

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

v.

MARK NORDLICHT, et al.,

Defendants.

Case No.: 1:16-cr-00640-BMC

ORAL ARGUMENT REQUESTED

**DEFENDANT DANIEL SMALL'S SENTENCING MEMORANDUM**

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Defendant Daniel Small, by and through his counsel, respectfully submits this memorandum and accompanying exhibits, including letters of support, to assist the Court in determining the appropriate sentence to impose at the November 15, 2023 sentencing hearing.

**PRELIMINARY STATEMENT**

We respectfully submit that, given the unique and unusual circumstances of this case, a non-incarceratory sentence, with no period of additional supervision, and no monetary penalty (apart from the mandatory \$200 special assessment) is “sufficient, but not greater than necessary” to achieve the aims of sentencing. 18 U.S.C. § 3553(a) (“Section 3553(a)”).

Mr. Small is the rare defendant that stands before this Court for sentencing in Zone A of the Sentencing Table, with a Total Offense Level of 5, in Criminal History Category I, and with an advisory Guideline Range of 0–6 months. Notably, because he does not have any criminal history points and none of the aggravating factors suggesting a likelihood of recidivism that the Sentencing Commission identified in new U.S.S.G. § 4C1.1 apply to him, he falls within the newly added commentary to the Guidelines that a sentence that does not involve a term of imprisonment is “generally appropriate.” U.S.S.G § 5C1.1 Application Note 10(A). What is more, as of the time of this submission, Mr. Small has been subject to pretrial supervision, without incident, for nearly seven years.

Given this advisory range and the facts and circumstances here, our proposed sentence is appropriate. This is an exceptional case. In the Indictment, the Government accused Mr. Small and others of “engag[ing] in a scheme . . . to deprive the Bondholders of the proceeds of the sale of the vast majority of Black Elk’s most lucrative assets . . . .” (ECF No. 1 (Indictment) ¶ 73.) The jury plainly rejected this theory when it acquitted Mr. Small of conspiracy to commit wire fraud. Moreover, as the Court found, there were no victims and there was no loss. (*See* ECF No.

1005; ECF No. 1003 at 52 n.14; *see also* Presentence Investigation Report (“PSR”) ¶ 60.) Accordingly, accepting the jury’s verdict for the purpose of sentencing,<sup>1</sup> Mr. Small was convicted of a fraud offense involving a single transaction (the Consent Solicitation) with no actual loss, no intended loss, and no victims. (*See* ECF No. 1005; ECF No. 1003 at 52 n.14; PSR ¶ 60.) Ordinarily, such a case would not even have been brought. U.S. Dep’t of Just., Just. Manual § 9-43.100 (2020) (“Prosecutions of fraud ordinarily *should not be undertaken* if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts.” (emphasis added).) Under these circumstances and with these advisory Guidelines, we respectfully submit that the imposition of a sentence involving further incarceration and/or supervision in this case would be inappropriate.

The other Section 3553(a) factors likewise support our proposed sentence.

*First*, our proposed sentence provides for a just punishment because it recognizes that Mr. Small has already been, and will continue to be, subject to collateral consequences that have affected, and will continue to affect, him. As such, further incarceration and/or supervision are unnecessary. *Second*, it furthers the sentencing goals of deterrence, protection of the public, and rehabilitation because it accounts for the fact that Mr. Small’s professional prospects have been significantly curtailed (in addition to other collateral consequences of his conviction) and that general deterrence has been accomplished through, *inter alia*, Mr. Small’s conviction itself and the highly publicized nature of this case. *Finally*, further incarceration and/or supervision would create unwarranted disparities between Mr. Small and similarly situated individuals.

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<sup>1</sup> Mr. Small reserves all rights regarding his conviction and the Court’s denial of his post-trial motions.

As to punishment, in addition to being branded a felon—which is, itself, punishment with life-altering consequences—Mr. Small has already incurred substantial collateral consequences as a result of this case and his conviction, including the loss of his job, financial ruin, health issues, and the notoriety and shame that accompany a high-profile criminal prosecution.

As to deterrence, there is no risk of recidivism. Accepting the jury’s verdict for purposes of sentencing, the conduct at issue is an aberration for Mr. Small, who has otherwise lived a good, honorable, and law-abiding life devoted to his family, friends, and community. Also, there is no evidence that imposing further incarceration or supervision would have a general deterrent effect, as empirical evidence demonstrates that even incarceration is an ineffective general deterrent.

Section 3553(a)’s proportionality principle—which seeks to avoid unwarranted sentencing disparities between relevant individuals—also supports the conclusion that no further incarceration or supervision should be imposed. As noted in the PSR, Mr. Small’s one-time co-defendant and alleged coconspirator Jeffrey Shulse—who, like Mr. Small was intimately involved in the Black Elk consent solicitation process—received a deferred prosecution agreement and will not be sentenced. (PSR at 3.) That Mr. Shulse has avoided liability is particularly notable in light of the fact that, in previous filings, the Government has described Mr. Shulse as having “played a pivotal role in the Black Elk Bond Scheme from within Black Elk” and argued that “[Mr.] Shulse was critical to the success of the Black Elk Bond Scheme.” (ECF No. 226 at 9.)

As to the issue of a financial penalty, there is no restitution because there is no loss in this case and, as the Probation Department (“Probation”) has found without objection, Mr. Small is unable to pay a fine. No financial penalty should therefore be imposed.

Accordingly, Mr. Small respectfully submits, consistent with the Section 3553(a) factors, that, in light of this atypical case, a non-incarceratory sentence, with no period of additional

supervision, and no monetary penalty (apart from the mandatory \$200 special assessment) is sufficient but not greater than necessary to achieve the goals of sentencing.

### **MR. SMALL'S BACKGROUND**

Those who know Mr. Small best consistently describe him as a caring and humble man, who puts the needs of others above his own. His loyalty and thoughtful nature is made clear in letter after letter submitted to the Court by those who have known Mr. Small throughout his life. Further, these letters shed light on why this process has been so devastating for him.

#### **A. Mr. Small's Upbringing**

Mr. Small grew up in Florida. His family—which consisted of Mr. Small, his two older brothers, Josh and Gregg, and his parents, Leona and Dave—was “closely-knit” and “loving.” (Ex. 2 (Letter from J. Small).)

Leona and Dave were both proud first-generation Americans. Their parents, Mr. Small's grandparents, emigrated from Eastern Europe to escape the Russian pogroms and Nazi Holocaust. Dave was the first member of his family to attend college, and he eventually graduated from medical school to pursue his dream of practicing medicine. After honorably serving in the United States Army—where he attained the rank of captain—he practiced ophthalmology for more than forty years. Leona worked and supported her parents, and, in addition to raising Mr. Small and his two brothers, she was employed as an office administrator, donated her time to numerous charitable organizations, and was a volunteer tutor to students with special needs in the public school system. Leona and Dave both passed away—within ten weeks—in 2016, shortly before Mr. Small was arrested. (Ex. 2 (Letter from J. Small).)

Leona and Dave instilled in Mr. Small and his brothers a core set of values. Those values included a deep love and respect for this country, a commitment to hard work, and, above all else, a kindness towards others. (Ex. 2 (Letter from J. Small).) As his older brother Gregg explains,

“my brother was raised by parents, who preached hard work, honesty and kindness as the avenues to life’s success. Dan is their greatest disciple.” (Ex. 3 (Letter from G. Small).)

B. Mr. Small as a Child and Adolescent

As a child, Mr. Small was “extremely energetic” with a “magnetic personality.” (Ex. 2 (Letter from J. Small).) Because of his “warm smile” and “kind disposition,” Mr. Small was able to “forge lasting childhood friendships” that have endured to this day. (Ex. 2 (Letter from J. Small).) Indeed, several of Mr. Small’s childhood friends have submitted letters on his behalf. (See Ex. 7 (Letter from A. Zervoudakis); Ex. 9 (Letter from M. Mothner); Ex. 21 (Letter from J. Barron); Ex. 8 (Letter from L. Kommer).) And several traveled across the country to attend Mr. Small’s trial to support him. (See Ex. 7 (Letter from A. Zervoudakis); Ex. 8 (Letter from L. Kommer).)

In sixth grade, although new to his school, Mr. Small “quickly became one of the most well-liked kids in school.” (Ex. 9 (Letter from M. Mothner).) The “other kids were drawn to him by his larger-than-life personality and genuine affability.” (*Id.*)

In high school, Mr. Small was a successful and well-rounded student, attaining status as a National Merit Scholar while lettering in two varsity sports. (Ex. 2 (Letter from J. Small).) He was named to the Arete Society, his high school’s highest honor, based on his character, academic record, and overall contribution to the school (*id.*), and his twelfth-grade history teacher referred to him as a “gentleman and a scholar.” (Ex. 9 (Letter from M. Mothner).) Notwithstanding his academic and athletic success, Mr. Small remained “a loyal friend.” (Ex. 9 (Letter from M. Mothner).) For instance, when one friend was involved in a serious car accident and was required to wear a halo brace and an arm cast, Mr. Small went out of his way to take his friend out and “keep [his] spirits up.” (Ex. 21 (Letter from J. Barron).)



C. Mr. Small at College and Law School

After graduating high school, Mr. Small went to the University of Pennsylvania for both undergraduate and law school.

As an undergrad, while achieving academically and acquiring a close group of friends, Mr. Small remained committed to helping others, including by “volunteer[ing] to teach underprivileged kids.” (Ex. 31 (Letter from R. Lewis).) He also helped his classmates with their studies. Steve Martinez, Mr. Small’s college friend and now a Partner and Vice Chairman at Apollo Global Management, provides a revealing anecdote:

I am a first generation, Cuban American. I grew up in an inner-city community in which my high school curriculum did not adequately prepare me for college academics. During freshman year I struggled immensely with the demands of the college workload. I nearly failed first semester calculus. Dan, who was my hallmate and had placed out of calculus, took the time to teach me how to get organized, properly take notes, review material, and prepare for exams. I obtained an A in second semester calculus and went on to graduate Magna Cum Laude thanks in large part to the foundational support and guidance that Dan selflessly imparted, and to which I am forever grateful. I later went on to earn an MBA from Harvard Business School.

(Ex. 12 (Letter from S. Martinez); *see also* Ex. 30 (Letter from R. Foster) (“He was someone approachable about explaining concepts or debating different ideas. . . . I clearly learned from Dan . . . .”)) Amongst his close friends, Mr. Small earned the nickname “Tower of Power” because “he is a moral and honest man who derives power from the strength of his good character.” (Ex. 31 (Letter from R. Lewis); *see also* Ex. 12 (Letter from S. Martinez) (noting that Mr. Small is “humble, kind, compassionate, conscientious, and has an unparalleled moral compass”).)

D. Mr. Small as a Professional

After graduating, and spending a few years as a law firm associate, Mr. Small transitioned into finance. (*See generally* PSR ¶¶ 104–12.) Between 1995 and 2016, Mr. Small worked at a

variety of financial institutions as an investment banker, securities analyst, research analyst, and portfolio manager. (See PSR ¶¶ 105–11.)

As his former colleagues have attested, Mr. Small displayed a commitment to hard work, conducted himself with integrity and compassion, and was always available to support those around him. For instance, David DiPaolo, his co-worker at Star Mountain Capital, “found Dan to be hardworking, intelligent, and ethical” and “straightforward and honest in his communication.” (Ex. 20 (Letter from D. DiPaolo).)

Likewise, as Peter Mirsky, who was Mr. Small’s college friend and worked with him at SG Cowen and Glenview Capital Management, explained: “[Mr. Small was] always there to help personally and professionally.” (Ex. 29 (Letter from P. Mirsky).) Sungjin Jim Bark, who worked under Mr. Small at Cowen and credits Mr. Small as the reason he was hired, further highlighted Mr. Small’s commitment to helping others professionally:

Dan pushed for me, stating that I had been unlucky and was “a good guy who deserves a second chance.” I believe that if Dan had not done that, my investment banking career would have ended then. Instead, I worked as an M&A banker for over 20 years, rising to be one of the first Asian M&A Managing Directors on Wall Street. Dan believed in hiring people from diverse backgrounds into our M&A group nearly two decades before diversity and inclusion became the mantra on Wall St. During his time at Cowen, he oversaw the transformation of our NYC based group from 4 white men to a 10-banker team that was 40% women and 50% visible minorities. This was at a time when women and minorities each represented less than 20% of Wall St.’s headcount. . . . Dan treated everyone in our group with respect and dignity, no matter their background. He was always supportive of our career development, he mentored us, and he helped us grow as professionals.

(Ex. 17 (Letter from S. Bark).)

Mr. Small’s friends and colleagues have made clear that, because of his integrity and honesty, they would have no qualms working with him notwithstanding his involvement in this case. For instance, Cary Schmelzer, one of Mr. Small’s graduate school friends, stated that he would “have no misgivings about collaborating with Dan in a business setting.” (Ex. 23 (Letter

from C. Schmelzer); *see also* Ex. 10 (Letter from L. Mandell) (“Whatever the outcome, for me and for those who know him, there is not anyone else in the world that I would trust more than Dan. I would give him every password to every account that I owned, I would trust the lives of my children in his hands, [and] I would come to him for advice on any matter . . .”).)

E. Mr. Small’s Commitment to his Friends

Mr. Small’s character is best illustrated by the words of his friends, from all phases of his life. Robert Stebbins, former General Counsel of the Securities and Exchange Commission, current Willkie Farr & Gallagher partner, and Mr. Small’s friend, sums it up: “Dan is a good person with a strong moral compass. I have always known Dan to conduct himself with integrity, honesty and humility.” (Ex. 28 (Letter from R. Stebbins).)

And to a person, Mr. Small’s other friends recognize him as uncommonly selfless, caring, helpful, devoted, and loyal:

- “Dan has never hesitated to put the needs of others ahead of his own. . . . Dan has never hesitated to behave in the most authentic way he knows how – as a kind, generous, supportive, selfless friend, partner, father and human.” (Ex. 26 (Letter from B. Birch).)
- “I have learned of his kindness, compassion, and friendly disposition – always humble, smiling, polite, patient, and showing[] tremendous care to both me, his children, and his friends. I am extremely grateful to know that I can count on him as a truly amazing man, and as my friend.” (Ex. 25 (Letter from C. Green).)
- “Dan brings a self-deprecating humility, humor and hospitality to every encounter, immediately making others feel welcome and at ease. His ability to make and sustain genuine connections with others – rooted, I suspect, in his understanding of the ‘dignity of difference’ – is a quality that I could only hope to emulate. . . . Without exception, Dan’s reflex has been to offer assistance, encouragement and support . . . I am truly grateful for his friendship and would be remiss if I failed to acknowledge his loyalty and constancy throughout . . . .” (Ex. 23 (Letter from C. Schmelzer).)
- “One of my most cherished memories is when my son . . . was born. Amidst the emotional highs of welcoming a new life, Dan’s presence at the hospital, as one of the first visitors, was deeply touching. His joy mirrored ours, reflecting the depth of our bond. It was a continuation of a narrative where Dan has been an essential chapter, often going above and beyond the call of friendship.” (Ex. 11 (Letter from M. Mandell).)

- “This is a man who has lived every day of his life bound by an unwavering code of loyalty to those close to him . . . This is a man who truly places the well-being of others above his own.” (Ex. 9 (Letter from M. Mothner).)
- “I have found Dan to be one of the kindest and most dedicated friends anyone could ask for . . . .” (Ex. 29 (Letter from P. Mirsky).)
- “Dan is a kind, thoughtful friend to us all and has always been a trustworthy and respected member of our community. My entire family will be eternally grateful for Dan’s contributions to our lives and we wholeheartedly endorse Dan’s character and solid moral values that he has exhibited throughout our years of friendship.” (Ex. 24 (Letter from R. Cohen).)
- “Having known him for decades, I believe I can speak for his character. He is honest, religious, steadfast and good. . . . When one of our friends was recovering after debilitating cancer surgery, I raced to the hospital to show support. Dan was already there. Dan sat through chemo sessions and was always a voice of positivity and strength. His philosophy for being present and handling challenging times is an inspiration to me and has made me a better person.” (Ex. 31 (Letter from R. Lewis).)
- “When my father passed away suddenly a few years ago, Dan was extremely supportive and helped me deal with my grief. . . . He is a person with a good and strong heart.” (Ex. 32 (Letter from R. Nelson).)
- “Dan . . . has a heart of gold – he has integrity, he is dependable, he is kind, he is genuine, he is encouraging, and he tries to see the best in everyone. The amount of support and kindness that Dan has shown me over the past few years has been matched only by my immediate family. . . . In the spring of 2020, during the height of the pandemic before there were vaccines available, I was newly pregnant and totally alone quarantining at my parents’ house in New Jersey. . . . Dan knew my situation and did so many things to show that he would be there for me when my family could not be. He constantly offered to take me to medical appointments. He regularly dropped off food so I wouldn’t have to go to the grocery store. And, just by talking with me whenever I needed someone, he was often able to ease many of my anxieties . . . .” (Ex. 15 (Letter from S. Stern).)
- “Dan is the kind of guy who has always looked out for the people around him.” (Ex. 19 (Letter from G. Dunoff).)
- “Dan has always been interested and concerned about the welfare of others. For instance, whenever there is a death in the community, Dan always makes sure to show up at a house of mourning to pay his respects to the deceased and comfort the mourners.” (Ex. 36 (Letter from J. Fraiman).)
- “Dan is one of the nicest, most caring, warmest, and optimistic people I know.” (Ex. 33 (Letter from D. Rudisch).)

- “During the pandemic, Dan would always call to check on my wellbeing and to see if I needed anything. His phone calls have continued to this day. Dan is a very caring and moral person.” (Ex. 35 (Letter from C. Graham).)
- “[F]or the last ten years, [Dan and I] regularly socialize and play cards with a group of other parents. Dan is especially devoted to the widowed member of our group for whom our gatherings is a critical social outlet. Additionally, he had been a dedicated and important mentor to some of the kids in the group and has helped them to go on to achieve success in college.” (Ex. 38 (Letter from L. Berman).)

An apt encapsulation of Mr. Small’s character is his commitment to helping people with special needs. For instance, Mr. Small’s cousin, Jay Press, has “been most moved by a very special relationship [Dan] has with [Mr. Press’s] youngest daughter . . . aged 29, who has special needs. It is a very solid relationship where they text, talk and visit. He is actually one of her best friends.” (Ex. 18 (Letter from J. Press).) Similarly, Mr. Small “makes a point to have weekly lunches with [his childhood friend, Mark Mothner] to help [him] through [his] problems with [his] Autistic son. What’s more, [Mr. Mothner and his wife], at a moment’s notice, . . . can count on Dan to stand in for [them] and keep [their] son safe and calm when [they] both need to be away from home.” (Ex. 9 (Letter from M. Mothner).)

Likewise, Peter Mirsky, Mr. Small’s friend, noted that “[w]hen [his] son was diagnosed with autism, Dan was among the very most supportive people in [his] life, not just emotionally, but through financial backing for the autism causes for which [his] wife and [he] raised money.” (Ex. 29 (Letter from P. Mirsky).) Mr. Small’s friend, former co-worker, and one-time co-defendant, Joseph SanFilippo, who was acquitted following the 2019 trial, has had a comparable experience: “I recall having many conversations with Dan in 2014 when I was going through a very difficult time with my youngest son who suffers from a severe case of autism. Even if just to listen, provide advice or provide reassurance that everything would work out.” (Ex. 5 (Letter from J. SanFilippo).)

F. Mr. Small's Family Life

In addition to being a great friend, Mr. Small is also a loving and dedicated father, partner, and brother.

1. *Mr. Small as a Father*

Mr. Small is a devoted father to three great children. His eldest daughter, Leila, is a fifth-grade teacher at a Jewish day school in New York who works exclusively with children that have learning disabilities. His son, Gideon, recently completed a year as a volunteer service corps member in Brooklyn providing food and services to those in need. And his youngest daughter, Ami, is a college student.

As those around him have observed, throughout his life, and even after the initiation of this protracted, costly, and emotionally taxing prosecution, Mr. Small has remained committed to being a consistent, positive presence in his children's lives:

- “Dan has remained a loving father to his children, showing real emotional intelligence and wisdom. After all, they were enduring these crises, as well. As a father, he helped his three children remain stable and cared for.” (Ex. 4 (Letter from Rabbi J. Kalmanofsky).)
- “Our children have grown side by side, sharing countless moments in Central Park and beyond. Not merely a passive observer, Dan actively participated in their lives, his children, always his priority. His dedication to them has been nothing short of inspirational, with images of our children laughing, playing, or even napping on Dan's lap serving as poignant reminders of his deep familial bond.” (Ex. 11 (Letter from M. Mandell).)
- “We always swapped stories about our children. He often spoke proudly of his children [Leila], Ami and Gideon's achievements in academics, gymnastics and the drums and has always been genuinely interested to hear about my family, including my sons' basketball games.” (Ex. 32 (Letter from R. Nelson).)
- “I have spent numerous family occasions and vacations with Dan, his fiancée, Liz and his three kids, Leila, Gideon and Ami. Dan is a deeply involved parent and friend who prioritizes the needs of his family and his friends above his own.” (Ex. 12 (Letter from S. Martinez).)

- “Dan is an outstanding father and invests heavily in his relationship with his kids. He will do anything for his children.” (Ex. 22 (Letter from M. Doppelt).)
- “Dan was so involved, so loving, so caring, and so actively engaged in everything related to his kids that I sometimes wondered how he was able to earn a living.” (Ex. 19 (Letter from G. Dunoff).)
- “Dan and I first met, as my assistant coach of our daughter’s soccer team. Dan is a devoted and compassionate Father, who didn’t know very much about soccer, but knew the importance of spending quality time with his daughter, as a coach, mentor and Dad.” (Ex. 37 (Letter from J. Wright).)

## 2. *Mr. Small as a Partner*

Mr. Small is a committed fiancé to his life-partner, Liz Rogak. Notably, early in their relationship, Mr. Small was candid about his circumstances and the challenges he was facing:

When we first met there was no hint of Dan’s personal and professional challenges. Dan is naturally friendly and charismatic. That night was no different; to me, he simply seemed happy to be there, to celebrate his friend and to meet me. On our first date a few weeks later, Dan shared a massive shipping container of tsuris, the recent loss of both his parents with whom he was very close, a contentious divorce and unemployment due to a criminal indictment the previous month. I shared my health condition and truncated life story.

Dan was transparent about his indictment and the circumstances of his divorce and readily answered my questions. He explained the basis of their separation, challenges since separating and the obvious impact on his three children. What was being shared would profoundly impact our lives for the next seven years. I saw in him a person who is worthwhile and although I did not ignore what he shared, I sensed his good nature and felt compelled to get to know him. I am grateful that my instincts were right; he has demonstrated time and again to be a person of integrity and strong values.

(Ex. 1 (Letter from E. Rogak).)

Despite these challenges, Mr. Small proved to be a loving, honest, thoughtful, and supportive partner:

Despite Dan’s travails, I feel lucky to have him. He makes the world a better and happier place. Dan could not be more supportive of me and my family. He cares for me deeply and is very proactive in supporting my health. He is present at every visit with my oncologist, asking questions about scan results, treatment options plans, and making sure I continue to get the best care. His sensitivity for my well-being and hyper care during Covid was a matter of course, even driving with

me so I could visit with my parents when other travel was considered too risky for them and me. Dan never misses a family occasion and is close with my parents, siblings, my nieces, nephew and extended family. . . .

I believe one should strive to live with grace and kindness. It is easy to be good natured when life is going your way but acts of kindness when going through personal turmoil are even more telling. Dan is a special man and a wonderful life partner. H[e] is dependable, loyal, kind, funny and loving. . . . Dan has learned and grown all that one could from this experience. I hope and pray that he will not be forced to spend a single day away from me.

(Ex. 1 (Letter from E. Rogak).)

3. *Mr. Small as a Brother*

Mr. Small is also a loving and supportive sibling to his two older brothers. In his letter, his brother Josh described the unwavering support that Mr. Small has provided:

For me personally, Dan has had a profound impact on my life and well-being. I have suffered from anxiety, depression and OCD since the age of 13. Following college, I lived with our parents for over thirty years. In May 2016 our mom unexpectedly passed from complications due to diverticulitis. Ten weeks later our dad, who had been battling late-stage Parkinson’s disease passed. For the first time, I was alone and in a dark place emotionally and mentally. As he has always done, Dan filled the void with his love, encouragement and positivity. Dan was there for me despite facing some of life’s worst upheavals - grieving the death of our parents, defending himself against criminal indictment, embroiled in a contentious divorce litigation, co-parenting two teenagers and an adolescent, and unemployed with massively diminished career prospects. Even today, there is not a week that goes by when we do not talk, and generally we speak multiple times per week. His constant and unwavering love and support helped me move on from the loss of our parents and become an independent, self-reliant person.

(Ex. 2 (Letter from J. Small); *see also* Ex. 3 (Letter from G. Small) (“[Dan] is in frequent contact with our brother Josh, who lives alone and suffers from anxiety and depression. He plays online bridge with Josh, visits him regularly, and recently helped furnish his apartment.”).)

Mr. Small has also been “a beacon of support” for his eldest brother, Gregg, during times of need:

In 2010 while my wife was tragically losing a 13-year battle with ovarian cancer, Dan flew instantly to California to be by my side despite being non-weight bearing



having just had surgery to repair a ruptured Achilles tendon and receiving Coumadin for a blood clot.

(Ex. 3 (Letter from G. Small); *see also* Ex. 36 (Letter from J. Fraiman) (describing the same trip to California).)

In short, even though he is the youngest, Mr. Small is a rock for both of his brothers. (*See* Ex. 19 (Letter from G. Dunoff) (“And when his brothers experienced significant trauma in their lives – Dan never shied away or handled those issues with disregard. He always sought the path to love, empathy, and support.”).)<sup>2</sup>

G. Mr. Small’s Faith

Mr. Small is also a man of faith. Growing up, his mother Leona “would light sabbath candles on Friday night and [Dan and his brothers] were Bar Mitzvah in a conservative Jewish synagogue.” (Ex. 3 (Letter from G. Small).) And today, Mr. Small takes joy in his faith and especially in sharing it with others.

Rabbi Jeremy Kalmanofsky, who leads the synagogue where Mr. Small is a member, has “known Dan for nearly 20 years, as his rabbi, and over time became his personal friend.” (Ex. 4 (Letter from Rabbi J. Kalmanofsky).) Rabbi Kalmanofsky has observed Mr. Small’s commitment to his faith and his community, even during these challenging times, firsthand:

In circumstances when many people might grow more selfish, Dan remains a generous person, concerned for others in his family, his friendship network, and his community. Notably, for instance, during our recent high holidays, Dan volunteered for hours as an usher, helping welcome people into the synagogue, so they could have positive experiences.

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<sup>2</sup> Additionally, Mr. Small is a caring and thoughtful cousin and nephew, going out of his way to connect with his extended family. (*See, e.g.*, Ex. 3 (Letter from G. Small) (discussing Mr. Small’s relationship with his elderly aunts and cousins); Ex. 18 (Letter from J. Press) (discussing Mr. Small’s relationship with his second cousin); Ex. 1 (Letter from E. Rogak) (discussing Mr. Small’s relationship with his elderly cousin).)

(Ex. 4 (Letter from Rabbi J. Kalmanofsky); *see also* Ex. 16 (Letter from S. Merrin) (“He has always been there to help our community acting as an usher for our Synagogue or volunteering when someone needed a hand.”).)

Mr. Small’s friends and family echo the Rabbi’s sentiments. For instance, Mr. Small relishes sharing Shabbat dinners with his daughters and fiancée. (*See* Ex. 1 (Letter from E. Rogak).) Similarly, Mr. Small has grown closer to his friend, Cary Schmelzer, due to their mutual “love for Judaism.” (Ex. 23 (Letter from C. Schmelzer).) And Mr. Small has “made it a point to include [his friends] in family functions as well as family, Shabbat and holiday dinners.” (Ex. 14 (Letter from S. Schnelwar).)

#### H. The Impact of this Case on Mr. Small and His Family

This case—the inception of which coincided with the passing of his parents and a difficult divorce—has taken a tremendous toll on Mr. Small. Although he has attempted to stay strong for his loved ones, the case has had a profound negative impact on him emotionally, psychologically, and financially.

Following his indictment, Mr. Small was not permitted to self-surrender despite repeatedly requesting that he be permitted to do so. Instead, and with no legitimate law enforcement reason for denying Mr. Small’s requests, Government agents arrested him at his apartment.<sup>3</sup> What is more, the federal agents appeared at his home in the early morning on a school day when his children were present. Unsurprisingly, this was a traumatic experience for Mr. Small and his family.

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<sup>3</sup> As noted in the PSR (*see* PSR at 1), Mr. Small was arrested on December 19, 2016 and held in custody until he was released on bail later that day.

After this inauspicious beginning, matters became even worse. As his older brother Josh has witnessed firsthand, Mr. Small has suffered emotionally, physically, reputationally, and professionally due to this prosecution:

I would also like to make you aware of the devastating impact the criminal process has had on Dan. In December 2016 Dan had moved on from Platinum and was working as a Managing Director at an investment fund named Star Mountain Capital. The day of his arrest, he was terminated. . . . These events have had damaging repercussions on his health. Although he will downplay the impact to avoid worrying his family and friends, since being criminally indicted Dan has developed hypertension and suffers from bouts of anxiety and depression.

(Ex. 2 (Letter from J. Small); *see also* PSR ¶¶ 96–98 (discussing hypertension, anxiety, and depression, among other conditions).)

Mr. Small’s other friends and family have similarly observed how taxing this case has been on him:

- “The uncertainty and grind of this seven-year process has been gut wrenching, psychologically and at times physically exhausting for both of us.” (Ex. 1 (Letter from E. Rogak).)
- “Over the past seven years I have seen the physical and emotional toll these accusations have taken on him.” (Ex. 9 (Letter from M. Mothner).)
- “I have also seen the personal cost Dan has had to make throughout this case. He has paid a hefty price economically, socially, and professionally.” (Ex. 26 (Letter from B. Birch).)
- “The Government’s prosecution of Dan has caused him personal anguish and irreplaceable loss, professionally and materially.” (Ex. 27 (Letter from B. Schneider).)
- “The toll these proceedings have taken on him, both personally and professionally, cannot be overstated.” (Ex. 34 (Letter from R. Resnick).)
- “. . . Dan and his family have suffered greatly during this seven-year process.” (Ex. 13 (Letter from R. Shuster).)

The individual best positioned to opine on the challenges that Mr. Small has faced in connection with this case is his friend, former co-worker, and one-time co-defendant, Joseph SanFilippo:

I was indicted along with Dan . . . . After almost 3 years I was fortunate enough to be able to get closure for myself and my family. I can tell you that those 3 years were the most difficult time in my life. When Dan stands before the court on November 15<sup>th</sup> for sentencing, it will have been almost 7 years for him.

(Ex. 5 (Letter from J. SanFilippo).)

Notwithstanding these challenging circumstances, Mr. Small has continued to be the kind, optimistic, thoughtful, and selfless person that he has always been. Given his experience in this arena, the observations of former Assistant United States Attorney for the Eastern District of New York John Nathanson, Mr. Small's law school classmate and friend, are particularly notable:

Dan has always been a kind, warmhearted person, who has deal[t] with difficulties in his life with grace and good humor. I think it speaks very well of him that he has projected (and I think achieved) calmness in his life in the face of his current legal situation, which has of course been such a significant weight for many years.

I believe that Dan has been and will continue to be a good and productive person, regardless of the outcome of [the Court's] sentencing determination, but I ask that as [the Court] make[s] that determination [it] take into consideration what I believe is his honorable character.

(Ex. 6 (Letter from J. Nathanson).) And Mr. Small's other friends and family members echo Mr. Nathanson's sentiment:

- “Despite these challenges [the criminal indictment, his parents' death, and his divorce], Dan has always been [a] devoted father to Leila, Gideon and Ami and remains a source of love, strength and support.” (Ex. 3 (Letter from G. Small).)
- “Despite Dan's near decade-long legal ordeal, it has always seemed as though my problems were top of mind to him.” (Ex. 9 (Letter from M. Mothner).)
- “Despite the difficulty of the last 7 years Dan has remained a man committed to his faith, family, and friends. Especially his three children, whom he loves very much. . . . Despite his own struggles Dan has always been someone that I can talk to regarding my own personal difficulties.” (Ex. 5 (Letter from J. SanFilippo).)
- “Through it all, Dan never failed to show up for others, whether to comfort a friend at the loss of a parent or to celebrate an achievement.” (Ex. 26 (Letter from B. Birch).)
- “Despite the gravity of his own predicament, he has not once wallowed in self-pity in his interactions with me, nor has Dan refused to lend a helping hand because he had his own ‘pressing’ matters to attend to as a matter of priority. . . . I am truly grateful for

his friendship and would be remiss if I failed to acknowledge his loyalty and constancy throughout, notwithstanding his own painful and complicated professional distractions. . . . Dan has – throughout this very trying period – made no excuses and exhibited a resilience and even-keeled nature that are rare and a credit to him.” (Ex. 23 (Letter from C. Schmelzer).)

- “As you can imagine, the arrest completely derailed Dan’s life. He went from a hardworking businessman to someone who could not get a job. His only concern was for his family and the ability to provide for them. He did not think about himself. He and I went to lunch, and he expressed to me that he was open to taking any job. His humility and desire to protect his family are traits that I respect. He puts the needs of his family first.” (Ex. 32 (Letter from R. Nelson).)
- “At his core, Dan is a kindhearted soul. It has been difficult for me to watch him endure legal and resulting professional challenges over these past seven years. I am in awe of his resolve and positive attitude.” (Ex. 14 (Letter from S. Schnelwar).)
- “It has been remarkable to see Dan’s positivity, especially as he has faced an uncertain future, has had limited opportunities to re-engage in the workforce and has faced reputational damage. He does not blame others for what is going on. His approach to life and to this matter is inspiring.” (Ex. 22 (Letter from M. Doppelt).)

Perhaps most tellingly, when Mr. Small heard the jury’s verdict, his first instinct was to console his fiancée Liz:

After the verdict was read, I was in tears, felt gutted and emotionally drained. Yet, who was there to console me? Dan. In the face of reputational ruin and the potential loss of his liberty, what mattered most to Dan was my well-being.

(Ex. 1 (Letter from E. Rogak).)

### **RELEVANT SENTENCING CONSIDERATIONS**

Under Section 3553(a), the fundamental principle of federal sentencing is that the Court should impose a sentence that is “sufficient, but not greater than necessary, to comply with the purposes” of federal sentencing. 18 U.S.C. § 3553(a); *see Dean v. United States*, 581 U.S. 62, 67 (2017) (referring to this “broad command” as the “parsimony principle”). As discussed below, our proposed non-incarceratory sentence, with no period of additional supervision, and no monetary penalty (apart from the mandatory \$200 special assessment) satisfies the Section 3553(a) factors, both alone and in combination.

**I. THE GUIDELINES CALL FOR A NON-INCARCERATORY SENTENCE**

Probation has calculated a Guidelines range for Mr. Small of 0–6 months, and, while not making a recommendation, has noted that Mr. Small’s probation officer “has not identified any factors that would warrant a departure or variance from” this range.<sup>4</sup> (PSR ¶¶ 121, 136.) Although we agree with the *range* that Probation has calculated (i.e., 0–6 months), as noted in our September 22, 2023, letter submitting objections to the PSR (ECF No. 1013 at 10), Mr. Small’s total offense level is 5, not 7. This is because he is entitled to the Adjustment for Certain Zero-Point Offenders set forth in U.S.S.G. § 4C1.1(a) of the guideline amendments effective November 1, 2023.<sup>5</sup> Given Mr. Small’s criminal history score of zero (*see* PSR ¶ 78), Mr. Small’s criminal history category is I (*see id.* ¶ 79). Thus, based on a total offense level of 5 and a criminal history category of I, Mr. Small falls within Zone A of the Sentencing Table.<sup>6</sup> *See* U.S.S.G. Chapter 5, Part A.

According to the commentary to § 5C1.1, as amended, given his eligibility for the § 4C1.1 adjustment and his placement in Zone A, Mr. Small should receive a non-incarceratory sentence. *See* U.S.S.G. § 5C1.1 Application Note 10(A) (“If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment

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<sup>4</sup> Mr. Small submitted his corrections and objections to the PSR on September 22, 2023. (ECF No. 1013.) As of the date of this submission, we have not heard further from Probation, and we have not received anything from the Government in response to the PSR or our corrections and objections thereto.

<sup>5</sup> “The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.” U.S.S.G. § 1B1.11(a).

<sup>6</sup> Even if the two-point adjustment under § 4C1.1 were not applicable (it is), Mr. Small would still fall within Zone A. *See* U.S.S.G. Chapter 5, Part A.

. . . is generally appropriate.”).<sup>7</sup> Put another way, the Sentencing Commission has concluded that, in this situation, Mr. Small should receive a non-incarceratory sentence, and there must be good reason to stray from that norm. As set forth in greater detail below, there is not. Nor is there any reason to subject Mr. Small to any additional supervision given the unusual circumstances of this case.

## II. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE WEIGH IN FAVOR OF A NON-INCARCERATORY SENTENCE

Mr. Small recognizes that violations of the securities laws are serious offenses, and he respects the jury’s verdict (despite his disagreement) and the judicial process. Here, however, the distinctive nature of this case supports our contention that a non-incarceratory sentence is appropriate.

Mr. Small is a first-time, non-violent offender who was convicted for committing a victimless and loss-less crime. (*See* ECF No. 1005; ECF No. 1003 at 52 n.14; PSR ¶ 60.) Indeed, this case is one that would have more naturally been brought as a civil enforcement action. (*See* ECF No. 1003 at 52 n.14 (“The Court made no secret of its view that, in the realm of potential fraud cases to prosecute, it was peculiar to choose to prosecute the Black Elk scheme, especially given, among other things, the lack of any victims. It suggested to the Government that a civil prosecution might be preferable to saddling these defendants with felony convictions.”).)

Critically, in acquitting Mr. Small of conspiracy to commit wire fraud, the jury concluded that he did not intend to deprive the Black Elk bondholders of any money or property. This

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<sup>7</sup> *See also* 28 U.S.C. § 994(j) (provision of the Sentencing Reform Act, which provided the original authority for the Sentencing Commission to promulgate guidelines, noting that “[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .”).

acquittal is particularly notable because it completely undermines the Government's theory of the case. (See ECF No. 1 (Indictment) ¶ 73 (“In or about and between November 2011 and December 2016, the defendants . . . , together with others, engaged in a scheme to defraud third-party holders of the BE Bonds (the “Bondholders”) and *to deprive the Bondholders of the proceeds of the sale of the vast majority of Black Elk's most lucrative assets* through material misrepresentations and omissions about, among other things, Platinum's ownership of and control over the BE Bonds.” (emphasis added)).)

Thus, although a conviction of the securities laws is serious (a fact which Mr. Small recognizes), Mr. Small's conviction relates to an inaccurate disclosure regarding a topic—the number of Black Elk bonds held by affiliates—that was unimportant to the purported victims in this case. As the Court found, “[t]he Government's only evidence of materiality consists of the conclusory claims by two self-interested (and possibly embarrassed) witnesses that the misstatement was ‘important’ to them, but their firms' conduct during the relevant period points decidedly against a finding of materiality.” (ECF No. 1003 at 41; *see also id.* (“The Government's entire theory of materiality was that bondholders ‘felt comfortable holding onto [their] bonds’ because they thought it was ‘unlikely’ the consent solicitation would pass, given it was ‘not economic’ and ‘would not be in the [bondholders] self-interest.’ Fair enough in theory, except that once the result of the vote was announced, nothing happened. *The price of Black Elk bonds did not go down; in fact, it went up.*” (alterations in original) (emphasis added)); *id.* at 42 (“[T]he Court did not find much of Yee and Pulvino's testimony credible.”).)

What is more, the allegedly inaccurate disclosure related to a highly technical issue—whether entities qualified as Black Elk's affiliates, under the terms of the Indenture, for purposes



of amending the Indenture—which no one involved in this case seems to have properly understood.<sup>8</sup>

For instance, Dixon Yee, one of two purported victim-witnesses the Government called, did not “understand what constituted an ‘affiliate’ within the meaning of the indenture.” (ECF No. 1003 at 23.) Mr. Yee’s confusion persisted *even after he reviewed the relevant Indenture language on the witness stand*. (See *id.* (“Yee was also under the impression that ‘affiliate,’ per the terms of the bond indenture, meant equity control. Even after reviewing the relevant language in the indenture while on the stand, Yee testified that an ‘affiliate’ was anyone that owned ‘10 percent [or more] of the voting stock of’ Black Elk.”).) Mr. Yee’s fellow purported victim, Todd Pulvino, likewise lacked a firm grasp on the issues at play in this case. (See ECF No. 1003 at 20 (“But Pulvino’s testimony revealed a misunderstanding of the indenture amendments.”).)

Similarly, Black Elk’s CEO John Hoffman and General Counsel Marizza Piché were aware of Mr. Nordlicht’s intention to use friendlies to amend the Indenture (see DX1-271; DX1-272; DX1-533), sought legal advice from BakerHostetler on that issue (see Tr. 548:23–549:4; Tr. 560:22–561:3), and still did not object to the Consent Solicitation. Indeed, Mr. Hoffman signed officer’s certificates in connection with both consent solicitations—which were the only officer’s certificates actually required under the Indenture (see Tr. 529:3–23)—attesting to the fact that the votes had been conducted in compliance with the Indenture (see DX1-268 at EDNY-PP-MISC-0000091–92; GX-286 at SKV\_BH\_00025005–06), which further evidences his confusion.

Moreover, the lawyers tasked with ensuring that the transaction ran smoothly (and legally) were in over their heads in connection with this complicated topic. In the private consent

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<sup>8</sup> (See ECF No. 1003 at 33 (“As a factual matter, I harbor doubts that Small knew the indenture contained a material misstatement and view the evidence as pointing towards a mistake.”).)

solicitation, lawyers from three sophisticated and well-regarded law firms oversaw the transaction and permitted Platinum entities, including PPVA (which owned 85% of Black Elk’s equity), to cast the *only* votes in that process. (See Tr. 417:6–24; Tr. 423:6–8; GX-266; DX1-268.) With respect to the public consent solicitation, as the Court has observed, Mr. Shearer, “the star witness against [Mr.] Small [and] the person whose job it was to prevent this whole mess” (ECF No. 1003 at 46), “had the puzzle pieces necessary to deduce what was going on” (*id.* at 39), but he did not stop the Consent Solicitation from closing. To the contrary, his firm, BakerHostetler, issued a clean opinion letter. (See GX-286 at SKV\_BH\_00025010–12.)

It also merits mention that none of these individuals involved in the private and public consent solicitations—Mr. Shearer, Mr. Hoffman, Ms. Piché, and the other lawyers from BakerHostetler, Blank Rome, and Emmet Marvin—will receive any punishment in connection with the Indenture and consent solicitation processes.

And notably, unlike his co-defendants, Messrs. Nordlicht and Levy, Mr. Small did not work at Beechwood and was not personally involved in the movement of bonds between Beechwood and Platinum entities. As such, he was differently situated from the other defendants, and this should be considered in imposing his sentence.

All told, these circumstances render this case outside the heartland of fraud offenses and support leniency in sentencing Mr. Small.

### III. OUR PROPOSED SENTENCE IS SUFFICIENT TO PROVIDE A JUST PUNISHMENT

Further incarceration and/or supervision is not necessary to provide just punishment. As an initial matter, being “saddl[ed] . . . with [a] felony conviction” (ECF No. 1003 at 52 n.14), is, itself, meaningful punishment. (See, e.g., PSR ¶ 135 (listing the general consequences of a felony conviction, including, but not limited to, “denial of government benefits” and “the inability to . . .

serve on a jury or to vote”).) Additionally, Mr. Small has already suffered collateral consequences as a result of the Government’s investigation and prosecution of this case. As the Second Circuit has observed, “[i]t is difficult to see how a court can properly calibrate a ‘just punishment’ [under Section 3553(a)] if it does not consider the collateral effects of a particular sentence.” *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009). Moreover, the sustained period of supervision Mr. Small has already been subject to, without incident,<sup>9</sup> was considerable punishment.

The collateral consequences for Mr. Small include the loss of his job, diminished career prospects, and a tarnished reputation. As a result of this case, Mr. Small was fired from Star Mountain Capital. (*See* PSR ¶ 105.) Further, based on his indictment and conviction in this case, Mr. Small is unlikely to work for a bank, financial firm, or any other regulated entity ever again. Accordingly, Mr. Small has had to work as a self-employed independent contractor. (*See id.* ¶ 104.) While he is grateful for the work that he is able to get, working as a contractor is unpredictable and far less lucrative than his previous jobs. (*See id.* ¶¶ 104–11.) Notably, Platinum withheld the vast majority of Mr. Small’s compensation (*see id.* ¶ 116), a matter which remains before the Court in the receivership action. Moreover, despite a right to indemnification, Mr. Small had millions of dollars in outstanding unpaid legal fees as of the time that Probation gathered Mr. Small’s financial information (*see id.* ¶ 115), and that obligation has increased since then.<sup>10</sup>

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<sup>9</sup> Mr. Small has been subject to some form of supervision since his arrest in December 2016 and “has been compliant with all of his release conditions [without any] issues or violations.” (PSR ¶ 4.)

<sup>10</sup> Mr. Small’s applications for payment—both in connection with improperly withheld compensation and attorneys’ fees—in the Securities and Exchange Commission matter, *United States Securities and Exchange Commission et al. v. Platinum Management (NY) LLC et al.*, 16-cv-06848-BMC, remain pending.

Mr. Small also has had to endure the stigma, shame, and humiliation of being convicted in a well-publicized criminal prosecution. Courts have recognized that such stigma, especially in high-profile cases, can properly be considered by a sentencing court. *See, e.g., United States v. Vigil*, 476 F. Supp. 2d 1231, 1315 (D.N.M. 2007) (considering the “incalculable damage to [the defendant’s] personal and professional reputation as a result of tremendous media coverage of his case,” including his “unflattering[] portray[al] as the face of public corruption”), *aff’d*, 523 F.3d 1258 (10th Cir. 2008). This case has drawn significant media attention, and there have been dozens of articles reporting on Mr. Small’s indictment and conviction (and the indictments and convictions of his co-defendants). This notoriety has dramatically impacted Mr. Small’s life. “As you can imagine, the arrest completely derailed Dan’s life. He went from hardworking businessman to someone who could not get a job.” (Ex. 32 (Letter from R. Nelson).)

As his older brother Josh wrote:

Dan has been radioactive in the financial services industry and despite repeated efforts has been unable to find employment in his field of expertise. Most devastating is the grim reality that a man who has always treated others with the utmost compassion, kindness and honesty has had his reputation forever stained.

(Ex. 2 (Letter from J. Small).)

Other collateral consequences include a deterioration in Mr. Small’s health. As Mr. Small’s fiancée notes, “[t]he uncertainty and grind of this seven-year process has been gut wrenching, psychologically and at times physically exhausting for both of [them].” (Ex. 1 (Letter from E. Rogak).) Mr. Small’s brother has also observed the detrimental effect this case has had on Mr. Small’s mental and physical health. (Ex. 2 (Letter from J. Small) (noting Mr. Small’s struggles with hypertension, anxiety, and depression); *see also* PSR ¶ 98 (noting ongoing anxiety and depression).)

IV. **OUR PROPOSED SENTENCE IS SUFFICIENT TO FURTHER THE GOALS OF DETERRENCE, PROTECTION OF THE PUBLIC, AND REHABILITATION**

Our proposed sentence is also sufficient to “afford adequate deterrence to criminal conduct,” and to “protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(B)–(C).

As for specific deterrence, Mr. Small poses no risk of recidivism. Apart from the conduct charged in this case, Mr. Small has lived a law-abiding life and has been a productive and valued member of his community. Indeed, as noted above, Mr. Small has been supervised for nearly seven years without incident. (*See* PSR ¶ 4.) Moreover, even setting aside Mr. Small’s personal circumstances, empirical research has shown that incarceration either has no impact on recidivism or increases the likelihood of recidivist conduct. *See, e.g., United States v. Luna-Jasso*, 2015 WL 1006390, at \*15 (D.N.M. Feb. 19, 2015) (“The weight of the research indicates that incarceration—imposing it at all or increasing the amount imposed—either has no significant correlation to recidivism or *increases* the defendant’s likelihood to recidivate.”).

Our proposed sentence is also sufficient to further the goal of general deterrence. Notably, scholars and courts generally agree that it is the certainty of punishment, not the severity of punishment, that most effectively deters crime. *See, e.g., Luna-Jasso*, 2015 WL 1006390, at \*17 (collecting sources and finding that “[s]tudies universally find that certainty of punishment has a far greater deterrent effect than severity of punishment”). Accordingly, incarcerating Mr. Small will have no greater general deterrent effect than imposing our proposed sentence. For similar reasons, neither would imposing a period of additional supervision.

Furthermore, any goal of general deterrence has been accomplished already through the highly publicized nature of this case. To anyone reading the news, the message that the

Government is seeking to send has been sent, loud and clear, without regard to whether Mr. Small is sentenced to a term of imprisonment or supervision.

The sentencing goal of rehabilitation is also consistent with the imposition of our proposed sentence. While the court is required to consider “the need for the sentence imposed 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)(D), Mr. Small needs no training, medical care, or correctional treatment. He is highly educated (*see* PSR ¶¶ 101–02), he has no substance abuse issues (*id.* ¶ 100), and while he has certain medical issues (*see id.* ¶¶ 95–98), he is currently managing them.

V. **OUR PROPOSED SENTENCE AVOIDS UNWARRANTED SENTENCING DISPARITIES**

Section 3553(a)(6) requires courts to consider the need to avoid unwarranted sentencing disparities among defendants. *See* 18 U.S.C. § 3553(a)(6). Here, the proportionality factor strongly weighs in favor of our proposed sentence.

Mr. Shulse, Mr. Small’s one-time co-defendant and alleged coconspirator, was intimately involved in the Black Elk consent solicitation process and received a deferred prosecution agreement and will not be sentenced. Indeed, Mr. Shulse (1) was the CFO of Black Elk, (2) worked closely with Mr. Shearer, Black Elk’s counsel, in connection with the Consent Solicitation process, and (3) has been described by the Government as having “played a pivotal role in the Black Elk Bond Scheme from within Black Elk” and being “critical to the success of the Black Elk Bond Scheme.” (Tr. 174:10–13; Tr. 218:1–3; Tr. 225:14–16; ECF No. 226 at 9.) Nevertheless, Mr. Shulse avoided criminal liability altogether.

Given how similarly situated Mr. Small is to Mr. Shulse, a sentence imposing further incarceration and/or supervision would result in an unwarranted disparity.

Moreover, although non-defendants are not covered by § 3553(a)(6)'s terms, the fact that, as discussed above, numerous individuals involved in the Consent Solicitation—including Mr. Shearer, Mr. Hoffman, and Ms. Piché—have avoided criminal liability altogether is relevant and supports the imposition of our proposed sentence. Indeed, as the Court has recognized, Robert Shearer—“the star witness against [Mr.] Small [and] the person whose job it was to prevent this whole mess”—was not even charged, even though the “evidence against [Mr.] Small is not so different from that against [Mr.] Shearer.” (ECF No. 1003 at 46.) Simply put, numerous individuals who were similarly situated to Mr. Small with similar information regarding the alleged misstatement in the Consent Solicitation statement face no punishment, and a sentence imposing further incarceration and/or supervision would be fundamentally unfair.

**VI. RESTITUTION IS INAPPROPRIATE AND MR. SMALL IS UNABLE TO PAY A FINE**

Because the Court has found that there was no loss in this case (*see* ECF No. 1005 ¶ 14; *see also* PSR ¶ 58), restitution would be inappropriate. *See, e.g., United States v. Powell*, 831 F. App'x 24, 26–27 (2d Cir. 2020) (“The goal of restitution, in the criminal context, is to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.” (citation and internal quotation marks omitted)); *United States v. Tanner*, 942 F.3d 60, 67 (2d Cir. 2019) (“Because the purpose of restitution is compensatory and 18 U.S.C. § 3664(f)(1)(A) provides that a restitution order is limited to the full amount of each victim’s losses, the restitution order must be tied to the victim’s actual, provable, loss, and the amount of restitution ordered must reflect a reasonable approximation of losses supported by a sound methodology.” (citations and internal quotation marks omitted)).

Further, Probation has found that Mr. Small is unable to pay a fine (*see* PSR ¶ 119 (“Based on the defendant’s financial profile, he appears unable to pay a fine.”)), we agree with Probation’s

assessment, and the Government has failed to object to that finding. Accordingly, the Court should not require him to pay one. *See* U.S.S.G. § 5E1.2(a) (“The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.”).

**VII. CONCLUSION**

For the foregoing reasons, Mr. Small respectfully submits that a non-incarceratory sentence, with no period of additional supervision, and no monetary penalty (apart from the mandatory \$200 special assessment) is “sufficient, but not greater than necessary” to achieve the aims of sentencing.

Dated: New York, New York  
November 1, 2023

By: /s/ Seth L. Levine  
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Paul A. Murphy  
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