UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v. - KALEIL ISAZA TUZMAN, Defendant.	S8 15 Cr. 536 (PGG)

SUPPLEMENTAL SENTENCING MEMORANDUM ON BEHALF OF KALEIL D. ISAZA TUZMAN

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Pursuant to the Court's order of May 5, 2021, ECF No. 1148, Defendant Kaleil Dov Isaza Tuzman respectfully submits this supplemental memorandum in advance of his sentencing hearing scheduled for July 30, 2021, to be considered in conjunction with his original sentencing memorandum (ECF No. 793), as well as the previously submitted letters of support (ECF No. 793 Exs. A-1 through A-75), report of Dr. Jessica Pearson (ECF No. 793 Ex. B), expert report of Professor Allen Ferrell (ECF No. 793 Ex. C), expert declaration of John Young (ECF No. 794), and the attorney declaration of Avi Weitzman (ECF No. 795).

INTRODUCTION

Events over the past nearly six years since Kaleil's arrest and incarceration in 2015 confirm that any sentence of imprisonment should be below the applicable Guidelines range, which the defense contends is 24–30 months' imprisonment. Following his arrest on September 7, 2015, Kaleil spent almost 11 months in Colombian prisons, suffering in terrible ways previously detailed to this Court—including physical assault, sexual assault, extortion and threats of violence to Kaleil's family, and lengthy solitary confinement. Since his return to the United States in late July 2016, Kaleil has spent the last five years on home detention with electronic monitoring in the Southern District of New York, remaining fully compliant with all applicable conditions, including weekly meetings with a court-appointed psychiatrist and social worker.

Notwithstanding his incarceration, his diagnosed PTSD, his lengthy period of home detention, his ruined professional reputation, his conviction and his pending sentencing, Kaleil has worked hard to be a positive and contributive member of society. Over the past five years, he has: done his best to be a remote parent to his 9 year-old daughter who lives abroad; continued to be a loving son, brother and uncle to his family; been a source of empathy and support to a number of friends who have gone through crises; immersed himself in his Jewish spiritual path and religious practice; volunteered his skills and over five thousand hours of his

time to a number of non-profit, socially beneficial causes; co-founded a start-up social impact company to address COVID-related medical information issues; provided pro bono forensic consulting to a U.S. law firm to help recover funds for an individual with five children defrauded of a substantial portion of her savings; worked with teens who have endured abuse and ostracization; led educational programs regarding prison sexual assault; continued working to develop the Obra Pia project previously detailed in our prior submission (*see* ECF No. 793 at 14–15), and hosted an acclaimed, national weekly faith-based radio show highlighting compassion and shared values across sociopolitical and religious divides. Kaleil has already been punished substantially for the offenses of conviction, and his conduct over the past six years demonstrates the transformative effect of his experience in the criminal justice system on his character, and the positive impact that Kaleil has on the world around him.

Further demonstrating his respect for the law is the fact that Kaleil, at his own significant risk, reported to the Colombian authorities the extortion and physical and sexual abuses he experienced at "La Picota." While incarcerated and during the five years since his release from prison, Kaleil has repeatedly provided material and substantial assistance to the Anti-Corruption Unit of the Colombian Attorney General's Office, which ultimately resulted in the indictment of a number of government officials in the Colombian National Prison Institute known as "INPEC" (Instituto Nacional Penitenciario y Carcelario)—including the prior warden of La Picota prison, César Augusto Ceballos—on dozens of charges of extortion, assault and murder. Notably, the Office of the Attorney General of Colombia has confirmed in writing Kaleil's cooperation, describing how he provided, both before and after his extradition, "*specific, detailed* and *verified* information," "extensive statements" and testimony, and "concrete evidence" that "have been of material and substantial assistance to" the Colombian Attorney General's investigation regarding

the "extortion of inmates in the La Picota Penitentiary Center by various high and mid-level prison officials (including the then Director of 'La Picota,' César Augusto Ceballos, and other senior staff)." Ex. B (Moreno Ltr. 1). The Colombian Special Prosecutor noted that Kaleil undertook this assistance "[a]t his own risk and by his own account, without any proffer or exchange for his help," and that his "valuable information" has already resulted in a number of arrests and will likely result in "additional criminal charges to be brought against several INPEC officials." *Id.* Needless to say, this is uncommon among criminal defendants and deserves substantial consideration by the Court in evaluating the appropriate sentence in this case—a request that the Colombian prosecutors directly made when they wrote: "*we firmly and respectfully join in the request for mercy or reduction of sentence by [Y]our Honor in . . . Your sentencing [of] Mr. Isaza Tuzman.*" *Id.* (Moreno Ltr. 2) (emphasis in original).

Kaleil presents no real risk of recidivism. Outside of this case, he has had a spotless criminal record. As a result of this conviction, his career as an officer of a public company is irrevocably finished. Moreover, given how his life has been fundamentally altered by the brutalities he experienced in prison, it is simply inconceivable that Kaleil would ever risk this kind of outcome again. It is well established both that defendants of Kaleil's age (he will be 50 years old in October 2021) "exhibit markedly lower rates of recidivism in comparison to younger defendants," *United States v. Carmona-Rodriguez*, No. 04 Cr. 667 (RWS), 2005 WL 840464, at *4 (S.D.N.Y. Apr. 11, 2005), and that "even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders," *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006). For all of these reasons, there is no practical need to imprison Kaleil again in order to protect the public or effect deterrence.

Nor is there any reason to imprison Kaleil again in order to "send a message" to others. What happened to Kaleil in Colombia has been widely reported in the press here and abroad, and as a result his case has become emblematic of prison sexual assault. Most people in Kaleil's shoes would have left Colombian prison bitter, self-destructive or worse. Kaleil, however, has done the best we could possibly expect as a society from a defendant who has made mistakes and is living with the consequences: he has tirelessly worked over these years to help other entrepreneurs learn from and avoid his mistakes, provided "essential cooperation . . . to an investigation of grave institutional consequence in [Colombia]," *id.* (Moreno Ltr. 2), spent over 5000 hours in community service, and generally helped bring awareness to the issue of prison sexual assault. *See* Ex. A (Aleph Institute Ltr. 9–10). Kaleil nearly lost his life in prison. His reputation has been publicly obliterated and he has experienced financial ruin. Even after his release from prison, his liberty has remained substantially curtailed for many years now. The message to would-be white collar criminals has already been made loud and clear; additional incarceration is not necessary to deter anybody else.

A sentence of further imprisonment is not only unnecessary here, but also out of step with the sentences imposed in recent white collar cases. Recent sentences in analogous white collar cases match the more modest below-Guidelines recommendation from the defense here. For example, in February 2021, Judge Jed S. Rakoff sentenced the former CEO and COO of MiMedix—convicted of accounting fraud following trial and facing decades-long Guidelines ranges based on a $34.6 million loss amount—to sentences of twelve months' imprisonment. *See United States v. Petit*, No. 19 Cr. 850 (JSR) (S.D.N.Y.). And in January 2019, Judge Woods sentenced a defendant convicted by a jury of securities fraud offenses (insider trading) to three months' imprisonment, notwithstanding a Guidelines range of 78–97 months. *See United States*

v. Chow, No. 17 Cr. 667 (GHW) (S.D.N.Y.). These and other recent sentencings discussed herein provide data relevant to avoiding unwanted sentence disparities.

For these reasons and those in our initial sentencing submission (ECF Nos. 793–94, 965–66, 1012–13), we respectfully submit that a sentence below the applicable Guidelines range of 24–30 months is sufficient but not greater than necessary to satisfy the factors set forth in 18 U.S.C. § 3553(a) and the interests of justice.

I. Mr. Isaza Tuzman's Conduct Post-Conviction

Over the last five years in home confinement, Kaleil has fully complied with all conditions on detention and dedicated himself to socially beneficial ends and community service. These activities are reflective of his history, character, and readiness to rejoin civil society.

Continued home detention and mental health treatment. Since July 2016, Kaleil has remained under the supervision of Officer John Moscato of Pre-Trial Services and without a single incident of non-compliance. For the last five years, Kaleil has also been compliant with constant court-appointed mental health treatment, continuing to meet at least weekly with psychiatrist Dr. Malgorzota Witek and Clinical Social Worker Peter Turco. Kaleil's lengthy home detention has represented a substantial curtailment of freedom and reinforced his deference and respect for the law. Perhaps the most painful reality of the last five years of Kaleil's home detention has been his inability to visit his nine-year-old daughter, who lives abroad and only rarely travels to the United States. Kaleil has been a loving, remote parent to his daughter and continued to be a loving son, brother and uncle to his family.

Co-founded a medical-technology start-up company. Starting in early 2020, Kaleil co-founded and built a social impact start-up medical technology company, DocuVax (*see* www.docuvax.com). DocuVax enables enrollees to catalogue their vaccination, lab results, preventative screenings, and other basic medical information in a secure, cloud-based, HIPAA-

compliant "medical wallet," allowing individuals to have greater agency in their healthcare and making medical information more easily and safely accessible to patients and health care providers. DocuVax provides a much-needed health care management tool to individuals and small and medium-sized employers during the COVID-19 pandemic and in the context of greater public awareness of the importance of preventative public health measures. *See* Ex. A (Dr. Graves Ltr. 3; Dr. Shepherd Ltr. 3; J. Giardino Ltr. 2; S. Amin Ltr. 3.)[1]

Public education regarding prison sexual assault. Kaleil has spoken to audiences candidly, openly and vulnerably about his sexual assault, resulting feelings of shame, self-loathing and suicidal ideation, as well as his personal path of acceptance and recovery. He has given these talks in both physical and virtual venues through the non-profit organization MicDrop (*see* https://micdrop.one/about/)—including at the Tank Theater in New York City in August 2019 (*see* https://youtu.be/nT5GZnadiZI)—as well as on the Zev Brenner Show on national radio in February 2020, the *In Search of More* podcast in November 2020, and subsequently on various podcasts, panels and webinars. These expositions are aimed at encouraging open dialogue and recovery—while reducing shame, depression and suicide—amongst formerly incarcerated individuals who have been subject to sexual abuse in prison. *See* Ex. A (A. Blaurock Ltr. 3; E. Nash Ltr. 4; R.L. Bernstein Ltr. 1; S. Winner Ltr. 2).

Volunteer work at Lamplighters Yeshivah. Kaleil served on the board of, and volunteered substantial time at, Lamplighters Yeshivah, a progressive Jewish school in Crown Heights, Brooklyn, NY, dedicated to providing alternative avenues for learning and growth to

[1] Additional and updated letters of support on behalf of Kaleil will be submitted as Exhibit A to this supplemental submission. Because some of these letters have not yet been received in signed form by counsel at the time of this submission, we have made reference to the letters herein, but will submit them as a package next week for the Court's ease of reference.

children often shunned or left behind in the New York-area Orthodox Jewish community. Since January 2018, Kaleil has volunteered over 4,000 hours at Lamplighters alone, including teaching and mentoring troubled teens and helping with the challenging "ethical closure" process caused by the COVID-19 pandemic. *See* Ex. A (Aleph Institute Ltr. 14–15; E. Nash Ltr. 2; J. Shapiro Ltr. 1–2; M. Lin Ltr 2; Y. Sidof Ltr. 1–3).

Volunteer work with Winner's Circle and Village Exchange Center. Kaleil has provided advice, guidance and mentorship to Winner's Circle, a non-profit organization dedicated to providing viable and rehabilitative vocational opportunities to formerly incarcerated individuals, to both reduce recidivism and improve the chances of successful familial and community re-integration. *See* Ex. A (S. Winner Ltr. 1–2.). Kaleil has also provided mentorship, pro bono consulting and administrative support over the years to the Village Exchange Center ("VEC"), a faith-based, non-profit community center in Aurora, CO. VEC provides programs and events that serve and empower thousands of refugees and immigrants in the Denver area—including public health initiatives, vocational training, and daily worship. *See* Ex. A (A. Blaurock Ltr. 3).

Volunteer work for childhood sexual abuse prevention and mental wellness projects. Kaleil has served as a mentor, volunteering hundreds of hours, to social entrepreneurs engaged in building enterprises related to childhood sexual abuse prevention, youth mental health, immigrant services, personal and mental wellness technology, and online vocational education. *See* Ex. A (A. Blaurock Ltr. 3; A. Conroy Ltr. 1; A. Hegazi Ltr. 1; M. Lin Ltr. 2; R.L. Bernstein Ltr. 2).

Participation in his local synagogue. Kaleil has volunteered hundreds of hours over the years, while serving on the board of his local temple/congregation, Chabad-Lubavitch of

Downtown Manhattan (colloquially "Chabad Loft"), helping to implement new donor development initiatives, lead special fund-raising events, grow religious programming, and help identify and sustain a new, larger place of worship. *See* Ex. A (Rabbi Bankhalter Ltr. 2).

Started a national, faith-based radio show. Starting in the Summer of 2020, Kaleil has hosted a faith-oriented AM radio show, *Equal Footing with Dov Tuzman*, broadcast live from 7–8 p.m. each Thursday on WVIP 93.5 FM HD 2 and WSNR 620 AM in the New York area, and on faith-based Talkline Network-affiliated radio stations nationwide. On the show, Kaleil is open about his mistakes and failings, and his own rehabilitative journey. He and his guests discuss a wide range of difficult social and theological matters—*e.g.,* crises of faith, teen suicide, addiction and recovery, the psychological toll of caregiving, broken parent/child relationships, hate speech vs. free speech, living and working with a criminal record, and religious repentance, amongst many other topics—demonstrating through dialogue that even across significant political or religious divides, we can exhibit compassion and find shared values. Past guests of *Equal Footing* have included respected theologians such as Reverend David Taylor, Abbot Do Am Sunim, Father Joseph Hagan, and Rabbi Simon Jacobson, as well as respected academics and practitioners such as Dr. Bat Sheva Marcus, Elena Fast, Dr. Tevi Troy, Peter Ginsberg, Richard Reice, and Rabbi Yarden Blumstein. An unedited library of all past episodes of *Equal Footing* is available at: https://soundcloud.com/equalfooting. *See* Ex. A (B. Forer Ltr. 2; R. Cidale Ltr. 2–3; S. Winner Ltr. 2; T. Stabb Ltr. 3; Y. Sidof Ltr. 3).

Pro bono consultant to law firm investigating lending and trading fraud. Kaleil has served as a consultant to the law firm Michelman & Robinson, helping on a pro bono basis to uncover lending fraud and successfully obtain a judgment for an individual, vulnerable mother of five who did not have the funds to hire forensic experts and had lost a substantial portion of her

savings. For the same law firm, Kaleil conducted a detailed, year-long forensic analysis of a hedge fund's trading and investment records, helping to uncover a Ponzi scheme and secure a path to recovery for defrauded investors. *See* Ex. A (E. Nash Ltr. 3–4; J. Giardino Ltr. 1; R.L. Bernstein Ltr. 2).

Provided material cooperation to Colombian Attorney General's Office Anti-Corruption Taskforce. In the last five years, Kaleil has provided material and substantial assistance to the Anti-Corruption Unit of the Colombian Attorney General's Office in a wide-ranging investigation into extortion and other crimes by prison officials at La Picota and other prisons in Colombia. Kaleil provided voluntary testimony "[a]t his own risk . . . , without any proffer or exchange for his help," providing "material and substantial assistance" and ultimately resulting in the indictment and arrest of numerous officials in the Colombian Bureau of Prisons (INPEC)—including the then-warden of La Picota prison where Kaleil had been held, César Augusto Ceballos—on charges of extortion and corruption. *See* Ex. B (Moreno Ltr. 1); *see also* Seth Robbins, Systemic Colombia Prison Corruption Reaches Top Officials, *InSight Crime*, Mar. 4, 2019, *available at* https://insightcrime.org/news/analysis/jail-corruption-colombia-officials/ (accessed July 9, 2021). Kaleil's cooperation with Colombian law enforcement has served the interests of justice with a key United States ally in the region, and may have spared other inmates from future abuses. The Colombian prosecutor in charge of the anti-corruption investigation wrote a remarkable letter pleading for leniency for Kaleil. *See* Ex. B (Moreno Ltr. 1–2).

In summary, Kaleil has put his years of home confinement to good use: serving his local community, opening up about his mistakes, working to meaningfully improve the lives of others, cooperating with law enforcement, and generally evincing desire and ability to make continued positive contributions to society.

II. The Appropriate Sentencing Guidelines Range

A. Mr. Isaza Tuzman Disputes Two Guidelines Enhancements.

As discussed in his prior sentencing submissions, Mr. Isaza Tuzman respectfully submits that the appropriate Guidelines range for the offenses of conviction is 24–30 months. Two Guidelines disputes are pending:

A 22-level enhancement for loss amount is inappropriate. The main driver of the PSR's total offense level is the purported total loss amount of $57.75 million, derived from changes in the price of KIT Digital's equity. For the reasons stated in Mr. Isaza Tuzman's June 2018 sentencing submission (ECF Nos. 793–95), at the *Fatico* hearing held April 1–2, 2019, and in Mr. Isaza Tuzman's post-*Fatico* briefing (ECF Nos. 965–66, 1012–13), these figures cannot be reasonably or reliably tied to the offenses of conviction. Even the Government has since revised its figures and suggested various reduced loss amount calculations of $10.4 million, $8.08 million, and $3.41 million following questions and briefing from the defense. *See* ECF No. 993 at 20–21. The Government's repeatedly revised loss amount figures are arbitrary and unreliable. *See* ECF No. 1012 at 4–6. Accordingly, the Court should hold that the Government has not satisfied its burden to establish any loss amount, or, in the alternative, use Mr. Isaza Tuzman's salary and bonus during the period at issue as a measure of "unlawful gain," a Guidelines-authorized alternative to loss amount. *See* ECF No. 965 at 46–49.

A four-level enhancement for endangering the solvency of a corporation is improper. For the reasons stated in Mr. Isaza Tuzman's sentencing memoranda and in the Expert Declaration of John Young (ECF No. 793 at 49–56; ECF No. 794), at no point in time was KIT Digital close to insolvent, and its financial security was not substantially endangered as a result of any of the offenses of conviction. Instead, a private equity fund exploited the turmoil that resulted after Mr. Isaza Tuzman resigned to push KIT Digital into voluntary bankruptcy in order

to acquire its equity at a fire-sale price. KIT Digital has since emerged from bankruptcy and operates successfully to this day under its new name, Piksel. The company is still the clear leader in the video asset management software field; it continues to employ hundreds of KIT Digital employees, manage most of the same offices KIT digital had around the world, serve the majority of KIT Digital's clients, and tout KIT Digital's prior track record. *See* About Piksel, www.piksel.com/about (accessed July 9, 2021) ("Piksel has worked with clients in the Broadcast & Media industry for over 20 years, tackling difficult, industry specific problems and helping transform it. From launching Sky Go with BSkyB and 4oD with Channel 4 in 2006, to helping architect and implement OSN, we've been involved with OTT and the Media Supply Chain since the digital transition started.").

Removing these two Guidelines enhancements, the resulting Guidelines base offense level is seven; the total offense level of 17; and the appropriate Guidelines range is 24–30 months' imprisonment.

B. The Court May Apply the ABA Task Force's "Shadow Guidelines" as an Alternative to U.S.S.G. § 2B1.1.

As discussed in Mr. Isaza Tuzman's prior sentencing briefing, numerous judges and commentators have criticized Section 2B1.1 of the Sentencing Guidelines for producing unduly harsh sentencing recommendations in fraud cases involving a stock price drop of a publicly traded company. *See* ECF No. 793 at 58–63. An alternative approach to loss amount has gained traction in recent years for federal fraud offenses—an approach the Court should consider applying here. These so-called "shadow guidelines" (the "Shadow Guidelines") were drafted in 2014 by the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes—a blue ribbon panel of prominent judges (including Judges Lynch, Gleeson, and Rakoff from this Circuit), law professors, and practitioners—while

the U.S. Sentencing Commission's review of its fraud guidelines was underway. *See* American Bar Association Criminal Justice Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014), *available at*: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. Among other things, the ABA Task Force proposal narrows the § 2B.1.1 loss amount table from 15 tiers to six, and decreases the enhancement for highest loss amount from 30 offense levels to 14. *Id.* at 2. It changes the definition of loss from the "greater of the actual or intended loss" to actual loss. *Id.*, Application Note 1. And it includes a section for "culpability," adding offense levels for offenders with the higher culpability, and subtracting offense levels for those with lower culpability, based on a set of factors including the defendant's motive, and the correlation between the loss amount and a defendant's gain. *Id.* at 2 & Application Note 2.

Federal judges in this Circuit have applied the Shadow Guidelines in recent federal fraud sentencings. For example, in a 2016 sentencing, Judge Vitaliano of the Eastern District of New York rejected the Sentencing Commission's Guidelines and followed the Shadow Guidelines' proposed loss amount table: resulting in a sentence of 63 months instead of life in prison. *United States v. Faibish*, No. 12 Cr. 265 (ENV) (E.D.N.Y.). In *Faibish*, a CEO was convicted by a jury of conspiracy to commit bank and securities fraud and making false statements to the SEC. The PSR had calculated a $32 million loss amount—$26 million lost by an FDIC-insured bank, and millions more lost by shareholders as a result of the company's bankruptcy—yielding a Guidelines sentence of life in prison that was capped by statute to 80 years. *See* Sentencing Tr., *United States v. Faibish*, No. 12 Cr. 265, ECF No. 271 (E.D.N.Y. Mar. 10, 2016) (attached hereto as Exhibit C). Noting at sentencing that the latest Guidelines "are just mindlessly

accelerated once you have numbers of any size added in the loss or gain table," Judge Vitaliano conducted an alternative offense level analysis under the Shadow Guidelines as more "fairly reflective of what a court is required to do under Section 3553(a)" and "most reasonable here." *Id.* at 23, 54. The Judge imposed a sentence of 63 months' imprisonment. *Id.* at 54.

Other judges in this Circuit have similarly cited and relied upon the ABA Task Force's Shadow Guidelines. For example, in *United States v. Litvak*, No. 3:13 Cr. 19 (JCH) (D. Conn.), Chief Judge Janet C. Hall of the District of Connecticut stated that she was in "complete agreement with the drafters of this proposal, some of whom are very highly regarded judges in this circuit, in which the drafters urge the courts not focus on things that are easily quantifiable." Sentencing Tr. at 135–36, *United States v. Litvak*, No. 3:13 Cr. 19 (JCH), ECF No. 298 (D. Conn. July 23, 2014) (attached hereto as Exhibit D). Judge Hall sentenced the defendant to 24 months in prison where the Guideline recommendation was 108–135 months. *Id.* at 158. Similarly, in *United States v. Rivernider*, No. 3:10 Cr. 222 (D. Conn.), Judge Robert N. Chatigny of the District of Connecticut applied the Shadow Guidelines in sentencing a defendant convicted of 18 counts of wire fraud and conspiracy to commit wire fraud. Judge Chatigny noted that the Shadow Guidelines' calculation yielding a sentence of 144 months' imprisonment was "preferable to" the 324–405 month calculation under the current Guidelines that "significantly overstate[d]" the defendant's culpability. Sentencing Tr. at 206, 212, *United States v. Rivernider*, No. 3:10 Cr. 222 (RNC) (D. Conn. Dec. 18, 2013) (attached hereto as Exhibit E).

Under the Shadow Guidelines, the purported loss amount of $57,750,000—which we continue to dispute and which the Government has largely abandoned—would yield an offense level increase of 14, not 22. Accepting all other aspects of the PSR as accurate, this change

yields a total offense level of 31, and a Guidelines range of 108–135 months. However, for the reasons discussed throughout Mr. Isaza Tuzman's sentencing submissions, the loss amount proximately caused by the offenses of conviction must be reduced, and the insolvency-related enhancement in not warranted, further reducing the appropriate Guidelines range using either rubric.

III. A Substantially Below-Guidelines Sentence Is Appropriate.

A. Recent Sentences in Comparable Cases

Since our prior sentencing submission, judges in this Circuit have continued to sentence defendants convicted of similar offenses to shorter terms of imprisonment in line with the defense's recommendation here. These sentencings demonstrate that a substantially below-Guidelines sentence is appropriate for purposes of general deterrence and to avoid unwanted sentencing disparities. For example, in *United States v. Petit*, No. 19 Cr. 850 (JSR) (S.D.N.Y.), defendant Parker Petit, the former CEO of MiMedx, a publicly traded biopharmaceutical company, was convicted following a jury trial of securities fraud for employing secret agreements and corrupt financial inducements with four distributors to materially inflate the quarterly and annual sales revenue of the company. In the process, Petit and his co-conspirators deceived the SEC, auditors, and the investing public, repeatedly misrepresenting the financial condition of their publicly traded company. Driven by a loss amount of $34.6 million, the Guidelines range was life imprisonment, capped by a statutory maximum of 20 years. After the defendants were convicted at trial, the Government sought a six-year term of imprisonment, explaining that "[t]he Government does not dispute that a 20-year sentence, the sentence called for by the Guidelines, is not necessary for Petit[.]" *Petit*, ECF No. 145 at 29. On February 24, 2021, Judge Rakoff sentenced Petit to twelve months' imprisonment. *Petit*, ECF No. 153.

Petit's co-conspirator William Taylor, the COO of the company, received the same one-year sentence for substantially similar conduct. *See Petit*, ECF No. 154.

Similarly, in *United States v. Chow*, No. 17 Cr. 667 (GHW) (S.D.N.Y.), defendant Benjamin Chow was convicted by a jury of securities fraud offenses related to an insider trading scheme. Chow had repeatedly tipped his friend about the potential acquisition of a publicly traded company by private equity firms he managed, which resulted in illegal profits of more than $5 million for his friend. *See Chow*, ECF No. 148 at 4. Following Chow's conviction after trial, the Government urged a Guidelines sentence of 78–97 months' imprisonment. *Id.* at 8. On January 17, 2019, Judge Woods sentenced Chow to below-Guidelines sentence of three months' imprisonment. *Chow*, ECF No. 152.

Finally, in *United States v. Duczon*, No. 19 Cr. 651 (LTS) (S.D.N.Y.), defendant Robert Duczon pleaded guilty to conspiracy to commit wire fraud and bank fraud in connection with his participation in a transnational ATM skimming and money laundering organization that unlawfully obtained victim account holders' debit card account information and then used that information to fraudulently withdraw approximately $1.5 million in cash from victims' bank accounts. *See Duczon*, ECF No. 690 at 2. Duczon had been held for approximately ten months in Romanian and Hungarian custody while awaiting extradition to the United States, during which time he endured inhumane treatment, including lack of food and toilet paper, lack of medical care, inability to shower for weeks, not being allowed to tell family members where he was, and being arbitrarily beaten by prison guards. *See Duczon*, ECF No. 676 at 2–6. The applicable Guidelines range was 41–51 months. *Duczon*, ECF No. 690 at 3. On June 8, 2021, Judge Swain sentenced Duczon to a substantially below Guidelines sentence of 22 months' imprisonment, and recommended to the Bureau of Prisons that he be credited for his pre-

extradition time served. *Duczon*, ECF No. 713. As noted in our prior submissions, Kaleil's time in pre-extradition custody should not only be counted against any sentence imposed, but also, given the harsh conditions in Colombia and the suffering he endured, is further reason for leniency and a sentence far below the applicable Guidelines range.

In stark contrast, judges have reserved lengthy sentences in securities fraud cases for defendants who have committed billion-dollar financial frauds or brought to bear other extreme aggravating facts not present here. For example, in *United States v. Durante*, No. 15 Cr. 171 (ALC) (S.D.N.Y.), the defendant Edward Durante pled guilty to conspiracy to commit securities fraud, securities fraud, money laundering, and perjury. Durante began this securities fraud scheme while he was still in prison for a prior securities fraud scheme, and indeed had dedicated much of his adult life to fraud. On May 15, 2018, Judge Carter sentenced Durante to 216 months' imprisonment, *Durante*, ECF No. 401, a sentence substantially below the applicable Guidelines range of 292–365 months, *Durante*, ECF No. 299 at 9.

In *United States v. Galanis*, No. 15 CR. 643 (PKC) (S.D.N.Y.), defendant Jason Galanis pled guilty to securities fraud offenses in connection with his participation in multiple fraudulent schemes: one to manipulate the market the market for a publicly traded company and defraud its shareholders; another to defraud clients of an investment advisory firm; and another to defraud a Native American tribal entity and the investing public of tens of millions of dollars in connection with bonds issued by the tribal entity. The Government noted that "[m]anipulative practices are particularly pernicious when they result in the enrichment of the perpetrator or the victimization of others," and highlighted in particular that Galanis used his illicit proceeds to live in an $8 million Bel Air mansion, maintain a $10 million home in New York, all while his victims lost tens of millions of dollars. *Galanis*, ECF No. 376 at 16 ("The Court heard from certain of these

victims . . . . At the end of the day, real people lost real money as a result of Galanis's crimes."). On September 24, 2020, Judge Castel sentenced Galanis to within-Guidelines 189 months' imprisonment and ordered restitution of more than $80 million. *Galanis*, ECF No. 558.

Finally, in *United States v. Brennerman*, No. 17 Cr. 337 (RJS) (S.D.N.Y.), defendant Rahim Brennerman was convicted of conspiracy to commit bank fraud, wire fraud, and visa fraud after inducing financial institutions and individuals to invest in his sham company. Brennerman's company was a sham from the beginning, never possessing any of the assets, producing any of the goods, or employing any of the workers that he claimed it did. Brennerman used the stolen money to spend lavishly on himself, purchasing a luxury condominium, stays at expensive hotels, international flights, fine jewelry and designer clothes, and the like. Moreover, Brennerman had already been convicted for criminal contempt and sentenced by Judge Kaplan to two years' imprisonment, which sentence did not deter his fraudulent misconduct. *See Brennerman*, ECF No. 176 at 7–8, 10. The Government recommended a Guidelines sentence of 135–168 months, *id.* at 1, and, on November 19, 2018, Judge Sullivan sentenced Brennerman to 120 months' imprisonment, *Brennerman*, ECF No. 203.

This case is much more similar to *Petit*, *Chow*, and *Duczon*, and does not show any of the aggravating facts present in *Durante*, *Galanis*, and *Brennerman*. Kaleil is not a repeat offender, has no criminal history, and did nothing to obstruct the functioning of the civil or criminal justice system. (In fact, he has provided substantial and material support to law enforcement in Colombia.) No investors in KIT Digital have come forward or been identified as victims of the offenses. Importantly, Kaleil did not enrich himself in any way as a result of the conduct alleged. To the contrary, as one of KIT Digital's largest shareholders, he experienced huge financial losses as a result of the company's bankruptcy. *See* ECF No. 965 at 24–27; ECF No.

993 at 20 (Government acknowledges Mr. Isaza "Tuzman owned 57.82% of the company as of December 31, 2008 and that those shares should not be counted for purposes of loss"). In these ways, the most recent case law further supports a modest sentence of imprisonment as sufficient to satisfy the § 3553(a) factors and the interests of justice.

B. Any Sentence Imposed Should Avoid a "Trial Penalty."

Mr. Isaza Tuzman's lengthy Guidelines range is driven by the number of offenses charged and the resulting offense grouping under the Guidelines. Specifically, the large loss amounts associated with Counts Four and Six, each capped at a five-year statutory maximum, grouped together with Count Five's lower loss amount but higher statutory maximum, produces the instant Guidelines range. *See* ECF No. 793 at 67. Any sentence should ensure that Mr. Isaza Tuzman's Guidelines range is not higher as a result of his proceeding to trial.

Over the last few years, judges, scholars, and legal commentators have continued to identify and criticize the so-called "trial penalty": the discrepancy between sentences received after a guilty plea and those received following conviction at trial for the same conduct. *See* Nat'l Assoc. of Crim. Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* at 15 (2018) ("*The Trial Penalty*"). There is little doubt that such a sentencing discrepancy exists. For example, one analysis using 2015 U.S. Sentencing Commission data concluded that sentences imposed after trial as a result of a guilty verdict are greater than sentences imposed following a guilty plea in every category of crime, particularly white collar cases, in which defendants convicted following trial received average sentences more than three times longer than those who pled guilty. *Id.* As this study explained, the resulting effect is deeply corrosive the American system of justice:

> The notion that the exercise of a fundamental constitutional right should be so burdened contravenes a core value that is at the heart of a democracy founded upon the concept that the power of government should be limited. Accused persons

> should not have to gamble with years of their lives in order to have their day in court. No one should be subjected to geometrically increased punishment merely for putting the government to its proof. And no government should be able to wield the power to prosecute and condemn in a process that is rigged so that it virtually never has to show its hand. A system that has effectively consigned the right to a trial to the dustbin of history should not be tolerated.

Id. at 8.

Several federal judges in this Circuit have publicly highlighted this trend and voiced criticism of any trial penalty as a chill on Sixth Amendment rights. For example, Judge Rakoff has commented that, through the trial penalty, the "Government rewards those who surrender their constitutional rights, so few dare to exercise them." *United States v. Cabrera*, No. 10 Cr. 94-7 (JSR), 2021 WL 1207382 *5 (S.D.N.Y. Mar. 31, 2021). Judge Rakoff noted that a trial penalty may also frustrate the truth seeking function of the court, because an "innocent but rational man might plead guilty and suffer a sentence of five years, rather than going to trial and risking the same sentence plus a ten-year trial penalty." *Id.*

Former Judge John Gleeson of the Eastern District of New York has similarly criticized the trial penalty. He has said that the trial penalty has resulted in sentences so harsh which "would be laughable if only there weren't real people on the receiving end of them." *United States v. Holloway*, 68 F. Supp. 3d 310, 312 (E.D.N.Y. 2014). Citing publicly available empirical analyses, Judge Gleeson has written that the trial penalty is multifaceted and widespread, and used to gain leverage for guilty pleas. *United States v. Kupa*, 976 F. Supp. 2d 417, 438 (E.D.N.Y. 2013). Writing later as a private attorney, former Judge Gleeson has warned that "[i]n too many cases, excessive trial penalties are the result of judges having internalized a cultural norm that when defendants 'roll the dice' by 'demanding' a trial, they either win big or lose big." *The Trial Penalty*, Forward at 3. Yet this approach risks compromising the promise of the United States Constitution "to protect the guilty as well, affording them a presumption of

innocence and protecting them from punishment unless the government can prove them guilty beyond a reasonable doubt." *Id.*

The late Judge Jack B. Weinstein of the Eastern District of New York voiced related concerns, explaining that, in "many cases, prosecutors utilize the prospects of higher sentences to induce defendants to plead guilty." *Garcia v. Herbert*, No. 02 Civ. 2052, 2018 WL 6272778 *31 (E.D.N.Y. Nov. 30, 2018). And similar criticism and concerns have been raised at sentencing by Judges Preska and Sullivan. *See Eubanks v. United States*, No. 92 Cr. 392 (LAP), 2017 WL 2303671 *5 (S.D.N.Y. May 9, 2017) (urging prosecutors to reconsider recommending life imprisonment for a defendant who was offered and rejected a plea offer with a sentencing range of 151 to 188 months); *United States v. Washington*, No. 11 Cr. 605 (RJS), ECF No. 109 at 12 (S.D.N.Y. July 31, 2014) (criticizing prosecutors for seeking to impose a 52-year sentence on a criminal defendant who had rejected a 10 year plea bargain and calling such a sentence "unnecessary and unjust").

Here, Kaleil's pre-trial options were stark because he had no opportunity to plead to any subset of the charged offenses. Although the defense requested on multiple occasions both a *Pimentel* letter and a plea offer, the Government refused to make a plea offer short of insisting that he plead guilty on all counts, and did not provide a *Pimentel* letter identifying his potential exposure. *See* emails between D. Williams and A. Weitzman *et al.* (July 24, 2017) (attached hereto as Exhibit F); Trial Tr. 7290–91 ("I have asked the government many, many, many months ago for a *Pimentel* letter. They refused to provide us one. They never provided us their guidelines range."). Because Mr. Isaza Tuzman believed he had genuine legal defenses, and faced equally harsh sentencing outcomes whether he pleaded guilty or was convicted following

trial, he had little choice but to proceed to trial. He should not be additionally punished for exercising his Sixth Amendment right to a trial.

C. Kaleil's Conduct in the Years Since Conviction Demonstrate a Below-Guidelines Sentence is Appropriate.

Kaleil's conduct over the past nearly six years since his arrest (including the past three-and-a-half years since conviction) strongly supports our request for a sentence below a Guidelines range of 24–30 months as sufficient but not greater than necessary to accomplish the purposes of sentencing under 18 U.S.C. § 3553(a). *See* ECF No. 793 at 57–77. Mr. Isaza Tuzman offers the following supplemental arguments for a below-Guidelines sentence.

Five years of home confinement. Kaleil's five years of home detention and GPS monitoring in the SDNY represent a significant curtailment of his liberty. Kaleil has demonstrated total and absolute compliance with the Court's instructions—both in terms of PTS supervision and mental health treatment—and has been a model pre- and post-trial detainee. All the while, he has continued to suffer the after-effects of his inhumane detention and abuse in Colombia, including PTSD. These facts should weigh substantially in the Court's analysis of what constitutes a just and appropriate punishment.

Continued community service. Over these years, both while incarcerated and on home detention, Kaleil has dedicated himself to helping others—through advocating for human rights (including detailing prison conditions in Colombia in his complaint to the Inter-American Commission on Human Rights) and against sexual prison assault, assisting law enforcement in a major anti-corruption case, providing pro bono anti-fraud consulting services to a law firm, and dedicating thousands of hours of community service for organizations and initiatives like Lamplighters Yeshivah, Winner's Circle and Village Exchange Center. Professionally, he has sought out and worked on projects with positive social impact, including mentoring social impact

entrepreneurs, and co-founding medical records start-up DocuVax.com. At the same time, Kaleil has been a pillar in his local synagogue and its governance and hosted a non-profit, faith-based radio show focusing on reconciliation and redemption that has built a national audience. Kaleil continues to receive the moral support of family, friends, business partners, and religious leaders. All of this reflects on his good character and his deep desire and proven ability to make enduring, positive contributions to the world around him.

CONCLUSION

For the foregoing reasons, Mr. Isaza Tuzman respectfully requests that this Court adopt a Guidelines range of 24–30 months and impose a sentence substantially below this range as sufficient but not greater than necessary to accomplish the purposes of sentencing under 18 U.S.C. § 3553(a).

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Respectfully submitted,

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