimed that his companies were acquiring houses from the City of New Haven and from local banks (the "New Haven Properties") that would be remodeled and sold. The defendant represented to investors that these houses would be sold for what he referred to as "social housing projects" which he falsely claimed were endorsed and sponsored by the City of New Haven. The defendant represented to the investors that the homes would then be occupied by low income families who had secured or would secure financing from local Connecticut banks

and State of Connecticut agencies. The defendant furthered this lie by relying on the fact that he had, at one point in time, served on the Board of the Bank of Southern Connecticut also located in New Haven Connecticut, and sought to use this affiliation to further establish his *bona fides*. In order to induce his victims to make investments, the defendant told them that they would receive a return on their investments of 20% per year and that this "return" would be generated by the buying and selling of the New Haven Properties. These representations were materially false and the funds were not invested as represented.

The defendant created the false impression that the investments would have the added aspect of benefiting lower income families in New Haven because his program was purportedly related to "social housing projects" endorsed and sponsored by the City of New Haven. In this regard, the defendant used the former Mayor of New Haven's name and photo as well as materials taken from the city's website to seek to establish his ties to the city and the good work he was purportedly helping to finance. Later in the scheme, the defendant made similarly false representations with regard to the financing of a senior assisted living facility. These fraudulent representations not only led the victim-investors to believe they would make a healthy return, but also led them to believe that by virtue of their investment they would be having a positive social impact in the City of New Haven through the livable city initiative and for senior citizens in the area.

The investors who ultimately invested with the defendant were provided "Promissory Notes." The lies in the Promissory Notes were consistent with the oral representations made to investors and promised to pay interest of 20% per year and promised a full return of their principal in one year. Additionally, the defendant provided investors with a participation table outlining anticipated returns or "interest payments." As mentioned above, the defendant also told investors

he was developing a senior assisted housing facility in New Haven.

In reality, neither the defendant nor his companies had a relationship or joint undertaking with the City of New Haven or with the State of Connecticut. Furthermore, the defendant did not invest his victims' money in "social housing projects" or a senior living community in New Haven. Instead, the defendant spent the investors' money on his own personal expenses and enriched himself and his family members. The defendant did not own and develop the large number of properties as he had represented to investors; nor did any of his companies. The defendant owned only 10 properties, only 7 of which were purchased after he started soliciting investments with Promissory Notes. Additionally, these properties were not purchased with investor funds, but with purchase money mortgages. In all, the defendant solicited millions of dollars for investment in New Haven residential properties, yet only $700,000 worth of properties were purchased during the scheme, and again were purchased using additional borrowed funds. The investors never received the total promised 20% return nor the return of their principal sums.

Contrary to arguments made by defendant that he did not enter into the venture to "with the intent to swindle anyone" (Def. Mem. at 7), as early as 2006, the defendant's scheme was operated as a Ponzi scheme. As described in the PSR at ¶¶ 10-19, the defendant used early investors – who believed the investment was real – to promote the program and entice subsequent investors to trust him with their funds. In one instance, De Lugo used family contacts and convinced one investor to bring his mother and brother into the scheme and did not tell them is that he was using money from later investors to pay the interest due to earlier investors.

The bank records for the defendant's accounts reveal that at times the defendant had a negative balance in his account and was then only able to make payments due to early investors when another investment of principle came into his account. This patter continued for years and

thus it cannot be argued (as the defendant seeks to argue) that he had success *throughout his career*. (Def. Mem. at 7). As described more fully in the PSR at ¶ 19, in addition to using investor funds to make Ponzi payments, De Lugo used the money to improve his residence, pay tuition, and for his own speculative investments, including putting the funds into yet another Ponzi scheme.

These actions as reflected in the bank account records, reinforce the notion that De Lugo initiated this fraudulent scheme in order to line his own pockets. He did not wait until 'later' in the scheme to use the victim-investors' funds in an attempt to try to right the proverbial ship, but instead, he syphoned off the funds to make payments to early investors and pay personal expenses from the very beginning. For example, funds from investors who invested in March of 2006 were used by De Lugo almost immediately to pay other investors their promised interest payments. Also in 2006, money solicited from investors was transferred directly to his personal checking account. Another such example is that money solicited from investors in 2007 was used to pay the Marriott Vacation club. The defendant simply cannot argue that greed was not a motivating factor in his behavior in light of the clear black and white bank records.

After the victims' funds had been spent, De Lugo falsely represented that his real estate projects were still ongoing. De Lugo made repeated false statements and sent fraudulent letters to lull the victims and to seek to forestall the discovery of the scheme. For example, in or around May 28, 2008, a number of victims received letters signed by De Lugo regarding the status of their investment. The letters state in relevant part, "First of all I want to apologize for my delay. In this document you will find an explanation for the current situation of Arquin Development, a subsidiary of Arquin Decoraciones, a side from our previous conversation." The third paragraph of the letter states that: "The one and only reason for the payment delays was that Arquin

Development was required to have any investor/broker license in order to acquire the loan for the units. It was my understanding that this inconvenience would have been resolved by March 28, 2008; however, that date was delayed, and it has taken longer than expected. As of right now I am unsure when this will be resolved, I informed that it could take anywhere between one week to three months." This was of course blatantly false. Finally, in paragraph five of the letter, De Lugo concluded by stating: "In this case, I want to assure you that your capital is completely safe." The letters were all signed by Juan Jose Alvarez De Lugo Azpurua, President, Arquin Decoraciones. PSR at ¶ 13. The investors' capital was not safe.

The statements made by De Lugo regarding acquiring an investor/broker license were merely lulling type statements intended to provide an excuse for the failure to make the promised payments but which, in reality, had no basis in fact. The State of Connecticut Department of Banking Securities and Investments Division determined the following: (i) there were no records reflecting an issuer registration under the name Juan Jose Alvarez De Lugo; (ii) there were no records reflecting a broker-dealer registration under the name Juan Jose Alvarez De Lugo; (iii) there were no records reflecting an investment adviser registration or investment advisory notice filing under the name Juan Jose Alvarez De Lugo; (iv) there were no records reflecting a broker-dealer agent registration or investment adviser agent registration under the name Juan Jose Alvarez De Lugo; and (v) there were no records reflecting a broker-dealer registration, investment adviser registration or investment advisory notice filing where the registrant's name for Arquin, Juko, Arquin Decoraciones, LLC, Arquin Development, LLC, Arquin LLC and Juko Investments, LLC. Thus his statements were blatant lies – yet the scheme continued for approximately two additional years until the date of his arrest.

Similarly, in approximately August of 2009, after having defrauded numerous investors

over at least five-plus years, De Lugo caused yet another victim-investor to invest approximately $2 million to the account of Arquin Decoraciones LLC, purportedly for an investment in an assisted living facility in New Haven, Connecticut, when in fact the investment was used for the defendant's own personal use and benefit. This last $2 million was taken well after DeLugo had come to the realization that his real estate ventures were total and complete failures. It simply cannot be argued that this portion of the loss amount, the final $2 million was ever intended for a legitimate business venture or that this amount 'overstates the seriousness of the harm' or that he ever had even the slightest legitimate business purpose for taking this money.

Based on his multi-year, multi-million fraud, a prison sentence for Alvarez De Lugo near the middle to the top of the Guidelines range of 41 to 51 months would be a reasonable and just sentence and should be imposed in this matter. Additionally, as set forth below, none of the arguments advanced by defendant De Lugo support the granting of a downward departure or a below Guidelines sentence.

II. Brief Procedural Background

On September 18, 2013, the defendants waived indictment, was charged in an Information with one count of wire fraud in violation of 18 U.S.C. § 1343, and pleaded guilty. A presentence report was prepared and victim-impact statements were submitted to the United States Probation Office and the Court.

III. Sentencing Guidelines Calculation

As stated above, De Lugo pleaded guilty to a one-count Information charging him with Wire Fraud, in violation of 18 U.S.C. § 1343. Since a violation of 18 U.S.C. § 1343 carries a maximum penalty of 20 years, the defendant starts with a base offense level of 7 pursuant to U.S.S.G. § 2B1.1. As a reasonable and conservative estimate of loss suffered by the victims in

this matter can clearly be established and was agreed upon to be within the range of $1,000,000 to $2,500,000, the base offense level is increased by 16 levels. Because the offense involved approximately 30 victims, which is clearly "10 or more victims" there is an additional two-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(2)(A).

The defendant is entitled to a reduction of three levels based on his acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. The defendant's total offense level calculation is 22. The parties agreed that the defendant falls under Criminal History Category I. The resulting Guidelines' range is 41-51 months of incarceration.

IV. None of The Sought-After Downward Departures are Appropriate

The defendant argues that the Court should consider a non-Guideline sentence or a downward departure based on: (i) the argument that his offense level substantially overstates the seriousness of the harm; (ii) his purported low likelihood or recidivism given his middle-age; (iii) his self-proclaimed excellent work history (which ironically includes this five-plus multi-million dollar Ponzi scheme); (iv) the punishment he has *already* suffered by among other arguments, the embarrassment of being arrested and finger-printed; and (v) the totality of the circumstances. None of these requests either taken together or in combination support the granting of a departure or the imposition of a below Guidelines' sentence and accordingly, these requests should be rejected.

The Sentencing Guidelines provide a framework applicable to a "heartland" of cases. The statutory reason for promulgating the Sentencing Guidelines was the recognition of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). A sentencing court dealing with an "atypical" case has flexibility to depart from the proscribed Guidelines provided facts are present

of a kind or to a degree not contemplated by the Sentencing Commission. Although the Guidelines afford the district court flexibility in sentencing, the Second Circuit has instructed that the power to depart should be used sparingly and should be reserved for unusual cases. *See United States v. Williams*, 37 F.3d 82, 85 (2d Cir. 1994); *United States v. Core*, 125 F.3d 74, 79 (2d Cir. 1997).

The Second Circuit has characterized the "heartland"" departure as a "discouraged departure." *United States v. Broderson*, 67 F.3d 452, 458 (2d Cir. 1995). A sentencing court should only consider such a departure "when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest." *United States v. Chabot*, 70 F.3d 259, 262 (2d Cir. 1995). The Supreme Court has said that the sentencing court, in resolving whether a particular case is within the heartland, "must make a refined assessment of the many facts" of the case in "comparison with the facts of other Guidelines cases," using its "day-to-day experience in criminal sentencing" to determine whether the factor in the case at hand "is present in some unusual or exceptional way." *Koon v. United States*, 518 U.S. 81, 98 (1996). The defendant bears the burden of establishing that he should receive a downward departure. *See United States v. Silleg*, 311 F.3d 557, 564 (2d Cir. 2002); *United States v. Harris*, 79 F.3d 223, 233 (2d Cir. 1996). De Lugo has failed to carry that burden.

A. <u>The Offense Level Simply Does Not Overstate the Seriousness of the Offense</u>

Defendant De Lugo's first ground for a downward departure is his claim that the adjusted Guideline range based on the loss amount and the number of victims, which taken together increases his adjust offense level by 18-levels, overstates the seriousness of the offense. This argument is without merit and is contrary to controlling law that the Guidelines are to be the starting point. As the Supreme Court has held, because the Guidelines are "the product of

careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall v. United States*, 128 S. Ct. 586, 594 (2007), district courts must treat the Guidelines as the "starting point and the initial benchmark" in sentencing proceedings. *Id.* at 596. Accordingly, applying the loss portion of the Guidelines and the victim adjustment as set forth in U.S.S.G. § 2B1.1 produces a fair and consistent sentence.

First, loss has enjoyed a long history as the preferred method to measure the severity of economic crimes and there are logical justifications behind adhering to a loss and victim structured analysis and the comprehensive nature of the fraud guidelines. Moreover, sentencing decisions using the fraud guidelines are especially important to serve the interests of uniformity for a group of victims who may be dispersed across the nation or as here, in foreign nations, as is often the case in white collar crimes.

Second, the calculation of loss as a measure of severity of theft has deep roots in our common law jurisprudence. As early as 1275, English common law developed divisions of larceny which hinged on the calculation of loss. Grand or petit larceny was charged solely based upon the value of the goods stolen. *See* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History* (hereinafter "*Economic Crime*"), 35 Ind. L. Rev. 5, 13 (2001). Throughout history, while distinctions between crimes against persons became more refined (the creation of various degrees of murder and assault, for example), there still remained "only one recognized, commonly codified determinant of the degrees of seriousness of economic crimes-the value of the thing stolen." *Id.* at 16.

The rationale behind using loss to determine the severity of theft is simple: loss serves as an effective proxy for both the culpability of an offender's mental state and the harm suffered by his victims. *See* U.S.S.G. § 2B1.1, comment. Courts are in accord that loss adequately measures the

severity of harm. *See United States v. Innarelli*, 524 F.3d 286 (1st Cir. 2008) (upholding district court's calculation of intended loss and Guideline sentence, agreeing with the district court's statement that "loss in a fraud case is a yardstick for moral culpability" (internal quotations and brackets omitted)); *United States v. McCoy*, 508 F.3d 74, 79 (1st Cir. 2007) (noting that expected loss is a "measure for the defendant's culpability"). The reality is that loss is an effective gauge for measuring the seriousness of an offense and adherence to the loss enhancement is perfectly compatible with notions of justice.

Similarly, the Guidelines as well as numerous sentencing courts have determined that defrauding more victims is generally considered a more serious crime than defrauding fewer. It is axiomatic that more people and more families have suffered harm. Frequently, the court that ultimately sentences a white collar criminal must protect the interests of victims in numerous jurisdictions. White collar crimes can affect large numbers of people across the nation and the world. Thus, in white collar cases, courts should be particularly careful to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Additionally, although sentencing courts have always had the discretion to depart from intended loss figures which substantially overstate the severity of the offense, *see* U.S.S.G. 2B1.1 comment. (n.19(C)), courts have repeatedly adhered to loss figures, even post-*Booker*. *See United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008); *United States v. Gale*, 468 F.3d 929 (6th Cir. 2006); *United States v. Mickens*, 453 F.3d 668 (6th Cir. 2006); *United States v. Serrano*, 234 F.App'x 685 (9th Cir. 2007).

Turning to the case here, the defendant did not engage in a one-time fraud involving a small sum of money. On the contrary, the instant action spanned over five years and amounted to

a total loss in the many millions of dollars. The defendant repeatedly made false representations to the victim-investors and used their funds for personal expenditures. Moreover, this is not the type of case when the loss suffered by the victims is different than the amount gained by the fraudster. To the contrary, the amount lost by the victims and the amount received by De Lugo is a one-to-one ratio, since De Lugo received in his bank accounts and had possession of every dollar that was taken from the victims. Additionally, this loss figure that was reached and agreed upon in the plea agreement with a range of between $1,000,000 and $2,500,000 is a conservative figure and more than readily provable. Because of the foreign nature of the victims and evidence and the potential difficulty in establishing the higher loss amount, and because of the defendant's prompt acceptance of responsibility, the Government agreed to a conservative and clearly established loss amount. In this regard, the Government stands by the plea agreement. *See, United States v. Fernandez*, 877 F.2d 1138, 1145-46 (2d Cir. 1989). Thus, it simply cannot be argued that the loss amount and the number of victims overstates the seriousness of the crime.

This is exactly the type of case (an investment scheme with identifiable individual and family victims) where the loss and victim enhancements should be applied and do not overstate the seriousness of the harm. The agreed upon loss amount provides an accurate pecuniary measure of the harm. What it does not measure is the broken trust, the lost confidence, the sense of betrayal and violation, and the lost time and energy spent by the victims and their families in an attempt to recover their money.

B. The Age of the Defendant is NOT a Ground for Departure

De Lugo next argues that his law abiding life and his being middle-age, that is 46 at the start of his crime, militates in favor of a departure or below Guidelines sentence. This argument also has no merit.

Numerous courts have addressed the issue of age and the majority of cases dictate that age itself is not a ground for departure. In fact, the Guidelines specify that age should only be considered to the extent that it has relevance. As section 5H1.1 (Policy Statement) notes:

> Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

U.S.S.G. §5H1.1. Age (Policy Statement). The case law is replete with denials of downward departures based on age even where the defendants being sentenced were much older than DeLugo – He is only 53 years old. *See, e.g., United States v. Tocco*, 200 F.3d 401, 434 (6th Cir. 2000) (concluding that defendant's age of 72 alone "should not be considered as a basis for a substantial downward departure" and "observ[ing] in passing in this regard that eight judges of this court, still in service, are seventy years old or older"); *United States v. Booher*, 962 F. Supp. 629, 633-34 (D.N.J. 1997) (denying downward departure motion under U.S.S.G. § 5H1.1 for 64-year-old defendant with coronary heart disease).

Sentencing courts are loathed to carve out an exception in the Guidelines for those who are advanced in age. As one court stated "[i]f the Court were to create such an exception, the elderly could violate the law with impunity . . . Moreover, several of the individuals who were involved in the fraudulent schemes with [defendant] are older than sixty years of age." *United States v. Paradies*, 14 F. Supp.2d 1315, 1320 (N.D.Ga. 1998). *See also United States v. Brooke*, 308 F.3d 17, 20-21 (D.C. Cir. 2002) (denying age-based departure request for 82-year old defendant convicted of narcotics trafficking).

De Lugo also argues that his age (in his fifties) makes him less of a risk of recidivism. However, many age-based departure requests have been specifically denied despite an older defendant's low risk of recidivism. As one sentencing court reasoned:

> [Defendant] contends that he poses a low risk of recidivism because of his age, criminal history, and familial relationships, and that this low risk warrants a downward departure . . . While the Court does not disagree that [defendant] presents a low risk of future criminal conduct, the Court does not believe this factor warrants or justifies a downward departure. Many persons convicted of white-collar crimes present low risk of future criminal conduct . . . [T]he Court will exercise its discretion to deny the request for a downward departure.

United States v. Vigil, 476 F. Supp. 2d 1231, 1302 -1303 (D.N.M. 2007). The Sixth Circuit similarly rejected such claims in *United States v. Davis* where it reversed a district court's imposition of a downward departure against a seventy year old defendant convicted on two counts of bank fraud. The court noted that while a district court may account for a defendant's age at sentencing, "Davis's age (70) by itself [does not] warrant[] a one-day sentence." *United States v. Davis*, 537 F.3d 611, 617 (5th Cir. 2008). The court also considered the fact that "one of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes . . ." *Id.*

Moreover, De Lugo's argument rings hollow when one considers that he was not a youth when he began his years of fraud and one could hardly distinguish a man in his late forties form one in his early fifties as remarkably different when it comes to risk of recidivism. De Lugo is just as likely to commit white collar crimes in his fifties as he was in his forties and apparently being a mature 46 did not prevent him from stealing millions of dollars. Said another way, since he committed fraud later in life at the approximate age of 46-52 he is even less likely to change his ways after he serves his term of imprisonment.

C. <u>DeLugo did Not have an Excellent Work History No Departure is Warranted</u>

De Lugo next argues that his excellent work history supports a departure. However, over the last 8 or 9 years, from at least 2005, De Lugo was conducting a fraud and had no legitimate job. He cannot argue that he had an excellent work history when he has not had legal employment for nearly a decade. Moreover, as the Second Circuit has held, a defendant's employment record is not "ordinarily relevant" and "will warrant departure in a relatively few instances." *United States v. Jagmohan*, 909 F.2d 61, 65 (2d. Cir. 1990) (internal citations omitted). As there is nothing exceptional about the defendant's employment history other than the multi-million theft that he devised and executed, there is no ground for departure.

The defendant's work history, of stealing from his victim-investors for over five years -- as he himself has admitted -- is hardly an indication of the "exceptional or extraordinary" history that the Defendant would need to establish in order to satisfy the requirements established by the Second Circuit precedent. *Jagmohan*, 909 F.2d at 65.

D. **<u>Defendant is Not Entitled to a Departure on the Other Grounds Advanced</u>**

De Lugo also argues for a departure based on a collection of other arguments including that he has lost friendships, may be getting divorced, has been incarcerated since his arrest, and may eventually be deported. None of these arguments support the granting of a departure.

First, the fact that he lost friendships when he stole money from his friends is the natural result of stealing money from friends.

Second, the fact that he has not had direct contact with his family and may be having marital difficulties or getting a divorce, while unfortunate, is again not uncommon given that he has committed a serious crime and will spend many years in jail. In this regard, the Guidelines are instructive on the issue of family responsibilities, and provide that "family ties and responsibilities

are not ordinarily relevant in determining whether a departure may be warranted." U.S.S.G. § 5H1.6. As the Second Circuit has articulated, consideration of family circumstances is discouraged as "many defendants shoulder responsibilities to their families . . . disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant are inherent in the punishment of incarceration." *United States v. Johnson*, 946 F.2d 124, 128 (2d Cir. 1992).

Third, the fact that he was deemed a flight risk and has been detained is also not a reason to depart downward. The Second Circuit has held that conditions of pre-trial confinement may be severe enough "to take a case outside the heartland of the applicable Guideline." *United States v. Carty*, 264 F.3d 191 (2d Cir. 2001), only where a case involves *extreme abuse* and unsafe and unsanitary prison conditions. *See Carty*, 264 F.3d at 193, 196-197 (remanding for consideration of departure request where defendant was subjected to cruel prison conditions including being held in a small cell with four other inmates, with no light, no running water, and no toilet, just a hole in the ground); *United States v. Francis*, 129 F. Supp. 2d 612 (S.D.N.Y. 2001) (downward departure granted where defendant made multiple complaints to the court during pretrial detention and the extensive factual record showed abuse and mistreatment suffered by defendant in a non-federal prison); *United States v. Rodriguez*, 213 F. Supp. 2d 1298 (M.D. Ala. 2002) (downward departure justified where defendant was raped by prison guard while awaiting sentencing, expressly limiting holding to factual circumstances of case).

In this case, while De Lugo has spent pre-sentencing detention at Wyatt, there is no evidence that he has been treated any differently than any other inmate at this facility or that he has been the victim of physical or psychological abuse during his detention. Moreover, De Lugo has not cited any facts to support an argument that the conditions at Wyatt are in any way

unduly harsh or substandard. A departure in this case, based on the fact that De Lugo was held at Wyatt, would lead to a departure in every federal case in which the defendant is detained pre-trial.

De Lugo will be given credit for time served and thus to give him additional time would be tantamount to double credit for time served. Quite simply, De Lugo's pre-sentencing detention does not take his case outside the Guidelines heartland and is insufficient to warrant a downward departure from the applicable Guidelines.

Fourth, the defendant's likely deportation after serving his sentence should not result in a lesser sentence. Although it is true that the defendant is likely to be deemed deportable as a result of his conviction in this case, he has pointed to nothing about his circumstances that would support a departure from the guideline range. *See United States v. Tejeda*, 146 F.3d 84, 88 (2d Cir. 1998) (per curiam); *United States v. Restrepo*, 999 F.2d 640, 644 47 (2d Cir.1993) (reversing downward departure on basis of deportable alien status, concluding that harsher confinement conditions, post imprisonment detention pending deportation, and deportation did not justify departure).

Even post *Booker*, the Second Circuit has reaffirmed the reasoning in *Restrepo* and stated that "a sentencing scheme in which future deportation may lead to diminished sentences would weaken the deterrent effect of punishment." *United States v. Wills*, 476 F.3d 103, 108 (2d Cir. 2007). Moreover, the Second Circuit in *Wills* found that a non-Guidelines sentence that purportedly rests on the judge's prediction that a defendant will be deported is "inherently suspect." *Id.* at 109. In *Wills* the Court held that the district court erred as a matter of law in factoring into Wills' sentence his likely deportation after serving his prison term. *Id.* Accordingly, the Court should not depart or grant a non-guideline sentence based on the possibility that Defendant De Lugo may be deported.

V. The Need for Determining an Appropriate Sentence

As this Court is no doubt aware, in *United States v. Crosby*, 397 F.3d 103, the Second Circuit explained that, in light of *United States v. Booker*, 543 U.S. 220 (2005), district courts should engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id*. at 112. Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id*. at 112-13.

The Second Circuit has instructed district judges to consider the Guidelines "faithfully" when sentencing. *Crosby*, 397 F.3d at 114. "*Booker* did not signal a return to wholly discretionary sentencing." *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) (citing *Crosby*, 397 F.3d at 113). The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Crosby*, 397 F.3d at 113. Because the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall v. United States*, 128 S. Ct. 586, 594 (2007), district courts must treat the Guidelines as the "starting point and the initial benchmark" in sentencing proceedings. *Id*. at 596; *see also Rattoballi*, 452 F.3d at 133 (the Guidelines "'cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based

upon the actual sentences of many judges.'") (quoting *United States v. Jiminez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007).

The Second Circuit has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also Kimbrough*, 128 S. Ct. at 574 ("We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'")(quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)); *Rattoballi*, 452 F.3d at 133 ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Having addressed the Guidelines calculations and the fact that none of the sought after departures are applicable, the Court must now consider Section 3553(a) which provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and which sets forth seven specific considerations:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > (B) to afford adequate deterrence to criminal conduct;
> > (C) to protect the public from further crimes of the defendant; and
> > (D) to provide the defendant with needed educational or vocational

training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];
(5) any pertinent policy statement [issued by the Sentencing Commission];
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

For the reasons discussed above and the additional arguments set out below, the defendant's conduct, weighed in view of the factors set forth in Section 3553(a), calls for a sentence of imprisonment consistent with the terms recommended by application of the Sentencing Guidelines, a sentence in the range of 41 to 51 months, arguably at the top of the Guidelines. *See* 18 U.S.C. § 3553(a)(4).

A. <u>The Nature and Circumstances of the Offense Calls for a Guideline Sentence</u>

Defrauding real hard working people, including defrauding a friend who had known him for many years (as described in the victim impact statement) of more than $2 million, as well as a number of other friends and associates, and doing so over a multi-year period is by any measure a very serious offense. De Lugo systematically lied to people – in many instances directly to their faces while showing them homes in New Haven that he did not own or showing them plans for a senior assisted living center he was not going to invest in – and then flat-out stole their money.

Moreover, as the scheme continued De Lugo adapted the scheme to take in larger dollar amounts. Accordingly, it is the Government's position that the Court should sentence De Lugo to a term of imprisonment consistent with the Guidelines, as such a sentence would be consistent with the seriousness, magnitude and scope of the defendant's conduct.

To state the obvious, this crime was neither a minor financial crime nor a one-time mistake of judgment. To the contrary, the defendant engaged in a well-conceived and carefully calculated fraud scheme over the course of many years, which required setting up empty shell or sham companies, phony documents, lulling letters blaming the regulators for the delays, and actively lying to investors. The crime was orchestrated and committed using false documents, false letters and by abusing the trust of friends, and it was committed for personal gain.

The illegal activity resulted in the loss of millions of dollars by any measure a significantly large sum of money. The bank records demonstrate that as early as 2006, when he received investor funds, De Lugo almost immediately withdrew the stolen funds and spent them on items such as bogus interest payments, vacation programs, his home, and his children's tuition -- all but ensuring that the victims would never recover the stolen funds.

By any measure – the seriousness of De Lugo's illegal conduct, the amount of investor losses, and the impact on the victims – a substantial prison sentence is warranted. In his sentencing memorandum the defendant states that defendant De Lugo "did not set out to commit frauds or to steal money from his investors." (Def. Mem. at 2) Almost any objective interpretation of the evidence turned up in the investigation, especially the bogus promissory notes, reveals that this assertion is false. De Lugo misled his investors from the very beginning, by falsely claiming that he could pay 20% per year and that he had contacts with the livable city initiative. Once he had successfully lured the victim-investors into his scheme *via* fraudulent statements, the defendant used the funds to pay off personal expenses. When investors subsequently inquired into the status of their investments, De Lugo continually lied.

Perhaps one of the most glaring examples of De Lugo's criminal behavior is demonstrated by his conduct in connection with one investor who was driven around New Haven and shown a

number of houses believing them to be part of the investment. Also, as quoted above, De Lugo lied to the investors telling them their money was safe.

By 2005, De Lugo did not have honest intentions and the scheme continued for another five years and would likely have continued had he not been arrested. The entire scheme was rampant with fraud, and adherence to the Sentencing Guidelines would ensure a just punishment. The Government respectfully submits that this factor warrants a sentence consistent with the Sentencing Guidelines.

B. History and Characteristics of the Defendant

While this is De Lugo's first conviction, he has been a professional con-man since at least 2005 (if not earlier) having not held a legitimate job in many years As detailed in the report prepared for the Court by the probation office, De Lugo was educated as an engineer but has been "self-employed" his entire career. (*See* PSR at ¶ 48-49). He has no record of working, punching a time clock, and earning a pay-check. There does not appear to be anything in his background, or his character and history that warrants a sentence outside the range. The fact that he would take money from friends who trusted him and use the City of New Haven's programs designed to help the less fortunate and use the (now former) Mayor's name and photo image all as part of the scheme demonstrates his poor character.

C. The Sentence Must Promote Respect for the Law.

The sentence in this case must reflect the seriousness of the offense committed and provide a message of deterrence to De Lugo himself and to all potential white-collar criminals who would consider defrauding investors. When investment promoters cannot be trusted to tell the truth, the entire marketplace suffers. A significant period of incarceration should be imposed in this case to

demonstrate that those who defraud investors of their investment funds are punished with something more than a proverbial slap on the wrist and an order not to do it again.

D. <u>The Court Should Consider General Deterrence.</u>

One of the factors the Court must consider in imposing sentence is the need for the sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). A significant prison sentence for such conduct can serve as a powerful deterrent against the commission of lucrative financial crimes by persons like De Lugo who have educations and the ability to make money legitimate yet turn to investment scams.

Investment professionals and money managers in general make daily decisions that affect their clients' investments. Unless these white-collar executives truly understand that there are serious and certain consequences for their actions, the temptation to mislead investors and steal their investments cannot be tempered, let alone eliminated. It is only when these would-be conmen realize that similarly situated white collar criminals, such as De Lugo, go to jail for lengthy periods of time, that these persons will think twice before deciding to mislead investors and steal their funds. General deterrence serves an important function and works, perhaps even more effectively than in the context of other types of criminal conduct, to prevent financial crimes.

De Lugo argues that no further term of imprisonment is necessary to achieve the goals of specific and general deterrence in this case. He contends that white-collar felons such as himself are peculiarly sensitive to the ignominy of conviction that he was embarrassed and humiliated and therefore, the fear of conviction alone, without a significant prison sentence, is sufficient to achieve general deterrence. This argument should be rejected. First, recent history has shown that the risk of a felony conviction alone has not been sufficient to deter individuals who are tempted to put their personal financial interests above their legal and fiduciary duties to make full

and truthful disclosures to their shareholders and the SEC. *See* Kroger, "Enron, Fraud, and Securities Reform: an Enron Prosecutor's Perspective," 76 U. Colo. L. Rev. 57, 110 (Winter 2005) (noting that low sentences traditionally handed down to white-collar defendants under the Sentencing Guidelines failed to adequately deter corporate crime).

Second, such an argument, at its core, relies on premises inimical to basic principles of equal application of the laws. According to this logic, one who is educated and highly regarded should not be sent to jail for committing the same crime that would justify a sentence of imprisonment for a less well-heeled and well-regarded defendant. This argument turns on its head the notion that from those who have the greatest advantages in life, the most is properly expected. The Court should reject the notion that white-collar criminals (like De Lugo) should be sentenced more lightly than the poor and powerless because, for the former, the embarrassment of conviction alone (without any prison sentence) is more devastating than it would be for those who have enjoyed fewer advantages in life. Indeed, the author of a survey of academic research regarding the efficacy of criminal sanctions for white-collar crimes had this to say:

> White-collar crime is believed to be particularly amenable to deterrence due to its rational and profit-oriented motivation. In a conceptual analysis of the topic, Braithwaite and Geis observed that white-collar offenders are not committed to a lifestyle of illegality, are risk aversive, and have more to lose as a result of a criminal conviction than street offenders. Elsewhere Geis noted that "[j]ail terms have a self-evident deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure." It is generally perceived that executives exhibit distress at the thought of being sentenced to incarceration: "It results in hypertension, it causes heart attacks, it is very serious."
>
> Most judges and prosecutors view general deterrence as the one of the goals, if not the major purpose, in sentencing white-collar offenders. Punishment should serve to discourage others from committing similar offenses and jail or prison sentences, judges and scholars alike tend to believe, are particularly effective as a general deterrent.

Elizabeth Szockyj, "Imprisoning White-Collar Criminals?" from "Symposium: A Fork in the Road Build More Prisons or Develop New Strategies to Deal with Offenders," 23 S.Ill.U.L.J. 485, 492 (1999) (footnotes omitted); *accord* James J. Fishman, "Enforcement of Securities Laws in the United Kingdom," 9 Int'l Tax & Bus. Law. 131, 170 (1991) ("Though it may be small satisfaction to defrauded investors, incarcerating perpetrators of financial misdeeds serves an important deterrence to future violators. The certainty of enforcement and prison for white collar criminals is an effective deterrence."); Jennifer S. Recine, Note, "Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act," 39 Am. Crim. L. Rev. 1535 (Fall, 2002).

E. The Need for Just Punishment, Specific Deterrence, and Protection of the Public Warrant a Guidelines Sentence

Finally, the goal of affording just punishment would not be served by a sentence below the Guidelines range. In that regard, the need to avoid unwarranted sentence disparities among defendants similarly situated is controlled in part by using the Guidelines as a starting point. Here the defendant has pleaded guilty to wire fraud. Any potential disparity is avoided by imposing a Guideline sentence.

A prison sentence at the top of the Guideline range is a just punishment that will: (a) promote respect for the law; (b) fairly punish the Defendant for his conduct; (c) send a message of general deterrence to prevent others from abusing their positions of trust; and (d) send a message of deterrence to fraudulent investment managers, that fraud is considered a serious crime by the Court and will be punished accordingly.

VI. Restitution Must be Made Part of the Sentence

In addition to the period of incarceration, the Defendant should be ordered to make full restitution to the victims of the fraud. The Mandatory Victims Restitution Act ("MVRA"),

provides, in part, that in sentencing a defendant convicted of a felony committed through fraud or deceit, the court must order the defendant to pay restitution to any identifiable person directly and proximately harmed by the offense of conviction. *See* 18 U.S.C. § 3663A(a)(2).

The procedures to be followed in determining whether, and to what extent, to order restitution pursuant to the MVRA are those set out in 18 U.S.C. § 3664. *See id.* § 3663A(d). Section 3664 provides that "[i]n each order of restitution, the court shall order restitution to each victim **in the full amount of each victim's losses** as determined by the court and without consideration of the economic circumstances of the defendant." *Id.* § 3664(f)(1)(A)(emphasis added).

Additionally, the defendant agreed, as part of his pleas to the following: "In addition to the other penalties provided by law, the Court ***must also order*** that the defendant make restitution under 18 U.S.C. § 3663A, and the Government reserves its right to seek restitution on behalf of ***victims of the defendant's conduct*** consistent with the provisions of § 3663A." (Plea Agreement at 2 (emphasis added). The parties also agreed that "[t]he defendant understands and agrees to make restitution to all the victims of his criminal conduct and understands that pursuant to 18 U.S.C. § 3663A restitution is payable to all such victims and not merely to the victim or victims included in or referenced in the count to which he agrees to plead guilty." Plea Agreement at 2. Title 18 U.S.C. § 3663A(a)(3) provides that: "[t]he court **shall** also order, if agreed to by parties in the plea agreement, restitution to persons other than the victim of the offense." Here the defendant caused financial harm to approximately 31 victims, all of whom are entitled to restitution pursuant to 18 U.S.C. § 3663A(a)(3) regardless of the fact that the agreed upon

Guidelines loss is lower.[1] To this end, The Government calculates the restitution amount to be $5,161,083. (See Attachment "A").

In ordering restitution, the Court should fix a schedule for payment of restitution, and in so doing, must consider the following statutory factors:

> (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
>
> (B) projected earnings and other income of the defendant; and
>
> (C) any financial obligations of the defendant; including obligations to dependents.

18 U.S.C. § 3664(f)(2).

Although the sentencing court "need not make detailed factual findings on each factor, the record must disclose some affirmative act or statement allowing an inference that the district court in fact considered the defendant's ability to pay." *United States v. Lucien*, 347 F.3d 45, 53 (2d Cir. 2003) (internal quotation marks omitted).

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[1] *See, e.g.*, *United States v. Thompson*, 39 F.3d 1103, 1105 (10th Cir. 1994) ("when a defendant knowingly bargains to make full restitution in exchange for dismissal of other pending counts of an indictment, it should be presumed the bargain was made with its consequences in mind [and] it should be presumed a defendant in those circumstances considered its financial burden a fair exchange for the penal advantage gained"). The MVRA directs the Attorney General to ensure that "in all plea agreements…consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded." 18 U.S.C. § 3551 Mandatory Victim Restitution, Note (1).

If the Court intends to establish a schedule of periodic payments, it must do so expressly and clearly, as the failure to set forth such a schedule creates a presumption that the entire restitution amount is payable immediately. *United States v. Nucci*, 364 F.3d 419, 421 (2d Cir. 2004). Moreover, where the defendant has the capacity for future employment at the conclusion of his term of imprisonment, the Court should properly consider his potential future earnings in fashioning an appropriate payment schedule. *United States v. Lino*, 327 F.3d 208, 210 (2d Cir. 2003) ("An order of restitution, if fashioned on a delayed schedule, will call for payment at times far in the future."). That such a schedule necessarily involves some guesswork on the part of the Court regarding the defendant's future income is no impediment to the Court making a reasonable prediction, based on information available at sentencing, regarding the amount of that income. *Id.*; *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000); *United States v. Atkinson*, 788 F.2d 900, 902 (2d Cir. 1986); *see also United States v. Kinlock*, 174 F.3d 297, 300 (2d Cir. 1999) ("a defendant's present financial situation does not eviscerate the district court's discretion to order restitution."). In fashioning a payment schedule that properly takes into account the defendant's personal expenses, the courts in this Circuit have frequently required the defendant to pay a percentage of his post-incarceration income as restitution. *See United States v. Fiore*, 381 F.3d 89, 98 n.9 (2d Cir. 2004) (sentencing court required the defendant to pay monthly installments following his release from incarceration; each monthly installment was based upon a formula which imposed a graduated percentage of his earned income based on the income amount); *United States v. Walker*, 353 F.3d 130, 132 (2d Cir. 2003) (sentencing court required the defendant to pay ten percent of his gross monthly earnings toward restitution during the three-year period of supervised release); *United States v. Jaffe*, 314 F.Supp.2d 216, 226 (S.D.N.Y. 2004) (requiring the defendant to pay the

greater of $150,000 or fifteen percent of his post-tax annual income on a monthly basis).

Accordingly, the Court shall order the defendant to make restitution to the victims of the fraud (see Attachment A) and establish a payment schedule, designating when such payments should commence and how much the defendant should pay. In doing so, the Court should consider the defendant's financial statement and further information supplied by defense counsel concerning the assets listed in the financial statement. *See Hughey v. United States*, 495 U.S. 411, 413; *United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998); *United States v. Silkowski*, 32 F.3d 682, 689 (2d Cir. 1994).

There is no dispute that the Court should order restitution and accordingly a payment schedule should be set. The restitution portion of the judgment can provide for periodic payments that extend beyond any term of imprisonment and term of supervision, until the debt has been paid in full. Pursuant to 18 U.S.C. § 3613(b), a defendant's obligation to pay restitution does not expire until, at the earliest, twenty (20) years after the entry of judgment. *See* 18 U.S.C. § 3613(b), 18 U.S.C. § 3613(f) (making all provisions of 18 U.S.C. § 3613 applicable to restitution). The Court may set a date certain for payment of the balance of the restitution debt, but it is not required to do so. *See* 18 U.S.C. §§ 3572(d)(1) and 3664(f)(3)(A). Moreover, as part of his conditions of supervised release the defendant can be required to make periodic payments. The end of the term of supervised release would in no way affect his continuing obligation to pay the remaining restitution once supervision expires. The imposition of restitution is a separate part of his sentence from any period of incarceration and terms of supervised release.

VI. Conclusion

For the foregoing reasons, the Government respectfully submits that, under the circumstances of this case, the Court should impose a sentence of imprisonment of 41 to 51 months.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on January 27, 2014, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the courts CM/ECF System.

/s/Michael S. McGarry
MICHAEL S. McGARRY
ASSISTANT U.S. ATTORNEY

Attachment A
Filed Separately
Under Seal