

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 17-20235-CR-MOORE/SIMONTON

UNITED STATES OF AMERICA,

v.

HYUNJIN LERNER,

Defendant

_____ /

**SENTENCING MEMORANDUM ON BEHALF OF
HYUNJIN LERNER**

MARCUS NEIMAN & RASHBAUM LLP
One Biscayne Tower
2 South Biscayne Blvd, Suite 1750
Miami, FL 33131
Telephone: (305) 400-4261

MORVILLO ABRAMOWITZ GRAND
IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
Telephone: (212) 856-9600
Fax: (212) 856-9494

Attorneys for Defendant Hyunjin Lerner

I. PRELIMINARY STATEMENT

On October 12, 2017, Hyunjin Lerner pleaded guilty to one count of conspiracy to make false statements to a public company's accountants, to falsify a public company's books and records, and to commit securities fraud, in violation of 18 U.S.C. § 371. Hyunjin is scheduled to appear before the Court for sentencing on January 11, 2018.

We respectfully submit this memorandum to address the factors we ask the Court to consider when determining Hyunjin's sentence. *First*, we ask the Court to consider Hyunjin's incredible personal journey, from a South Korean orphan raised in poverty by his grandparents, to the United States where he was adopted by loving parents, received an education, entered the business world, and started his own family. As described more fully in this memorandum, Hyunjin's criminal conduct stands in sharp contrast to a life otherwise spent as a productive member of society and a devoted son, brother, husband, and father.

Second, without minimizing Hyunjin's culpability or responsibility, we ask the Court to consider the circumstances surrounding Hyunjin's participation in the conduct at issue in this case. Specifically, Hyunjin participated in the conspiracy in his capacity as the Vice President of Finance of Bankrate, Inc. ("Bankrate") on the instructions of his boss, Bankrate's Chief Financial Officer ("CFO"), Edward DiMaria. DiMaria was charged on December 19, 2017 with thirteen counts of conspiracy, making false statements to Bankrate's accountants, making false entries in Bankrate's books and records, securities fraud, and wire fraud arising out of his role in the instant offense. *See* Indictment, *United States v. DiMaria*, No. 17-cr-20898-KMM (S.D. Fla. Dec. 19, 2017) (Dkt. 1) ("DiMaria Indictment").

Third, we ask the Court to consider that, unlike others at Bankrate, Hyunjin agreed to resolve charges brought by the Securities and Exchange Commission (the "SEC") before that agency filed a complaint. Moreover, Hyunjin has accepted responsibility for his conduct by

pleading guilty, and he has cooperated with the Department of Justice (the “Justice Department”). In his agreement with the government, Hyunjin committed to continue his cooperation and the Justice Department agreed that it would consider bringing that cooperation to the attention of the Court. It is our understanding that if DiMaria’s case proceeds to trial, the Justice Department expects to call Hyunjin as a prosecution witness. We expect that the Justice Department will not provide additional details about Hyunjin’s cooperation until after DiMaria’s case has been resolved.

In sum, in light of the provisions of 18 U.S.C. § 3553(a), we respectfully ask the Court to impose a sentence below the 60 month statutory maximum.

II. HYUNJIN LERNER’S INCREDIBLE LIFE JOURNEY

Notwithstanding the events that bring him before this Court, Hyunjin Lerner’s path in life has been truly remarkable. Overcoming a difficult early childhood in South Korea, Hyunjin received the love and support of his adopted parents. He worked his way through college and, ultimately, sought financial security through a series of professional jobs. As reflected in Hyunjin’s letter to the Court and the letters submitted by 22 of Hyunjin’s friends and family members, however, Hyunjin has made his greatest mark as a loving husband, devoted father, caring son and brother, and loyal friend. It is these qualities that reflect Hyunjin’s true character.

A. Hyunjin’s Childhood in South Korea

Hyunjin was born in Seoul, South Korea on January 18, 1969 and was raised by his paternal grandparents until 1977. Presentence Investigation Report dated Dec. 5, 2017 (“PSR”) ¶¶ 68, 73. Growing up, Hyunjin was told that his biological father had dropped him off at a police station after his biological mother had died giving birth to him. Hyunjin recalls spending his early childhood living with his grandparents in a small one-room house without a bathroom. PSR ¶ 68; Ex. 1, H. Lerner letter at 1.

Hyunjin rarely saw his grandfather, who worked long hours during the day and returned home after Hyunjin went to sleep. PSR ¶ 68; Ex. 1, H. Lerner letter at 2. Sadly, Hyunjin’s memories of his grandmother largely focus on the punishment that she inflicted, including corporal punishment which left him with bruises and other marks on his body. PSR ¶ 68; Ex. 1, H. Lerner letter at 2. Hyunjin recalls the harsh manner in which he was disciplined as a child:

Another instance I remember was when I came home from one of my excursions with my friends. My grandmother was so mad that I came home late that she stripped me naked and threw me outside the house in late autumn. Not only was I cold and shivering, I also was totally embarrassed that my neighbors were looking at me, crying at the top of my lungs, begging my grandma to let me back in the house.

Ex. 1, H. Lerner letter at 2.

Hyunjin’s grandparents provided Hyunjin food and basic necessities, but they struggled to pay his school fees. Ultimately, they gave Hyunjin up for adoption when he was eight years old. In November 1977, Hyunjin was adopted by two Americans—Richard Lerner, a journalist, and Jan Fritz, a Georgetown University professor. PSR ¶¶ 69, 70; Ex. 1, H. Lerner letter at 1, 2. Richard and Jan already had a five-year-old daughter, Karin, whom they adopted in 1973, and they had wanted to adopt another, older child from South Korea. *See* PSR ¶ 71; Ex. 4, Jan Fritz letter at 1 (“At that time, South Korea had 12 as the maximum age for adoption. We knew this and had asked to adopt an older child so that the child would not miss an opportunity to have a permanent family.”).

B. Hyunjin’s Childhood in the United States

Hyunjin met his family for the first time when he flew from South Korea to the United States to start his new life with Richard, Jan, and Karin. PSR ¶ 69. Hyunjin recalls:

I remember getting off that jet in November 1977, after being in a plane filled with Korean babies for over 24 hours, walking through the corridors of JFK airport with my guide, looking anxiously around for my new parents whom I only

saw in a few photos which they sent while I was in Seoul. Ahead, I could see my name on a poster board, which said in Korean “Welcome to America our son.” Holding that sign were my future parents with beaming smiles... my mother, Jan Fritz, and father, Richard Lerner. I was both scared and nervous, meeting them for the first time.

Ex. 1, H. Lerner letter at 1.

When Hyunjin arrived in the United States, he knew no English aside from phrases he learned on the flight, and neither Richard nor Jan knew Korean. PSR ¶ 69; Ex. 4, Jan Fritz letter at 1. Richard recalls that, when he arrived in the United States, Hyunjin was “frail, unable to understand or speak any English and frightened.” Ex. 3, R. Lerner letter at 1. Richard and Jan tried to ease his transition to the United States by learning Korean phrases and enrolling Hyunjin in a Saturday school for children from Korean and Korean-American families. Ex. 4, Jan Fritz letter at 1.

Hyunjin developed a very close relationship with Richard, Jan, and Karin. He explains that, through his adoptive family, he experienced familial love for the first time. Ex. 1, H. Lerner letter at 2. Hyunjin recalls his parents “raised me as their own and provided a stable, loving home of happiness and laughter.” *Id.* at 2. Despite their demanding careers, Richard and Jan made time for Hyunjin and Karin, and they went to the park to play soccer, skated at the local ice rink, and went to numerous museums in Washington D.C. *Id.* at 3. Hyunjin grew close to his mother during this time, and recalls she “was strong, intelligent, and cared so much about the people around her, that I always have admired her.” *Id.*

Hyunjin remembers that he and his sister, Karin, “hit it off instantly” and that he had “many happy times with her as we had fun in the snow, swam, played hide and seek, and even got into little fights as siblings often do.” *Id.* at 2, 3. Karin describes Hyunjin’s influence on her life, which continues to this day:

My brother has played a central role in my life ever since the two of us were adopted as children. He was always somebody I felt I could look up to when we were young, and that never changed as we became adults and parents. I assure you that he has been a strong source of encouragement and support to me and my two daughters, Cecily, 28, and C [REDACTED], 16, who know him as a dependable, responsible uncle.

Most recently, Hyunjin helped me go forward with a major series of changes in my life as I moved from Ohio to Florida with my youngest daughter, C [REDACTED]. It required new employment, new housing, new schools and a lot of difficult challenges. I'm not sure how well it would have gone if it weren't for Hyunjin's encouragement and assistance. At times, he actually traveled hours to literally lend a hand when we were packing and unpacking. He offered to drive the moving truck. My brother[']s help was invaluable.

Ex. 5, K. Lerner letter at 1; *see also* Ex. 3, R. Lerner letter at 2 (“He’s sought consistently to be the one [Karin] could turn to if she needed a ‘big brother’—defending her in their youth and later being a supporter when she or her daughters encountered unexpected difficulties. He offered financial assistance and helped her with transitions as she adjusted to being a single parent[.]”);

Ex. 4, Jan Fritz letter at 2 (“He particularly watched out for Karin, his younger sister, and always helped her in any way.”).

Hyunjin recalls being received well by his new extended family: “both sides [of the family] welcomed me with open arms. I always felt included and loved by every family member. They really went out of their way to make me feel like I’ve always been their family.”

Ex. 1, H. Lerner letter at 3. Because his family life in the United States was so positive, Hyunjin did not have a strong desire to return to South Korea and locate his biological father or grandparents. PSR ¶ 69; Ex. 1, H. Lerner letter at 2.

Despite his positive family life, Hyunjin’s early years in Washington, D.C. were marred by difficult social relationships with his peers. Hyunjin was bullied and teased about his Asian features, as he was the only Asian child in his elementary school. PSR ¶ 69; Ex. 1, H. Lerner letter at 3. His father recalls the difficulty Hyunjin had adjusting to life in the United States:

While living in Korea with a low-income family, Hyunjin faced enormous challenges and they continued as soon as he came to be with us in America—first when our home was in Washington and then when we moved to a Maryland suburb. He not only had to adjust to a wholly different culture in a foreign land, but he had to do it at an age when most youngsters struggle merely to hold their own in a classroom, to make friends, to be socially acceptable—and he did it while learning a new language and customs. Being Asian made it even harder. He had to endure teasing, prejudice and worse, yet he persevered.

Ex. 3, R. Lerner letter at 2. Hyunjin recalls running home and crying to his mother asking why his classmates were so mean. Ex. 1, H. Lerner letter at 3. To this day, Hyunjin recalls the social difficulties he had as a child; unfortunately, he has to coach his own children through similar issues. *See* Ex. 2, L. Lerner letter at 2 (“Our kids, H [redacted] and M [redacted], have endured being teased all their life about their Asian looks [Hyunjin] has told our kids that he has been teased during his childhood and that they shouldn’t take it personally. He reassures them how special they are, being different is a good thing and they should be proud of themselves.”).

C. High School, College, and Early Professional Career

When Hyunjin was 15 years old, he moved to Palm Springs, California with his father and sister as Richard started a new job as a television news director while Jan remained in Washington, D.C. where she continued teaching at Georgetown.¹ Richard recalls that, during this period:

Hyunjin quickly assumed many responsibilities without being asked. Somehow, he found a way to excel in classes and sports competition while often taking charge of day-to-day household operations when I was tied up at my office. Evenings were frequently tough for me. So Hyunjin started cooking meals and mentoring his sister with homework. I discovered I could count on him to do these things well. He grew up fast.

¹ Richard and Jan divorced when Hyunjin was 17 years old and remarried two years later, when Hyunjin was in college. They currently live together in Palm City, Florida. Richard and Jan made sure that Hyunjin and Karin received both parents’ love and affection when they lived apart. Both parents are providing emotional support to Hyunjin during this difficult stage of his life. PSR ¶ 70.

Ex. 3, R. Lerner letter at 2. Hyunjin's relationship with his father grew stronger when they lived in Palm Springs:

Even though I knew that he was exhausted from the high stress job that required the best of himself each and every day, he always took the time to talk to us about what was happening at work and home and he cared deeply how we were spending our time in school and after school. As a result of these long talks and time spent together, my relationship grew to where not only was he a Dad that I loved with all my heart, but also my best friend that I could talk to about almost anything.

Ex. 1, H. Lerner letter at 4.

After high school, Hyunjin attended college at the University of California Los Angeles ("UCLA"). *Id.* His parents' financial situation was fragile at this time and Hyunjin worked part-time jobs through college to help pay his expenses. Ex. 3, R. Lerner letter at 2.

Hyunjin initially majored in biochemistry in the hopes of fulfilling his biological grandmother's dream that he would become a doctor. After pursuing the major for almost three years, however, he realized that he lacked interest in medicine and was increasingly concerned about his mounting student loans. Hyunjin's concern over his debt persisted even as he worked 20 to 30 hours a week through college, and he decided to change majors and study accounting as an avenue to a well-paying job that would allow him to start paying down his student debt immediately upon graduation. *See* Ex. 1, H. Lerner letter at 4.

At first, Hyunjin was bored by accounting and he skipped classes, mistakenly thinking he could learn what he needed outside the classroom. Hyunjin's lack of interest resulted in his failing an introductory accounting class midterm. Rather than giving up on the subject, Hyunjin viewed his poor performance as a challenge that he had to overcome. *Id.* The following quarter, Hyunjin retook the class and, after studying hard and taking numerous practice tests, he received an A in the course. *Id.* at 4-5. This early experience taught Hyunjin that he could thrive in

accounting through hard work and dedication, and he pursued the field as a means of achieving the financial stability that had eluded him during his early childhood in South Korea.

Hyunjin graduated from UCLA in 1992 with a degree in economics, and he joined KPMG (then one of the “Big Six” firms) as a staff accountant. At KPMG, Hyunjin performed audits of public companies and nonprofit organizations. Despite his good salary, Hyunjin embraced his American grandfather’s advice regarding the importance of saving money and lived frugally. *See id.* at 5. Thus, while working at KPMG, he lived with two roommates in a one-bedroom apartment in a low-income neighborhood in Los Angeles. *Id.*; *see also* Ex. 6, H. Vu letter at 2.

After leaving KPMG in 1995, Hyunjin changed jobs frequently, each time for a position that provided more responsibility and a higher salary than his previous one. Between 1995 and 1999, he worked at a series of banks—Coast Savings Financial, California Federal Bank, and then Imperial Bank—and, in 1999, he became controller of Official Payments Corporation, an e-commerce company, where he was responsible for preparing for the company’s audits and SEC filings. In 2002, he became a vice president and controller at MaxWorldwide, Inc.,² an internet brokerage firm, where, in addition to his accounting duties, he assisted with a restatement of the company’s financials for the years 2000 and 2001. In 2004, Hyunjin joined Korn/Ferry International (“Korn Ferry”), an executive recruiting firm, as senior director of internal audit. Korn Ferry had offices in over 30 countries, and Hyunjin traveled extensively in connection with both the firm’s implementation of Sarbanes-Oxley and various audits that he performed.

In 2006, Hyunjin joined Bankrate as its Vice President of Finance after being recruited by Edward DiMaria, the company’s CFO. DiMaria had been Hyunjin’s direct supervisor at Official

² Max Worldwide was previously known as L90, Inc.

Payments a few years earlier and Bankrate's Chief Executive Officer ("CEO"), Thomas Evans, had been the CEO at Official Payments. Hyunjin took the job both because it represented yet another promotion up the corporate ladder and because he had previously enjoyed working for both DiMaria and Evans. Ex. 1, H. Lerner letter at 6.

D. Hyunjin's Commitment to His Wife and Two Children

In 1996, while Hyunjin worked at KPMG, he met Ladda Theeraphapthanarak, a Thai national who was pursuing a Master's Degree in International Business at California International University. See PSR ¶ 72; Ex. 2, L. Lerner letter at 1. Ladda worked part time at a Thai restaurant that Hyunjin frequented, Ex. 2, L. Lerner letter at 1, and Hyunjin recalls thinking that Ladda "ha[d] the similar kind of inner strength and compassion that [he] f[ound] admirable and reminiscent of [his] mom." Ex. 1, H. Lerner letter at 3.

Huy Dang Vu, Hyunjin's roommate and best friend from UCLA, recalls Hyunjin's early relationship with Ladda:

I remember when Hyunjin first met Ladda. She was a waitress at a restaurant. Hyunjin shared with me his excitement about Ladda and kept coming back to the restaurant until one day he gained the courage to ask her out. She agreed to that first date, and they have been together since.

Ex. 6, H. Vu at 2.

A few months after they met, Ladda finished her degree and returned to Thailand, but Hyunjin was committed to pursuing her:

Growing up, my parents are very strict, so I told Hyunjin, there was no way for me to come back to be with him without my parent's permission. Eight months later, Hyunjin came to Thailand on my birthday and asked my parents [if he could] marry me. He didn't have much money back then so we had just a small engagement in front of my parents, relatives, and friends. But he promised my parents that he will take good care of me. He will work hard to support me so that I didn't have to go to work, or do things that I didn't want to do.

Ex. 2, L. Lerner letter at 1. Hyunjin married Ladda in October 1998 in Malibu, California.

Ladda says that Hyunjin “is the only person that I can truly be myself with” and that Hyunjin has been “my rock and my best friend.” *Id.* He is equally appreciative of her, noting, “Even today, my wife is still sticking by me. I didn’t deserve her back then and I don’t deserve her now.” Ex. 1, H. Lerner letter at 6. Their loving, supportive partnership is evident to their friends and family. *See* Ex. 7, K. Kitiyakara letter at 2 (“As long as I’ve known [Hyunjin], he has treated Ladda with love, respect, and compassion. She has always been his ‘queen’ to him and she has always been happy, content, and loves Hyunjin very much. . . . Everything he does for her, he did it . . . wholeheartedly.”).

Ladda and Hyunjin have a daughter, M■■■■, who was born in 2004, and a son, H■■■■, who was born in 2006. Together with Ladda, the children are the center of Hyunjin’s life. Ladda describes Hyunjin’s strong commitment to their children:

Spending time with the kids is his top priority. He tells me he doesn’t want to miss this opportunity because when they get to be older, they will naturally become independent. He wakes them in the morning, make[s] breakfast for them, and drives them to school to have extra time with them even though they can take a school bus. . . . Hyunjin has spent countless hours with them with their school work and encourages them to read and do extra school work to better prepare them for their future.

Ex. 2, L. Lerner letter at 2.

Many of Ladda and Hyunjin’s friends and neighbors are struck by Hyunjin’s commitment to his children. For example, Kasama Kitiyakara, whom Ladda has known since their childhood in Thailand, writes:

He is a good and devoted dad. I have never seen people like him. He is really dedicated to his family. He always spends the time with them even after the busy and tired day at work. He will make sure the kids are on the right track in school, piano and tennis. Every day he will train them to play tennis, sit with the kids to make sure they are practicing piano and working with them on their homework. On the weekend, he makes sure he does spend the time with them. They always have activities together. In summer or school break, he will have plan for the kids

to go to visit different place, especially Ladda's family in Thailand. He said he would like to spend every minute with them since the kids will grow up and they will not stay with him anymore. He is the adopted kid so the family is everything to him. I know it will be heartbreaking for him if he can't spend the time with them anymore.

Ex. 7, K. Kitiyakara letter at 1; *see also* Ex. 6, H. Vu letter at 2 ("Through observing Hyunjin's time and efforts spent with his own kids, that has influenced me to rethink my relationships with my own children and the time I spend with them. As a result, I believe I have become a better father, and my children definitely have 'Uncle Hyunjin' to thank for that."); Ex. 9, D. Katsky letter at 2 ("Above all else, Hyunjin is devoted to his children and prioritizes them. He is a passionate father and gives his time as well as his love to his children."); Ex. 10, N. Kitiyakara letter at 1 ("One thing that impresses me the most about Hyunjin is that he is the most dedicated father. He is a true inspiration for me to become a better father for my children. . . . He has taught us to spend most of our valuable time with our children now while they are growing up and to try our best to prepare them for the future. I have spent almost every single day tutoring math for my children mainly because I was inspired by what he has done for his children."); Ex. 11, F. Fortson letter at 1 ("Hyunjin seemed to have a plan to do everything possible to teach and contribute to the improvement, development and education of his children, and not rely solely on the public education system. I admire his focus and dedication to his family."); Ex. 12, S. Gandhi letter at 1 ("Since [his kids] were little, he has been involved in all aspects of their school and extracurricular activities. He taught both his children how to play tennis and still coaches them 4 to 5 times a week and at tournaments. It is not unusual for me to be at his home and find him working with his children on their homework or involved with his daughter's piano lessons."); Ex. 13, C. Fritz letter at 1 ("His children are now his top priority. He is the one who takes them to their piano or tennis lessons."); Ex. 14, L. Katsky letter at 1 ("I have no doubt his children are the two most important things in the entire universe to him, and he prides himself on

nurturing and caring for them.”); Ex. 15, D. Morris letter at 1 (“Hyunjin has always devoted much of his time to his children, and I can say with confidence that he is a truly terrific father. An accomplished tennis player, Hyunjin has personally taught both of his children to play tennis.”); Ex. 16, Janet Marley letter at 1 (“Hyunjin is one of the most engaged parents I know. He devotes many hours to teaching his children tennis and spending quality time with them.”); Ex. 17, H. Eicholtz letter at 1 (“As the head of his family, Hyunjin is very involved with all of his children’s activities, homework, [and] personal development.”); Ex. 18, M. Morris letter at 2 (“For a period of time, Hyunjin took M■■■■ to gymnastics lessons Not to knock other dads, but Hyunjin was usually the only father cheering on his child, amidst a sea of moms.”); Ex. 19, M. Truman letter at 1 (“Hyunjin is one of those magic fathers who has devoted himself to personally spending as much time as he could with his children.”).

Hyunjin’s extraordinary relationship with M■■■■ and H■■■■ make his impending incarceration especially difficult. *See infra* at 22-23 (citing Ex. 1, H. Lerner letter at 3; Ex. 2, L. Lerner letter at 2-3; Ex. 6, H. Vu letter at 2; Ex. 12, S. Gandhi letter at 1-2; Ex. 16, Janet Marley letter at 2; Ex. 22, Jack Marley letter at 1).

E. Hyunjin’s Support for His Family and Friends

Perhaps as a result of his difficult childhood in South Korea, Hyunjin is extraordinarily committed to his family and he makes every effort to spend time with them. Creating family memories for his immediate and extended family is a priority for Hyunjin. *See* Ex. 1, H. Lerner letter at 6 (“[A] rich life is a life of health, having shared experiences with the people that I love, and taking care of the people that I love.”). For example, in 2012, Hyunjin organized a short family trip to St. John with Ladda, their children, his father, and his 99 year old maternal grandmother, who left the continental United States for the first time. *See* Ex. 3, R. Lerner letter at 2-3; Ex. 8, Julia Fritz letter at 1 (“Hyunjin took me on my first out of the country trip with the

family [to St. John], with all consideration going to me. I had the best room and the great grandchildren were made to understand that I was his top priority. We only visited places that had wheelchair access, which limited the others, but was in deference to me. He was always making sure I was comfortable.”).

Hyunjin’s grandmother, who is now 104 years old, describes how Hyunjin makes her feel “special” and “go[es] out of his way to include [her] and show [her] that [she is] valued”:

I am in Florida in the winter, now, as my daughter, Carol, has retired and brings me down, and I can finally spend time with Hyunjin and his family. Hyunjin always invites me over to spend casual time with his family. I’m also included when neighbors and friends are over his house. This family time is especially important to me!

Ex. 8, Julia Fritz letter at 1.

Ladda explains that Hyunjin is equally close to their family in Thailand, and has worked hard to develop and maintain a relationship with them:

Near to my heart, my family in Thailand loves him. Hyunjin has made numerous trips to Thailand to spend time with my family. They can’t speak English, so Hyunjin has made a real effort to learn Thai to communicate with them. Every time when we go to Thailand, we take my family on . . . short trips. This has been a tradition and they look forward to these trips with us.

Ex. 2, L. Lerner letter at 3; *see also* Ex. 3, R. Lerner letter at 3 (“[H]e has done everything necessary to bring his in-laws to the United States from Thailand for extended visits that would have been impossible if he hadn’t taken the initiative[.]”); Ex. 12, S. Gandhi letter at 2 (“He has taught himself Thai so that he can communicate with his mother in law who speaks only Thai and visits for months at a time.”).

Hyunjin’s family and friends know that he will be there to assist them during their times of need. Ladda appreciates this quality about him:

One of the things I love about my husband is that he cares deeply about my family and friends and makes them feel special. He goes out of his way to do things for them. I remember in the early years of our marriage, my Thai friend in Los

Angeles made a mistake, drove into Mexico while visiting San Diego with her boyfriend and couldn't get back to her home in Los Angeles due to Visa issues. She was stuck in Tijuana for over a week, was extremely afraid, and didn't have enough money to fly back to Thailand. Hyunjin drove me several times to visit and comfort her, then bought her a plane ticket to Thailand so that she can be reunited with her family.

Ex. 2, L. Lerner letter at 2. Hyunjin's friend, Sunil Gandhi, appreciates the time that Hyunjin spent with Gandhi's son during a difficult time in his son's life:

My son has severe dyslexia. While he was in middle school, he was bullied and had low self-esteem and deep depression. This was an extremely difficult time for our family and I spoke with Hyunjin often for support and advice. It was Hyunjin, by coaching him on his tennis game, working out with him and listening to him, who helped him through those difficult years by giving him understanding and worth. He was an excellent role model for him in a way that was difficult for me. My son is in college now and still values his relationship with Hyunjin. I cannot begin to express how grateful I am for this.

Ex. 12, S. Gandhi letter at 2; *see also* Ex. 20, I. Gandhi letter at 1 (Sunil Gandhi's son, Ishan, describing "how much [Hyunjin] helped with my self confidence in a dark time [in] my life");

Ex. 21, S. Malosky letter at 2 ("With the recent Hurricane Irma, Hyunjin showed up at my house without being asked and insisted on helping me with the difficult job of placing shutters and plywood on the 2nd story windows. In my house this requires using a ladder and climbing out onto a tile roof that is pitched and the tiles are not easy to get traction on. Hyunjin refused to allow me onto my own roof, recognizing that at this point in time falling off the roof would be more damaging to my ability to work than to his. I have a number of friends in my life, but only Hyunjin shows up unannounced when he knows [I] need help and then insists on doing the most difficult part of the job himself."); Ex. 16, Janet Marley letter at 1 ("He has been a neighbor that I can rely on to help me in a pinch, or allow my son to spend the night while I take continuing ed classes. Our children rely on him for moral support, advice, and so much more."); Ex. 17, H. Eicholtz letter at 1 ("He and his wife have been helping a Vietnamese friend, Doi, who is an elderly widow. She has numerous health issues, and needs assistance with doctor visits,

household chores and maintenance. Despite their own busy schedules, Hyunjin and his wife, Ladda make time weekly to help her any way they can.”); Ex. 11, F. Fortson letter at 2 (“While preparing my home for Hurricane Irma, he called to offer to help with boarding our windows, despite the fact he still had to board-up his own home.”).

III. OFFENSE CONDUCT

In 2006, Hyunjin left Korn Ferry for Bankrate, a marketing and financial publishing company that aggregates and publishes information regarding consumer financial products, including mortgages, credit cards, insurance, and automobile loans. Superseding Information at 1, ¶ 1; PSR ¶¶ 14, 89. Hyunjin joined Bankrate as a Vice President of Finance, and he remained in that position until he left the company in September 2014. PSR ¶ 89.³ While they changed over time, Hyunjin’s principal responsibilities entailed reviewing documents and schedules related to Bankrate’s quarterly SEC filings and, prior to 2012, working with Bankrate’s auditors in connection with their quarterly reviews and annual audits.

As Vice President of Finance, Hyunjin reported directly to Bankrate CFO Edward DiMaria. Acting on DiMaria’s instructions, Hyunjin directed line accountants at Bankrate to make adjustments to Bankrate’s books and records. *See* PSR ¶ 30;⁴ DiMaria Indictment at 9, ¶ 5 (“DiMaria generally directed fraudulent manipulation of Bankrate’s financial statements through interstate telephone calls and emails to Lerner and others at Bankrate’s corporate headquarters in the Southern District of Florida.”). For example, on DiMaria’s instructions, Hyunjin directed Bankrate’s finance department to improperly book routine fees and expenses as “deal related

³ Bankrate placed Hyunjin on administrative leave in September 2014 and he left the company in May 2015.

⁴ On December 22, 2017, the Probation Department noted in an Addendum to the PSR that “the PSR was revised to include the related case information of DiMaria” and “[t]he offense conduct and role assessment sections were also revised and updated to include DiMaria’s information.” Addendum to the Presentence Report dated Dec. 22, 2017, at 2.

expenses” or “deal costs.” PSR ¶ 23; *see* DiMaria Indictment at 11, ¶ 13. Because two of Bankrate’s earnings metrics excluded “deal related expenses,” these adjustments fraudulently inflated those publicly reported figures. PSR ¶¶ 21-23.

Also on DiMaria’s instructions, Hyunjin maintained a “cushion” spreadsheet that kept track of unnecessary and unsupported expense accruals. *See* PSR ¶ 26; DiMaria Indictment at 9, ¶ 7 (noting that this spreadsheet was referenced internally as “Ed’s cushion”). These expense accruals were later released to enable Bankrate to report quarterly financial results dictated by DiMaria. *See* PSR ¶ 26; DiMaria Indictment at 10, ¶ 9. Similarly, while preparing Bankrate’s financial statements, Hyunjin made adjustments to Bankrate’s revenue and expense accounts in order to hit revenue or earnings figures set by DiMaria. *See* PSR ¶¶ 30, 32; DiMaria Indictment at 12, ¶ 16.

Finally, in accordance with DiMaria’s instructions, Hyunjin concealed false and misleading entries from Bankrate’s auditors. PSR ¶ 36; *see id.* ¶ 38 (noting that, in March 2011, DiMaria chastised Hyunjin when he thought Hyunjin had sent Bankrate’s auditors a spreadsheet to that might alert them to unsupported entries); DiMaria Indictment at 14, ¶ 21 (same).

IV. HYUNJIN’S SEC SETTLEMENT AND COOPERATION WITH THE JUSTICE DEPARTMENT

In August 2012, the SEC began to investigate issues relating to Bankrate’s financial statements for the second quarter of 2012. Two years later, in August 2014, Hyunjin was called to testify at the SEC, and he did so for three days.

Seven months after Hyunjin testified, the SEC decided to bring charges against him and others in connection with the misconduct at Bankrate. On July 22, 2015, before the SEC filed a complaint against him, Hyunjin agreed to settle with the agency. In connection with that settlement, Hyunjin paid a civil penalty of \$150,000, disgorged \$30,045 in proceeds from his

sale of Bankrate stock,⁵ and paid prejudgment interest of \$2,571. *See* Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act Of 1933, Sections 4C and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, *In the Matter of Hyunjin Lerner, CPA*, No. 3-16787, at 4, 12 (Sep. 8, 2015), *available at* <https://www.sec.gov/litigation/admin/2015/33-9902.pdf>. Hyunjin also agreed to be barred from serving as an officer or director at any public company for a period of five years. *Id.* at 12.

Hyunjin has also provided multiple proffers to the Justice Department in connection with the accounting fraud at Bankrate. By pleading guilty, Hyunjin accepted full responsibility for his actions. He knows that there is no justification for his conduct and feels deep remorse over the pain that he caused his own family and the damage that has been inflicted on Bankrate's investors. As Hyunjin writes in his letter to the Court:

I know that my actions hurt many people, including my co-workers at Bankrate, the company's shareholders, and my family and friends. I betrayed the trust that Bankrate's management and the investing public put in me. I also betrayed the trust that my family had in me to do the right thing and living a righteous life. Instead, their husband, father, son, brother, and friend is forever a felon.

Ex. 1, H. Lerner letter at 6; *see also* PSR ¶ 46. Hyunjin's mother describes her son's enduring regret and shame:

It took Hyunjin a full-year to find the courage to tell us about the SEC case and for years, in every (and I mean every) conversation, Hyunjin would say how sorry he was that he had let us down. He has lived the penalty for years of knowing that his children, who idolize him, must be told what is going on. He knows that his 104-year-old grandmother probably will die while he is in prison. He worries that his wife, who comes from Thailand and has never been in charge of the

⁵ Like many Bankrate employees, Hyunjin received stock grants and options as part of his compensation. Thus, in June 2011, in connection with Bankrate's IPO, Hyunjin received 1,500 shares of restricted stock and 30,000 options. Hyunjin sold 1,103 shares of the restricted stock and exercised 8,125 options on August 6, 2012 (*i.e.*, after release of the financial statements for the second quarter of 2012 and before the disclosure of the fraud).

family's affairs (e.g., homework, business matters, having an income), may not find a way to provide for the family. He has become spiritual and is battling the stress. He is very ashamed of what has happened.

Ex. 4, Jan Fritz letter at 3.

V. APPLICATION OF THE SENTENCING GUIDELINES

In the PSR, the Probation Office computed Hyunjin's unadjusted Offense Level as a 35 reflecting a Base Offense Level of 6 because the substantive offenses underlying the conspiracy to which Hyunjin pleaded guilty involved fraud, *see* U.S.S.G. §§ 2B1.1(a)(2), 2X1.1(a); a 22 level increase for a loss of between \$25 million and \$65 million, *see id.* § 2B1.1(b)(1)(L); an additional two level increase because the offense involved ten or more victims, *see id.* § 2B1.1(b)(2)(A)(i); a two level increase because Hyunjin intentionally directed others to make undisclosed accounting entries in order to impact a public company's books, which involved sophisticated means, *see id.* § 2B1.1(b)(10)(c); and a three level enhancement because Hyunjin was a manager or supervisor (but not an organizer or leader) of criminal activity that involved five or more participants, *see id.* § 3B1.1(b); *see also* PSR ¶¶ 40, 51, 54.

After applying a three level reduction for acceptance of responsibility pursuant to U.S.S.G. §§ 3E1.1(a) and (b), PSR ¶¶ 58-59, the Probation Department concluded that the adjusted Offense Level is 32, PSR ¶ 60. Hyunjin is a first-time offender and thus falls in Criminal History Category I, PSR ¶ 63, which results in a Guidelines range of 121 to 151 months. *See* U.S.S.G. § 5A. Because this range exceeds the statutory maximum term of imprisonment for a violation of 18 U.S.C. § 371, the applicable Guidelines sentence is 60 months. *See* U.S.S.G. § 5G.1.1(a); *see also* PSR ¶ 105.

In the plea agreement, the parties agreed to "recommend that the Court neither depart upward nor downward under the Sentencing Guidelines when determining the advisory Sentencing Guidelines range in this case," but reserved the right to argue for a variance under 18

U.S.C. § 3553(a). *See* Plea Agreement ¶ 13. The Government further agreed to evaluate Hyunjin’s cooperation and, if it concludes Hyunjin provided substantial assistance in the investigation and prosecution of others, to consider moving for a sentence reduction either pursuant to § 5K1.1 of the Guidelines or pursuant to Rule 35 of the Federal Rules of Criminal Procedure. *See id.* ¶ 9.

As we have noted, Hyunjin’s boss, Edward DiMaria was indicted on December 19, 2017. We expect that Hyunjin will testify at DiMaria’s trial and that the Justice Department will provide more detailed information to the Court about Hyunjin’s cooperation after DiMaria’s case has been resolved.

VI. A DOWNWARD VARIANCE IS WARRANTED UNDER 18 U.S.C. § 3553(a)

Following *United States v. Booker*, 543 U.S. 220 (2005), it is clear that the Guidelines are only advisory. *See United States v. Hossain*, No. 15-cr-14034-DMM, 2016 WL 70583, at *4 (S.D. Fla. Jan. 5, 2016) (“After Booker, there is no presumption that the Guideline sentence should apply . . .”). “Although the Guidelines remain ‘the starting point and the initial benchmark’ for sentencing, a sentencing court may no longer rely exclusively on the Guidelines range; rather, the court ‘must make an individualized assessment based on the facts presented’ and the other statutory factors.” *See Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (citing *Gall v. United States*, 552 U.S. 38, 49, 50 (2007)). The Guidelines “continue to play an important role in sentencing, but they do not and cannot play a decisive one.” *United States v. Matchett*, 837 F.3d 1118, 1121 (11th Cir. 2016). Rather, “[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.” *Nelson v. United States*, 555 U.S. 350, 352 (2009) (emphasis in original). Indeed, the Court “may vary from Guidelines ranges based solely on policy considerations, including disagreements with the

Guidelines.” *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quotations and citations omitted).

Under § 3553(a), the district court must impose a sentence “sufficient, but not greater than necessary,” (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.” 18 U.S.C. § 3553(a)(2); *see United States v. Ross*, 755 F. Supp. 2d 1261, 1262 (S.D. Fla. 2010). In addition to these mandatory factors, § 3553(a) also requires the district court to consider “the nature and circumstances of the offense and the history and characteristics of the defendant;” “the kinds of sentences available;” the Guidelines and any policy statements; “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct;” and “the need to provide restitution to any victims of the offense.” We respectfully ask the Court to consider these factors, and to impose a sentence below the applicable 60 month statutory maximum.

A. Hyunjin’s History and Characteristics

Section 3553(a)(1) directs the Court to consider the history and characteristics of the defendant. As described above, *see supra* at Part II, Hyunjin Lerner has lived a remarkable life, overcoming the adversity of his economically and emotionally impoverished childhood in South Korea to become a devoted son and brother, loving husband, committed father, and loyal friend. The letters to your Honor describe Hyunjin as “a strong source of encouragement and support to [his sister and her] two daughters . . . who know him as a dependable, responsible uncle,” Ex. 5, K. Lerner letter at 1; “a true inspiration for [a friend] to become a better father for [his] children,” Ex. 10, N. Kitiyakara letter at 1; “a genuinely warm and real friend, phenomenal father and

husband,” Ex. 11, F. Fortson letter at 2; “a good man, [and someone who] loves his family and friends, and is loved by everyone who meets him,” Ex. 17, H. Eicholtz letter at 2; “a person with great appreciation for living, a joy of life really, who is also an intellectual, a thoughtful, considerate, and loving individual,” Ex. 13, C. Fritz letter at 2; “like a second father to [a friend’s] children,” Ex. 21, S. Malosky letter at 1; “a fantastic father and husband,” Ex. 23, A. Malosky letter at 2; “a neighbor [one] can rely on to help me in a pinch [to] allow [her] son to spend the night while [she] take[s] continuing ed classes,” Ex. 16, Janet Marley letter at 1; and “a great father, loving husband and loyal friend,” Ex. 18, M. Morris letter at 2. Hyunjin’s commitment to his family and friends reflects upon his positive character and his willingness to put the interests of others ahead of his own.

Perhaps most importantly, Hyunjin is vitally important to his wife and his children. *See* Ex. 2, L. Lerner letter at 1 (describing Hyunjin as “my rock and my best friend”); Ex. 3, R. Lerner letter at 1 (“But the most important thing I can say about Hyunjin is that he’s been a constant source of security and comfort for his wife of almost 20 years and a superb role model for both their children. They all believe they can depend heavily on him and trust him implicitly. Without exception, he’s managed family affairs with great care and patience. They are always top priority.”).

Many of the letters submitted to the Court describe Hyunjin’s commitment to his children and his involvement in their lives. *See, e.g.*, Ex. 19, M. Truman letter at 1 (describing Hyunjin as “one of those magic fathers who has devoted himself to personally spending as much time as he could with his children”); *see also supra* at 10-12. Not surprisingly, Ladda is concerned that Hyunjin’s incarceration will have a devastating impact on her and their children:

Putting him in jail will hurt our family. The kids think of their Dad as their Hero. He’s been assuring me all the time that things will be okay and that we will make

it through, but I feel weak, hopeless, sad and angry. My mother has just come from Thailand to be with us during this difficult time.

Ex. 2, L. Lerner letter at 3. Hyunjin's children rely on him for support in connection with difficulties they face. *See* Ex. 1, H. Lerner letter at 3; Ex. 2, L. Lerner letter at 2; *see also* Ex. 12, S. Gandhi at 1-2; Ex. 6, H. Vu at 2 ("As Hyunjin faces the consequences of his actions, it is M [redacted] and H [redacted] who I am most concerned with as I know how close they have been with their father."); Ex. 16, Janet Marley letter at 2 ("Although the children will be with their mother, Ladda, the majority of discipline and structure come from the father. I know the family well, and know what a negative impact his absence will have on the dynamic of their family, especially with the teenage years that they are entering."); Ex. 22, Jack Marley letter at 1 ("I feel that separation from his family is going to devastate the kids. The amount of pressure it will be on his wife will be very difficult. Hyunjin is the glue that keeps his family together, disciplined, and productive.").

Moreover, Hyunjin's incarceration will severely impact his family's financial stability. His mother notes that Hyunjin "worries that his wife, who comes from Thailand and has never been in charge of the family's affairs (e.g., homework, business matters, having an income), may not find a way to provide for the family." Ex. 4, Jan Fritz letter at 3. Ladda recently became a real estate agent, but their financial situation remains precarious and Hyunjin and Ladda have been using their savings and retirement accounts to pay for their household expenses. Ex. 2, L. Lerner letter at 3.

B. The Nature and Circumstances of the Offense

Sections 3553(a)(1) and 3553(a)(2)(A) direct the Court to consider the nature and circumstances of the offense, and the need for the sentence imposed to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

First, Hyunjin is a first-time offender. While we do not minimize the seriousness of Hyunjin's actions in this case, we note that those actions stand in sharp contrast to his otherwise upstanding history of law abiding conduct. *See* Transcript of Sentencing Hearing, *United States v. Barroso*, No. 12-cr-20423-KMM, at 116, 127 (S.D. Fla. Apr. 18, 2013) (Dkt. 370) (“Barroso Tr.”) (granting downward variances in sentencing two defendants who were first-time offenders).

Second, Hyunjin's role in the conspiracy was clearly subordinate to DiMaria, Bankrate's CFO. As discussed above, *see supra* at Part III, Hyunjin did not devise the scheme but rather participated only at DiMaria's direction. Hyunjin recognizes that his failure to resist DiMaria's directions does not excuse his conduct, but the fact remains he acted on his boss's instructions. *See* Barroso Tr. at 116 (granting a downward variance where defendant's “role in the offense was not as serious as the role of some of the other defendants in this case”).

Third, Hyunjin has sought to ameliorate the impact of his conduct by cooperating with the Justice Department.

VII. ADDITIONAL SENTENCING CONSIDERATIONS

The PSR states that, under § 5E1.2(c)(3) of the Guidelines, the fine range for offense level 32 is \$17,500 to \$175,000. PSR ¶ 111. Notably, it concludes that, “[b]ased on defendant's present financial situation and considering he has two children to support, he does not appear to have the ability to pay a fine in addition to restitution, which is mandatory.” *Id.* ¶ 103. We further note that Hyunjin paid a \$150,000 penalty to the SEC and disgorged \$30,045 in proceeds from the sale of Bankrate stock and options. We ask the Court to consider Hyunjin's financial situation and the penalty he paid to the SEC when determining the financial aspects of his sentence.

VIII. CONCLUSION

Hyunjin fully acknowledges his role in the conspiracy and understands the serious nature of the crime that he has committed. He deeply regrets the harm that he caused to Bankrate's shareholders. We do not minimize Hyunjin's responsibility for his role in the conspiracy, but we respectfully request that the Court impose a sentence that credits Hyunjin's good character and his cooperation with the Justice Department.

Dated: January 5, 2018

Respectfully submitted,

By: /s/ Daniel Rashbaum
Daniel Rashbaum
Florida Bar No. 0075084
Email: drashbaum@mnrlawfirm.com
MARCUS NEIMAN & RASHBAUM LLP
One Biscayne Tower
2 South Biscayne Blvd, Suite 1750
Miami, FL 33131
Telephone: (305) 400-4261

By: /s/ Lawrence Iason
Lawrence Iason (*pro hac vice*)
Email: liason@maglaw.com
MORVILLO ABRAMOWITZ GRAND
IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
Telephone: (212) 856-9600
Fax: (212) 856-9494

Attorneys for Defendant Hyunjin Lerner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Sentencing Memorandum on Behalf of Hyunjin Lerner was served via ECF on January 5, 2018 on all counsel of record on the service list.

/s/ Daniel L. Rashbaum
Daniel L. Rashbaum