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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 UNITED STATES OF AMERICA,

4 v. 16 Cr. 483 (JSR)

5 STEFAN LUMIERE,

6  
7 Defendant. Sentence

8 -----x

9 New York, N.Y.  
10 June 14, 2017  
9:40 a.m.

11 Before:

12 HON. JED S. RAKOFF,  
13 District Judge

14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
Southern District of New York

17 IAN MCGINLEY  
18 DAMIAN WILLIAMS  
Assistant United States Attorney

19 JONATHAN HALPERN  
20 JONATHAN FRIEDMAN  
Attorneys for Defendant

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1 (Case called)

2 THE COURT: Good morning. All right. So the parties  
3 have stipulated to a gain amount. This is a stipulation "for  
4 sentencing purposes only," whatever that may mean. That a  
5 reasonable estimate of the gains resulting from the fraud is  
6 between 1.5 million and 3.1 million. I've reviewed that  
7 calculation and the basis for it. I find that it is a  
8 reasonable calculation. The government also still asserts the  
9 possibility of a loss, a larger loss calculation. I've  
10 reviewed that calculation, and I don't find it sufficiently  
11 adequately supported to adopt. So I will adopt the gain  
12 calculation, which means that to the base offense level of  
13 seven, there is added an enhancement of 16 points. The parties  
14 still disagree as to the other enhancements, the two-point  
15 enhancement for ten or more victims and the four-point  
16 enhancement for associations with an investment adviser.

17 I'm persuaded by the government's arguments, and so I  
18 will add those two enhancements for a total offense level of  
19 29, for a guideline range of 87 to 108 months in prison.  
20 However, if I did not add those enhancements and adopted the  
21 defense position, the total offense level would be 23, and the  
22 guideline range would be 46 to 57 months. Excuse me. Sit  
23 down, counsel. And my sentence, which is going to be below  
24 either of the guideline ranges, would be exactly the same  
25 whether those enhancements were added or not. They are totally

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1 irrelevant, as is the gain calculation. It is, of course,  
2 relevant how much this was a serious crime, which it clearly  
3 was, but all this number-crunching gibberish that constitutes  
4 the irrational guidelines is of little or no consequence to  
5 this Court. So we will proceed now to hear argument on factors  
6 under Section 3553(a).

7 MR. HALPERN: Your Honor, if I may just be heard on  
8 the last, on the guidelines point. In conversations with --

9 THE COURT: You would rather my not give a  
10 nonguideline sentence?

11 MR. HALPERN: No, your Honor.

12 THE COURT: So let's spend more time on the  
13 guidelines, because even though I'm going to give a sentence  
14 well below the guidelines, counsel for both sides seem to be of  
15 the view, even though I've made that clear repeatedly, that  
16 they should spend all their efforts on what is of little or no  
17 relevance to this Court. But go ahead, counsel.

18 MR. HALPERN: Your Honor, I well understand that. I  
19 well appreciate it, and I understand very well your Honor's  
20 point and the tenor of your Honor's comments. They come  
21 through loud and clear. I also recognize, as your Honor does,  
22 that there is an obligation under the law to do a calculation.

23 THE COURT: I've done it.

24 MR. HALPERN: Yes. And what I wanted to say is that  
25 in light of our stipulation, in conversations with the

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1 government yesterday, the government advised that the  
2 calculation for the two-level enhancement for greater than ten  
3 investors was not applicable and was not pressing. I just put  
4 that for --

5 THE COURT: I presided over the trial. I think it is  
6 admissible, but it makes absolutely no difference to my  
7 sentence.

8 MR. HALPERN: Understood. I just wanted to raise that  
9 for your Honor. I hope you'll forgive me for doing what I  
10 thought I had an obligation to bring an issue to your Honor's  
11 attention.

12 THE COURT: So noted.

13 MR. HALPERN: Thank you, your Honor.

14 On behalf of defendant Stefan Lumiere, we'd like to  
15 address several of the 3553(a) factors, including the history  
16 and characteristics, the role of the offense, and the special  
17 circumstances in the treatment, that we respectfully request  
18 the mercy of the Court a lenient sentence.

19 Mr. Lumiere is here and supported by his family, many  
20 friends, former colleagues, his parents, and at least one  
21 cousin and an aunt and a sibling, his significant other. And  
22 your Honor has been witness to the scores of letters -- it's  
23 approximately 80 or more now -- of those witnesses who know  
24 Mr. Lumiere the longest and the best. And as your Honor is  
25 aware that that presentation, that composite portrayal, is very

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1 different from the presentation through the lens of the prism  
2 that was presented at trial. I wasn't here for trial, as your  
3 Honor is aware, but that's a very different portrait of a man.  
4 I understand that -- I know your Honor has commented on the  
5 formidable responsibility of imposing a sentence on a fellow  
6 human being, and that sentence is imposed based on the whole  
7 life of a human being as an individual uniquely, unprecedented  
8 to any other matter, with the objective set forth in 3553(a)  
9 and the balancing and competing acts.

10 Those witnesses essentially have testified to your  
11 Honor. They come from all walks of his life not only his  
12 close-knit, loving, embracing family who has instilled in  
13 Mr. Lumiere key values that are reflected in the letters of his  
14 friends, his former colleagues, his former classmates in Costa  
15 Rica at business school.

16 THE COURT: There's absolutely no question that he has  
17 wonderful friends. He has a great many people who have  
18 attested to the positive side of his character, and I'm going  
19 to factor that in in a substantial way in the sentence that I  
20 impose. But in some ways that makes his deviation from those  
21 characteristics all the more telling. There's really no  
22 excuse, because he knew what he was doing was wrong, and that  
23 is the Court's calculation -- or, excuse me, determination and  
24 also was clearly the jury's. The broader aspects of his  
25 characteristics are very important to this Court and, as I say,

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1 favor leniency, but in an ironic way, it also does pinpoint the  
2 intentionality and willfulness of his misconduct.

3 MR. HALPERN: I understand your Honor's views. I'm  
4 going to turn to those. And, obviously, we're not here to  
5 re-litigate the issues or argue inferences from the evidence,  
6 and we acknowledge the jury's verdict. And, obviously, that's  
7 the reason we're here today in court, and the defendant stands  
8 humbly before you for sentencing. We'll turn to that.

9 I just want to identify some of those traits and  
10 characteristics that come through and, I agree with your Honor,  
11 that stand in very stark contrast to the presentation of the  
12 conduct at trial, and they are ones of not only industriousness  
13 but integrity, faithfulness, and loyalty. The perception,  
14 often too often, that's characterized of Wall Street and the  
15 greed of that is completely inapplicable to Mr. Lumiere. And  
16 one example that comes through in the letters, and I'm sure  
17 your Honor is aware of it, of all things of his character when  
18 he had a long history of employment in Wall Street, but when he  
19 went with a team, it was the Spears Leeds Kellogg Group,  
20 investment group, a team with him that was taken over by  
21 Goldman Sachs. And after a couple of years, Goldman Sachs said  
22 that Mr. Lumiere so excelled, his diligence, his hard work, his  
23 nose to the grindstone, that they were going to offer  
24 Mr. Lumiere solely the position, and he declined that without  
25 Goldman Sachs taking on his group. Goldman Sachs declined to

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1 do that, and Mr. Lumiere, as character standing up for his team  
2 at great self-sacrifice, declined that offer and went on. And  
3 had he accepted that offer, we may very well have been before  
4 your Honor today.

5 I appreciate that also the picture that you have of  
6 Mr. Lumiere, who has so dedicated to his profession, to the  
7 industry, to financial world, that's lost, that's forfeited.  
8 And with all of that that comes clear is that he, like other  
9 human beings, is flawed. Mr. Lumiere himself has many troubled  
10 issues, a number of exceptional issues that your Honor is aware  
11 of through the presentence report, through some of the letters,  
12 Exhibit B and Exhibit C to the defendant's sentencing  
13 submission. They warrant serious attention and treatment, and  
14 so that's part of the entire picture of the human being,  
15 someone who your Honor has recognized has a whole life of hard  
16 work --

17 THE COURT: I certainly take account of the special  
18 circumstances that you're alluding to. I assume you don't want  
19 to get into that in more detail here in the record.

20 MR. HALPERN: I think that's right. I make allusion  
21 to it. They're extensive. I won't go beyond that, but they're  
22 very serious.

23 THE COURT: I just want to make note, for the record,  
24 that I have taken that into account, but unless you want to, I  
25 don't see the need to elaborate on that.

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1 MR. HALPERN: I'll go into a little more detail later,  
2 but that's right, your Honor.

3 Also what comes through is the scrupulousness of  
4 Mr. Lumiere in other positions, of his former colleagues and  
5 friends who attested to his work. So I agree with your Honor's  
6 assessment that there's a disconnect from the evidence, the  
7 conduct that was portrayed and presented. One of the authors  
8 of the letter characterized Mr. Lumiere as scrupulous in his  
9 behavior. So I respectfully submit to your Honor, in  
10 considering the sentence to fashion, that Mr. Lumiere is not  
11 and does not represent or reflect the unflattering picture that  
12 too often we unfairly and reflexively have the common view of  
13 the caricature and stereotype of someone working at a hedge  
14 fund or in Wall Street.

15 THE COURT: I agree with you. I don't share that  
16 stereotype. Every case is individual, and every person who  
17 works in any field of endeavor, there are good folks and bad  
18 folks, and people in between. But what I think is  
19 unquestionable, and I know you maintain your position, but just  
20 so that the record's clear, this Court totally agrees with the  
21 jury's verdict. In the Court's view, the proof was  
22 overwhelming that the defendant committed the crimes he's  
23 convicted of. And that's not so unusual. You see again and  
24 again otherwise good people who, for one reason or another,  
25 succumb to temptations and commit serious crimes. It's



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1 important to remember the broader aspects of their life, all  
2 the laudable characteristics that you have so eloquently  
3 referred to, but I don't want anyone to be under the  
4 misimpression that I had any view of the misconduct here other  
5 than that it was willful, intentional, and proven  
6 overwhelmingly.

7 MR. HALPERN: I understand your Honor's view. And,  
8 again, we're not engaging in this. We're preserving all  
9 rights.

10 THE COURT: Of course.

11 MR. HALPERN: Obviously, your Honor is aware of the  
12 appeal, and I appreciate your Honor's comments.

13 Before I go on to the role and what I think is the  
14 total disconnect between a full life of this human being and  
15 what was portrayed at trial, I just would want to say that this  
16 lifetime where Mr. Lumiere on his own, great sacrifice,  
17 generosity, jumping in, interceding in positions where he had  
18 no obligation to do so, his devotion as a member of his family,  
19 close to his parents and to his nieces, that he has just  
20 voluntarily taken on this role with great relish, and he has  
21 been in his life in so many ways a role model in so many  
22 different traits and characteristics. He's a good soul, an  
23 honorable soul. I'll move on to the role in the offense.

24 When I had the good fortune of sitting in the  
25 government's chair for, really, 15 years --

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1 THE COURT: But you've repressed all that.

2 MR. HALPERN: I'm sorry?

3 THE COURT: But you've repressed all that.

4 MR. HALPERN: No, I've hopefully incorporated and  
5 softened and moderated and tempered my views. One of the  
6 things I continue to appreciate and I learned when I was in the  
7 office is that for investigations of fraud, white-collar crime,  
8 and other crimes, but especially white collar is you follow the  
9 money. You look for the trail of the money. Where does it  
10 lead, who's benefiting the most, and who is it, who's  
11 exploited, who's taken advantage? Even if a jury will find  
12 that there was criminal culpability, there are misjudgments  
13 that are made. I'm not -- I acknowledge the jury's verdict and  
14 I understand your Honor's comments, but you follow the money  
15 and that's what you look to.

16 For Mr. Lumiere's role in this offense, first, it's  
17 absolutely clear Mr. Lumiere was not portfolio manager of the  
18 credit fund of Visium. Full stop. He was, along with  
19 something like a dozen others, a portfolio manager of the  
20 global fund which had nothing to do with the charges in the  
21 trial in the case before your Honor. Mr. Lumiere was an  
22 analyst in the credit fund, and he was from time to time on an  
23 ad hoc basis asked to perform various duties. And he had  
24 expertise in restructuring --

25 THE COURT: I'm not sure any of this is relevant, but

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1 for what it's worth, I think there is evidence that he  
2 functionally served as a portfolio manager regardless of  
3 whatever title may have been involved. But it's all, in my  
4 view secondary. He played, intentionally played, a role in  
5 falsifying net asset value, in falsifying what was presented as  
6 being the reality of the situation. And it's relevant what  
7 level he did that at, but it's more relevant that he did it.

8 MR. HALPERN: I understand your Honor's view of the  
9 conduct. I take that. I do think it's relevant because he was  
10 exploited. It was Chris Plaford who was the only one,  
11 functionally or not, who ran that fund. It was Chris Plaford,  
12 by his own testimony, who interacted with investors. That's  
13 what the focus of the criminal activity was with a claim that  
14 investors were misled. It was Mr. Plaford who said that it  
15 wasn't Mr. Lumiere who had anything to do with investors. In  
16 fact, Mr. Plaford said he didn't trust Mr. Lumiere to do  
17 anything. He was the one who directed Mr. Lumiere with the  
18 quotes. It was Mr. Plaford who prepared the overrides. I  
19 mean, just going down, down, down. Yes, Mr. Lumiere was  
20 exploited. He was used.

21 The conduct was before your Honor, but I think context  
22 is important; relativity is important. Following the money,  
23 Mr. Lumiere received a fraction of the compensation. His  
24 annual salary, enviable for most of America, in this context  
25 was relatively small at \$200,000. Mr. Plaford --

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1 THE COURT: I don't think you can have it both ways  
2 with Mr. Plaford's testimony. He testified that Lumiere was "a  
3 senior analyst/portfolio manager on the credit team" and that  
4 Lumiere managed on average "over \$100 million." Thorell also  
5 testified that Lumiere was "a portfolio manager in charge of a  
6 section or subsection of the credit fund with a certain  
7 strategy specific to him." Now, I don't have to adopt those  
8 specific items of testimony because, as I tried to express to  
9 you a minute ago, I think this is somewhat a peripheral issue.  
10 But I don't think you can say: Oh, accept Plaford's testimony  
11 for point X, but don't accept it for point Y.

12 MR. HALPERN: Well, your Honor, I do recognize  
13 Mr. Plaford pled guilty to seven felonies and is a cooperating  
14 witness with the government on behalf of the government, and  
15 Mr. Thorell had immunized testimony and struggled to  
16 acknowledge certain of his conduct and what was the import of  
17 that at that time. I will say I'm aware -- I don't know if the  
18 Court still gives this instruction -- but elsewhere, you know,  
19 you evaluate the testimony of the witness, and sometimes it's  
20 like a slice of burnt toast. Sometimes you toss the whole  
21 burnt toast away, and other times you're going to carve out the  
22 toast. So I think it can be appropriate to --

23 THE COURT: I haven't used that analogy, but I'll  
24 certainly keep it in mind for the future. But I understand  
25 your point.

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1 MR. HALPERN: You don't have to be wholesale. In any  
2 event, I vigorously contest the notion that Mr. Lumiere  
3 functioned as anything like a credit fund portfolio manager  
4 given what he was actually doing.

5 Again, back to the money, Plaford had something like  
6 ten times as much compensation as Mr. Lumiere. It was Plaford  
7 along with Jake Gottlieb, the CIO of the fund, who determined  
8 bonus, and Plaford admitted that he received no bonus. It was  
9 his base \$200,000 salary. The disconnect is this, your Honor:  
10 It's that Mr. Lumiere had no motivation to do what the jury  
11 found, what was presented, and what your Honor inferred. There  
12 was no financial motivation. He received no bonus. He was in  
13 an untenable situation in especially these times. His sister  
14 at the time was married to Mr. Gottlieb. They were going  
15 through a deterioration in their relationship which led to a  
16 vitriolic and contentious divorce. Mr. Lumiere was not  
17 well-respected, was not well-treated, was not valued. He was  
18 exploited. He had no future there. There was no direct bonus  
19 or compensation from the scheme. He received no gain from the  
20 offense in this. It was coconspirators who received the gain  
21 through fees, performance fees, that came in.

22 I know your Honor sometimes refers to indirect  
23 benefits. That, well, he didn't receive compensation or a  
24 bonus in year one or year two, but there was a long-term  
25 prospect that if he did well, it would promote the well-being

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1 of the firm, and he would receive incidental or derivative  
2 benefits. Not happened in this case. He had no future there.  
3 It was a completely untenable position to be there. He  
4 couldn't wait to get out, and he got out.

5 When he left in April or May of 2013, did the scheme,  
6 as the government charged, proved, stop? Not at all. It  
7 continued unabated. It didn't miss a beat. It didn't miss  
8 Mr. Lumiere. So I think that is very important. He was a  
9 hapless soul. He was, as we said, someone who was a working  
10 stiff. We understand what the conduct showed to your Honor and  
11 to the jury. We respectfully submit, you know, the defense  
12 we're not going to argue here. We have those issues. It was  
13 not presented, and the government even argued that it was just  
14 argument. So we acknowledge the jury's verdict and respect  
15 your Honor's views, but in the context of what happened, he was  
16 the low person, and he was taken advantage of.

17 I'd like to turn to the last section, given that  
18 Mr. Lumiere essentially forfeited his career that he worked  
19 very hard for, studying for an MBA, learning a second language  
20 in a foreign country, earning that master's degree in a foreign  
21 language. He's given that up. His role in the securities  
22 world is over. It's finished. He will be deterred, and  
23 there's no issue as to whether this will recur. He's not a  
24 danger to society by any stretch, and so there's no further  
25 deterrence that way. I would just like --

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1 THE COURT: Well, the main issue in white-collar cases  
2 is often general deterrence, and there is a body of literature  
3 largely ignored by the sentencing commission but which suggests  
4 that, on the one hand, heavy sentences do not serve added  
5 deterrent effect in white-collar cases, but that, on the other  
6 hand, some meaningful prison time does serve a major deterring  
7 effect in white-collar cases because it sends the message to  
8 others similarly situated that you can't buy your way out of  
9 this.

10 MR. HALPERN: I understand that's a factor.  
11 Certainly, that's to be considered, along with the seriousness  
12 of the offense and other objectives. Under these really  
13 extraordinary circumstances for Mr. Lumiere personally,  
14 individually, those other factors that make some reference to  
15 that, when your Honor considers that, whatever punishment your  
16 Honor imposes is going to be disproportionately harsh because  
17 of the circumstances Mr. Lumiere finds himself in as outlined  
18 in the PSR, including paragraphs 119 and 120.

19 THE COURT: Based on my own assessment of some of the  
20 materials you presented in that regard, I think one could  
21 quibble here or there. I essentially accept the basic picture  
22 that's been portrayed there. So I don't think we need to get  
23 into that in great detail, unless you want to. So I understand  
24 the argument that you're making there.

25 MR. HALPERN: I would just say he is, because of those

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1 conditions, more vulnerable as a potential inmate. And given  
2 the circumstances, that there are triggers that could generate  
3 dire, even life-threatening conditions, as your Honor is aware,  
4 and --

5 THE COURT: That's true. On the other hand, depending  
6 on the sentence imposed, if he were sentenced, he would  
7 probably serve his time in a facility where those kinds of  
8 pressures would be less than they would be in a more onerous  
9 prison facility.

10 MR. HALPERN: For example, a community house, halfway  
11 house, would have -- serve those --

12 THE COURT: Actually, I'm not sure. This is really  
13 getting off the subject and not worth talking about it, but  
14 there are community houses and community houses. Some of them  
15 are actually worse than the low-level prisons that are offered  
16 usually to white-collar offenders because they are populated  
17 often by serious street criminals, violent street criminals who  
18 are on their way back to society and who, in fairness, are  
19 being given the opportunity to serve the last portion of their  
20 sentence in a halfway house but are not really the best company  
21 for someone situated like your client.

22 MR. HALPERN: That's an argument for a probationary  
23 sentence in this case.

24 THE COURT: Or for a prison facility of a low level.

25 MR. HALPERN: I understand your Honor's point.



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1           Finally, in closing -- and, actually, your Honor, with  
2           respect, I hate to revert to this, but could we mark as a court  
3           exhibit the agreed stipulation between the parties --

4           THE COURT:    Sure.

5           MR. HALPERN:   -- on the gain?

6           THE COURT:    Yes.

7           MR. HALPERN:   Thank you, your Honor.

8           THE COURT:    You want to hand that up.   Just give it to  
9           my courtroom deputy.   She'll mark it as Court Exhibit 1 to  
10          today's proceeding.

11          MR. HALPERN:   Thank you.

12          So on all of those factors and the need for, I think I  
13          would say, tempering the deterrence and other factors,  
14          including respect for the law, just punishment, the seriousness  
15          of the offense, with the specific and general deterrence that  
16          apply here, the other factors that pertain to the defendant,  
17          including that a sentence in custody would expose him to  
18          vulnerabilities, including physical issues that have been  
19          identified, that they would only exacerbate him, and, as I  
20          said, it would be disproportionate.   And I know your Honor will  
21          take that into account in fashioning an appropriate sentence.

22          I would just close on this part, your Honor, by saying  
23          here is a good soul.   He has been a role model.   The life that  
24          has at least been portrayed in the 80-or-so witness portrayals  
25          before your Honor points to a very decent and loving and

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1 devoted, son, sibling, friend, colleague, and he has a lot to  
2 offer society. He's given up his chosen career. And we just  
3 ask that his opportunities, to the extent possible by your  
4 Honor, be permitted to grow, to flourish, and not snuff out --  
5 the opportunities snuffed out so he receives the attention and  
6 the treatment to get back on his feet, not appear before your  
7 Honor in any like circumstances, but be really a beacon and a  
8 model for others and to show that, you know, his life can make  
9 a difference.

10 So with respect, your Honor, I would humbly seek the  
11 Court's leniency and mercy in imposing a sentence on  
12 Mr. Lumiere.

13 THE COURT: Thank you very much.

14 Let me hear from the government.

15 MR. MCGINLEY: Thank you, your Honor. Your Honor  
16 presided over this trial, and you have our submission, so I  
17 won't belabor the points. I'll note just a few things. It is  
18 important to remember that this crime was the defendant's  
19 brainchild. It started when his investments started to tank,  
20 and he then reached out. He got his friends -- there's no  
21 dispute about that, Vandersnow and Brook. They were the  
22 defendant's friends -- he got them involved in the scheme, and  
23 it started.

24 THE COURT: And the motivation, you would suggest, is  
25 that he saw that his own business acumen was being questioned

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1 and that his position, in effect, was not living up to his past  
2 performance, and so that's what led him to commit the crime.

3 Is that your view?

4 MR. MCGINLEY: That's fair, your Honor. There are  
5 other reasons, right, to maintain his reputation, and there was  
6 plenty of testimony that but for this, the defendant would have  
7 been fired. So I would just note that, your Honor, the crime  
8 went on for years, deceptive act after deceptive act. The  
9 defendant sent thumb drives to the brokers. He had them  
10 communicate on personal cell phones to avoid detection.

11 I would also note, your Honor, there are recordings in  
12 this case that your Honor's heard. I'll bring attention to  
13 two. The first on his knowledge of the scheme is when he talks  
14 to his friend PB as the scheme is ending, and he says, "By the  
15 way, don't tell anyone about the F'ing mismarking of the book."  
16 He knew exactly what was going on because he started the  
17 scheme. The other, and I think this goes to a number of points  
18 that defense counsel just made, is that chilling recording  
19 where he shows just how much he knows the scheme is wrong and  
20 the magnitude of it because he says -- and again, this is  
21 Government Exhibit 1222. Thorell tells him, "Well, what do you  
22 want to do with this information we have about the crime?"

23 And he says, "Well, first, we can extort it. I'd love  
24 to be able to go to him and say, 'Listen, Jake, Chris. Give us  
25 a hundred million between the both of you.'"

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1           Now, that, your Honor, is not a hapless soul. That's  
2 not a working stiff. That is a man who knows exactly what he  
3 did, and he's trying to figure out a way for him to even gain  
4 from that crime. That is what he was thinking then.  
5 Hopefully, this experience has changed him, but that was the  
6 real Stefan Lumiere you heard in those recordings too.

7           THE COURT: Let me ask a more technical question. Do  
8 you agree that under the *Honeycutt* case that came down a few  
9 days ago, that forfeiture is no longer appropriate in this  
10 case?

11           MR. MCGINLEY: Your Honor, I've consulted with my  
12 office on that. Main justice is still formulating a guidance  
13 on that. *Honeycutt*, I've read it. It's a drug case. We're  
14 not seeking forfeiture under the drug statutes. What I would  
15 ask, and, obviously, your Honor will do what your Honor does,  
16 is to have you calculate -- we advance two positions on  
17 forfeiture. That, at the very least, he should forfeit his  
18 salary, but the other position is that he's jointly and  
19 severally liable for the performance fees. And what we would  
20 ask is your Honor to make a finding on both and to delay a  
21 final pronouncement.

22           THE COURT: Well, I wonder how much -- again, as a  
23 practical matter, one of my many, many, many problems with the  
24 guidelines is they are so calculated in the abstract without  
25 reference to the particulars of a given situation, whereas I

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1 think most judges prefer to be practical. So *Honeycutt* does  
2 not affect restitution, does it?

3 MR. MCGINLEY: It does not.

4 THE COURT: Which is, what, 23 million-plus in this  
5 case? We may want to argue about the amount, but it's some  
6 large amount.

7 MR. MCGINLEY: Well, if we go by gain, your Honor --

8 THE COURT: It would be 3 million, or whatever.

9 MR. MCGINLEY: It would be, but we don't have the  
10 identified victims.

11 THE COURT: What about do I not have the ability to  
12 impose a fine of up to \$5 million?

13 MR. MCGINLEY: You do, your Honor.

14 THE COURT: OK. Anyway, anything else you wanted to  
15 say?

16 MR. MCGINLEY: Just two very quick points. To your  
17 Honor's point on general deterrence, I think that is very  
18 applicable here. These are crimes are very hard to detect.  
19 The crime here was simple, but the underlying conduct, the  
20 underlying business, very complex, very hard to make these  
21 cases. And for that reason, we think a stronger sentence is  
22 necessary.

23 THE COURT: Let me hear from defense counsel and then  
24 from the defendant if he wishes to be heard.

25 MR. HALPERN: Thank you, your Honor. Your Honor, the

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1 *Honeycutt* forfeiture is inapplicable here. They say it's a  
2 narcotics statute, but the principle applies that there should  
3 be no joint and several liability here. Mr. Lumiere  
4 received --

5 THE COURT: Let's assume I agree with you on that.  
6 What do you think is the right calculation of restitution?

7 MR. HALPERN: The right restitution, the right  
8 calculation of restitution -- first of all, separate concept --  
9 but zero, and that's because there are no actual victims.  
10 There's no actual loss. He stipulated to gain. That's an  
11 inappropriate measure for restitution, period.

12 THE COURT: All right. So assuming I were to agree  
13 with you on that and assuming that you persuaded me that less  
14 prison time than might otherwise be appropriate should be  
15 imposed, does not that argue for a substantial fine?

16 MR. HALPERN: In lieu of the forfeiture?

17 THE COURT: No, no, not in lieu of the forfeiture.  
18 It's a separate issue.

19 MR. HALPERN: OK.

20 THE COURT: But the issue is you've been eloquently  
21 arguing to me that, in effect, prison would be particularly  
22 difficult in his case because of vulnerabilities that he has,  
23 and so forth. I don't want you to be under a misimpression.  
24 There's going to be some prison time in this case. But  
25 assuming that I were to reduce it from what I otherwise would

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1 impose, punishment is still an important function, and should I  
2 therefore not consider a substantial fine?

3 MR. HALPERN: I agree, punishment is obviously a  
4 factor, but I disagree with a substantial fine. It's also with  
5 respect to this defendant's finances. He's not been working  
6 other than what he's trying to cobble together in the  
7 construction renovation --

8 THE COURT: A fine would be imposed prospectively,  
9 that is to say, a certain amount now, but a certain amount as a  
10 percentage of future earnings.

11 MR. HALPERN: Well, I understand that, but given the  
12 relative and comparative role that he had, and he earned  
13 \$200,000 when others were earning millions of dollars from  
14 Mr. Plaford, I don't think that's appropriate as to this  
15 defendant.

16 THE COURT: No, now you're confusing restitution and  
17 fine. The fine has nothing to do with how much he earned. The  
18 fine has to do -- it's a form of punishment, and it seems to me  
19 that if I buy into your argument that there should be less  
20 prison time for all the factors you've mentioned, then it's  
21 important that I temper that with a less onerous but still  
22 meaningful punishment in the form of a substantial fine.

23 MR. HALPERN: I understand, your Honor, that a  
24 criminal fine is part of the sentence your Honor can impose,  
25 but I must say I don't think that you can give with one hand

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1 and take away with the other. I think it should be  
2 treated that there are separate interests for custody, and I  
3 understand this is a crime of fraud and there's a financial  
4 component to it --

5 THE COURT: I'm sorry. It's obviously not some sort  
6 of formula, but the same section 3553(a) factors that operate  
7 in connection with prison also operate in connection with a  
8 fine, and missing from a fine calculation are some of the  
9 mitigating factors that you've argued for because vulnerability  
10 becomes irrelevant. So applying the Section 3553(a) factors to  
11 the fine, is it not the case that there's an argument for a  
12 substantial fine?

13 MR. HALPERN: We disagree with "substantial fine"  
14 because I think your Honor has to look also at the financial  
15 condition of the defendant, which is apart from --

16 THE COURT: I don't understand that argument if the  
17 fine is calculated as a percentage of his gross monthly income.  
18 So if he remains impecunious, he pays very little, and if he  
19 hits it rich, he pays a lot. So what does his present economic  
20 state have to do with it?

21 MR. HALPERN: As I understood the imposition of the  
22 fine, that that is a factor, when a fine is imposed, it's at  
23 the time of sentence and a kind of snapshot.

24 THE COURT: Well, that's if the fine is you must pay  
25 it now, but I'm talking about another.



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1 MR. HALPERN: I appreciate what your Honor's saying.  
2 I just don't think that -- I understand an appropriate but a  
3 small fine, given all of the factors that we've identified,  
4 would be appropriate, including his role relatively and the  
5 conduct that your Honor saw.

6 THE COURT: All right. Let me hear from the defendant  
7 if he wishes to speak.

8 MR. HALPERN: I'm sorry. On the forfeiture, though,  
9 am I correct, your Honor, that --

10 THE COURT: I'm not going to impose forfeiture, so you  
11 don't need to argue it.

12 MR. HALPERN: Thank you, your Honor.

13 THE DEFENDANT: Your Honor, thank you for hearing me  
14 today, and I just --

15 THE COURT: You need to bring that microphone a little  
16 closer to you.

17 THE DEFENDANT: Can you hear me? Yeah, I prefer to  
18 read this if I may.

19 THE COURT: You might as well sit down so you can get  
20 right up to that microphone.

21 THE DEFENDANT: Thank you. I understand I've been  
22 convicted. I understand the process involved in the  
23 sentencing, including the Court's role in determining a  
24 punishment. I respectfully ask your Honor consider these other  
25 factors about me when you decide what kind of sentence to

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1 administer.

2 I'm blessed with the support of my friends and family,  
3 many of whom are here today. Others who were not able to  
4 attend today have written letters to your Honor and offer their  
5 views about my character and the type of person I am. I  
6 appreciate the time that your Honor has taken in reviewing my  
7 submissions and the time your Honor has taken in reviewing my  
8 character letters from family and friends who know me best, and  
9 in so doing, you're able to see a more full picture of who I am  
10 as a person than the way I was presented in the trial.

11 I've studied long and hard to enter the field of  
12 finance, pursuing an MBA in a foreign language. I participated  
13 and passed my CFA program, which is a long process. To achieve  
14 this, I operate on very little sleep, countless hours, and now  
15 in one fell swoop all of my studies and work and  
16 accomplishments are for nothing. The career path that I had  
17 chosen has been shuttered; and, most importantly, the  
18 reputation that I worked so hard for to build is ruined. My  
19 dreams of running my own investment company are over, but I  
20 know I need to adapt and I need to be determined to find a way  
21 to rebuild myself.

22 I entered into the field of real estate and  
23 construction, since I was unable to return to my field of  
24 choice. I'm just getting started in this and hope to be able  
25 to return to this career and go on with my life and hopefully

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1 have the opportunity to start a family someday.

2           What hurts me most about this experience is the  
3 traumatic impact on my family, especially my mother who is sick  
4 and has to deal with her health issues as well as my situation;  
5 my father, a practicing physician in New York who was raised in  
6 a small town in Georgia called Dalton and worked hard his whole  
7 life just to be deeply embarrassed in having his family name  
8 dragged through the mud in a very public setting. Most of all  
9 I'm saddened by the pain my sister has been suffering while  
10 dealing with a never-ending and contentious divorce and its  
11 ultimate impact on her children.

12           I've always considered myself to be a family man, a  
13 strong man, a rock in the family. I always said it was my  
14 mission to be available for my family no matter what and  
15 whatever they needed of me. At my father's birthday party last  
16 night, I promised my niece I would continue to be there for  
17 her. I hope I will be able to keep my promise to her, continue  
18 to be there for my family and friends, just as they have been  
19 here for me in support during this most trying time in my life.

20           As I stand before -- or sit before your Honor with  
21 humbleness and respect, I ask for the Court's mercy and  
22 leniency in deciding the sentence. Thank you, your Honor.

23           THE COURT: Thank you very much.

24           Let me begin on one sort of side note, but I can't  
25 help but noting that this case once again demonstrates the

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1 absurdity of the sentencing guidelines. The sentence is driven  
2 largely by the gain amount, but there are other adjustments of  
3 a more technical nature. And under the adjustments that the  
4 government originally argued for and I think are so supported  
5 by the evidence, the guideline sentence would have been eight  
6 years or more, which is just ridiculous, absurd, barbaric in  
7 some respects in connection with someone like Mr. Lumiere. But  
8 even under the defense view of those adjustments or the middle  
9 position that apparently was acceded to by the government,  
10 though not by the Court, you still are talking about four to  
11 five years under the guidelines.

12           These draconian penalties bear no relationship, in the  
13 Court's view, to any of the factors set forth in Section  
14 3553(a): just punishment, the nature of the person's offense,  
15 and the nature of the person's character, the need for specific  
16 and general deterrence or not, and so forth. It is a terrible  
17 thing that this country's criminal legal system has become so  
18 punitive. I mean, Mr. Lumiere is lucky that he's a  
19 white-collar defendant when one considers the kinds of  
20 sentences that courts are often forced to impose by mandatory  
21 minimums, and the like, on people who have none of his  
22 advantages, but even as to him, these guideline sentences would  
23 be much more typical of a brutal regime than of a proud  
24 American legal system.

25           Now, having gotten that off my chest, so to speak,

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1 let's turn to the individual before the Court. So counsel for  
2 the defendant has eloquently, both in his oral presentation and  
3 in his excellent papers, made a good case for the claim that in  
4 many respects Mr. Lumiere has led a laudable life, one of which  
5 he and the many people who are here to support him can be  
6 proud, and also that he suffers from certain psychological  
7 vulnerabilities that would make him particularly -- that would  
8 raise certain possible dangers or hardships associated with  
9 prison time that would not necessarily be true of other  
10 similarly situated individuals. The Court accepts all that.  
11 More than accepts it, takes that very much into account.

12 But, on the other hand, the Court cannot ignore the  
13 fact that, as the government I think so correctly points out,  
14 Mr. Lumiere embraced this fraudulent scheme, was a highly  
15 significant part of the scheme, and did so not aberrationally  
16 one day or one week, but for years, for months. And even when  
17 he was on the verge of being caught, sought ways to turn the  
18 scheme to his further advantage through that attempt at  
19 blackmail. This is not the Mr. Lumiere that the people who  
20 have come to support him know. They, for the most part, or  
21 perhaps all, were not present to hear the testimony, but the  
22 testimony and the tapes and the evidence was overwhelming and  
23 showed a Mr. Lumiere who had no compunctions about lying and  
24 cheating, and that's very much the Mr. Lumiere who exists side  
25 by side with the Mr. Lumiere who has so many positive traits.

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1           So there is no doubt in the Court's mind that not only  
2 as a matter of general deterrence but also just as a matter of  
3 just punishment that prison time is required here. I came into  
4 the Court this morning thinking that even after giving all  
5 deference to all the many positive factors that defense counsel  
6 had raised, that a sentence of two years was the right  
7 sentence, but counsel has convinced me that a slightly less  
8 sentence is called for here. So the sentence of the Court is  
9 that the defendant is sentenced to a year and a half, to 18  
10 months, in prison, concurrent on all counts. No forfeiture  
11 will be imposed. Restitution in the amount of his salary which  
12 was, what, 300,000? Someone have that exact figure here?

13           MR. MCGINLEY: 200,000.

14           THE COURT: 200,000. Restitution in the amount of  
15 200,000 will be imposed, and a fine of \$1 million to be paid as  
16 15 percent of his gross monthly income beginning with the  
17 second month after he is released from prison. He will also be  
18 sentenced to three years of supervised release to follow  
19 imprisonment.

20           The terms of supervised release are, first, the  
21 mandatory conditions that he will not commit another federal,  
22 state, or local crime; that he will not unlawfully possess a  
23 controlled substance; that he will cooperate in the collection  
24 of DNA; and that he will make restitution in accordance with  
25 the schedule just set. The drug testing condition, however,

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1 will be suspended based on the Court's determination that he  
2 poses a low risk of future substance abuse.

3 There will also be imposed the standard conditions of  
4 supervision 1 through 13. They appear on the face of the  
5 judgment and will be gone over with the defendant by the  
6 probation officer when he reports to begin his period of  
7 supervised release, which he must do within 72 hours of his  
8 release from prison, and he will be supervised by the district  
9 of his residence. There are other special conditions  
10 recommended by the probation office, but I don't think they're  
11 necessary. Finally, there's a special assessment of \$300 which  
12 is mandatory and must be paid.

13 Now, before I advise the defendant of his right of  
14 appeal, anything else that counsel wants to raise for the  
15 Court? First, anything from the government?

16 MR. MCGINLEY: No, your Honor.

17 THE COURT: Anything from the defense?

18 MR. HALPERN: I'm sorry, your Honor, respectfully, if  
19 I just may be heard with respect to restitution, and I  
20 apologize to your Honor if I misheard. I had thought your  
21 Honor was saying earlier in response to my inquiry there was  
22 going to be zero restitution. It's also, I would respectfully  
23 submit, not applicable here because of gain and not actual loss  
24 and identifiable victims. So --

25 THE COURT: No, that's not a frivolous position.

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1 What's the government's position?

2 MR. MCGINLEY: Your Honor, I think, just to be safe,  
3 the government would forgo the restitution.

4 THE COURT: So no --

5 MR. MCGINLEY: If I just --

6 THE COURT: Not impose the restitution.

7 MR. MCGINLEY: And if I just may, just for the record,  
8 because sometimes these proceedings wind up in other  
9 proceedings, the government does not concede that there was no  
10 actual loss to these victims, but it has not been finally  
11 determined.

12 THE COURT: The government's position, as was very  
13 eloquently put forth in its many submissions, was that there  
14 was huge loss, but I have not been persuaded that the  
15 methodology is sufficiently accurate to permit that  
16 calculation, but the government fully maintains its rights.  
17 And with respect to forfeiture, I understand the government, if  
18 not in this case but certainly in some cases, is going to try  
19 to narrow *Honeycutt*, and all your rights are preserved. So  
20 we'll just leave it with the fine so far as the financial  
21 aspects of this sentence are concerned.

22 Anything else?

23 MR. HALPERN: Yes, your Honor, if I may, two things --  
24 three things. First thing, if I may, in terms of reporting  
25 recommendation, if I could request your Honor, understanding



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1 that it's limited, but would request that your Honor recommend  
2 that Mr. Lumiere report to FCI Otisville given the proximity to  
3 his family.

4 THE COURT: Yes, I will recommend that. As you  
5 understand, I'm sure he understands, I can't order that; I can  
6 only recommend it. Otisville is frequently sought by many  
7 similarly situated defendants, and they can't accommodate  
8 everyone who wants to go there. But I certainly think it would  
9 be appropriate in his case, and I will recommend it.

10 MR. HALPERN: And also because of the relatively fewer  
11 strictures that may not trigger some of the conditions that we  
12 referred to.

13 THE COURT: Agree.

14 MR. HALPERN: And this may be out of order, but I do  
15 have an application for bail pending appeal. But also if there  
16 is reporting, would request that that date be Tuesday,  
17 September 12, in light of the various factors we discussed.

18 THE COURT: I have no trouble with Tuesday,  
19 September 12, as the reporting date, 2:00 p.m. on September 12  
20 to the designated institution.

21 The government's not seeking remand at this time, are  
22 you?

23 MR. MCGINLEY: We're not seeking remand now, but we do  
24 oppose bail pending appeal. I don't know that that's ripe  
25 right now.

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1 THE COURT: No, I don't think it's ripe either. So  
2 when it becomes ripe, it will ripen.

3 MR. HALPERN: I'm sorry. Your Honor's not willing to  
4 hear argument at this point on that issue, bail pending appeal;  
5 do I understand that?

6 THE COURT: Correct.

7 MR. HALPERN: Would it be possible to set a schedule  
8 with your Honor when we can make those arguments?

9 THE COURT: First thing you have to do is file your  
10 notice of appeal. The second thing is you're going to have to  
11 be in a position to tell me what your arguments are on appeal.  
12 So when you're ready to do all that -- he's free till then.  
13 He's free until he reports to the prison unless I order  
14 otherwise. So when you're ready, convene a call with the  
15 prosecutor, and we'll set a schedule.

16 MR. HALPERN: Thank you, your Honor.

17 THE COURT: All right.

18 MR. HALPERN: One other, in terms of conditions of  
19 bail, I take it that there wouldn't be any less restrictive  
20 measures with respect to travel?

21 THE COURT: The bail conditions will be the same as  
22 they are now.

23 MR. HALPERN: Your Honor, last point, a little bit of  
24 housekeeping note. I just raise this. We weren't trial  
25 counsel, and we've worked with the good graces of our

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1 predecessor, Mr. Creizman's office, to obtain discovery from  
2 the government. It's been a long process. We've identified a  
3 number of government productions that we just do not have, and  
4 so I've spoken with Mr. McGinley. I understand that  
5 Mr. McGinley is undertaking to provide us with those copies  
6 that had previously been provided to Mr. Creizman. I just  
7 wanted to raise that with the Court. We hope that your Honor  
8 would have jurisdiction over that matter as well. I don't  
9 anticipate any resistance, but look forward to the production  
10 from the government.

11 THE COURT: All right. So, Mr. Lumiere, you have a  
12 right to appeal the sentence. Do you understand that?

13 THE DEFENDANT: I do, your Honor.

14 THE COURT: If you can't afford counsel for the  
15 appeal, the Court will appoint one for you free of charge. Do  
16 you understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Very good.

19 (Adjourned)  
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24  
25