

1 other issues, but I am happy to focus on these 3201 ledgers,
2 which was the basis for the addition of additional money and is
3 what has been argued in the filing from just a couple days ago.

4 There is one issue, we do actually agree with the
5 defendant's filing to the extent that he argues that the
6 accrued interest is not properly addable, properly added to the
7 forfeiture amount. We have added that up. We, for the record,
8 have a new request for \$38,541,209.69. And I have a revised
9 proposed order to pass up to the Court, if you would like, Your
10 Honor.

11 THE COURT: Well, to make things a little easier,
12 does the defendant-- Mr. Rogow, are you the main
13 spokesperson-- I am sorry, Mr. Kuglar, are you going to be
14 arguing this?

15 MR. ROGOW: Mr. Kuglar will be.

16 THE COURT: All right. Mr. Kuglar, do you agree with
17 the number credit that the Government has agreed to in terms of
18 this accrued interest matter?

19 MR. KUGLAR: Yes, Your Honor. On the accrued
20 interest, we agree that that is the appropriate amount to
21 deduct from their request.

22 THE COURT: All right, that's fine. So, we have got
23 one issue that is not disputed. Okay.

24 MR. NATHANSON: Thank you, Your Honor. I think the
25 main other issue has to do with this initial balance versus

1 ending balance. And the defendant laid out a table in his
2 filing showing the initial balance for these three 3201
3 accounts, The final balance showing that the total account
4 decreased, and has argued that that shows that there were no
5 actual proceeds from TBW during the period of the fraud.

6 We would submit, Your Honor, that that's just a
7 misleading way to look at it. If you actually look at the
8 ledgers for the accounts, you see a huge number of increases
9 and decreases over the 2002 to 2009 time period.

10 For instance, one of these accounts that is
11 identified, it is 20685, it starts out with a nearly
12 \$16 million balance. But if you look at the ledger, it gets
13 zeroed out in July of 2002.

14 So, for all of these accounts you see credits and
15 paydowns, and then during the course of the fraud you see the
16 accounts filled. And for this reason, we would submit, Your
17 Honor, that the final balance does accurately reflect the
18 proceeds to the defendant or the money that was paid out for
19 the defendant's benefit during the course of the fraud scheme.

20 And as we have laid out in our papers, there was
21 abundant testimony at trial that TBW only stayed in business
22 from 2002 through 2009 because of the fraud scheme.

23 And we would submit that the balances in the due from
24 shareholder account, and in these three due from 3201 accounts,
25 really do represent money that was paid out for the defendant's

1 benefit and was only available to him because TBW stayed in
2 business and because of the hundreds of millions of dollars
3 that flowed to TBW because of the Plan B scheme, because of the
4 sweeping scheme, and because of Ocala Funding and the other
5 aspects of the fraud.

6 THE COURT: All right. Mr. Kuglar.

7 Mr. Kuglar, it seemed to me that in your memorandum
8 you were trying to finesse some of the Circuit law that does
9 appear to go against your basic theory of defense on this
10 issue.

11 MR. KUGLAR: If it pleases the Court, I have a bench
12 book that I would like to hand up, if I could hand to the Court
13 Security Officer. There were a lot of various papers attached
14 to the various briefs that came through the Court. And I would
15 like to focus the Court on a few of those exhibits, as well as
16 trial exhibits, that were mentioned in the brief that the
17 Government didn't attach.

18 THE COURT: Do you have a set for the Government?

19 MR. KUGLAR: I sure do, Your Honor.

20 Your Honor, if I might, the Government's burden, as
21 the Court is aware, here today is to demonstrate that Mr.
22 Farkas received property constituting or derived from proceeds
23 that he obtained directly or indirectly as the result of such a
24 violation.

25 Now, at Tab 1, Section 982 is attached. And, of

1 course, any time we are dealing with the statute, the language
2 of the statute itself governs as the most relevant thing to
3 look at.

4 One of the issues that is at play here today is this
5 notion of proceeds and what constitutes proceeds. The point we
6 make is that in 18 U.S.C. Section 982 there are different
7 definitions and explanations of what is forfeitable under
8 specific criminal acts.

9 We are dealing with Section 982(a)(2), the Court in
10 imposing a sentence on a person convicted of a violation of
11 Section 1343 and '44.

12 Now, the important thing is that in Section (a)(2) it
13 says that Mr. Farkas shall forfeit property constituting,
14 derived from, or derived from proceeds he obtained directly or
15 indirectly as a result of violation.

16 Now, if the Court looks throughout this statute, it
17 sees that in different places Congress has defined it
18 differently.

19 So, for instance, in Subsection (5), in imposing a
20 sentence under different types of crimes, it specifically
21 mentions property which represents or is traceable to the gross
22 proceeds.

23 The same thing in Subsection (7) regarding health
24 care offenses, which references property from, quote, gross
25 proceeds traceable to the commission of the offense.

1 Our position is that the Court should follow the
2 plain language of the statute. And as we go through, I will
3 explain how that pertains to each of the three different
4 amounts that constitute this forfeiture request.

5 Now, the Government relies on Boulware, which is a
6 Ninth Circuit case out of a District Court in Hawaii which
7 suggests that under that subsection the defendant does not get
8 credit for amounts paid back. And we will address that as we
9 get to the particular item in the forfeiture request that that
10 applies to.

11 THE COURT: Well, you know though, as I recall the
12 basics of forfeiture law, is it not that once the crime has
13 been committed, whatever was received in the criminal act, at
14 that point the sovereign obtains title to that?

15 The fact that there might at some point be, for that
16 money, let's say it was 5,000 of fraud, and \$5,000 is obtained
17 as a bit of fraudulent activity, the moment that \$5,000 was
18 obtained, it technically then belonged to the U.S. government?

19 MR. KUGLAR: If it is obtained by Mr. Farkas. And
20 that is our point.

21 THE COURT: Directly or indirectly.

22 MR. KUGLAR: Directly or indirectly, that's right,
23 Your Honor.

24 THE COURT: Or some entity over which he has control.
25 For example, in a fraud case, if the moneys were being directed

1 to an entity over which he has essential control.

2 I mean, I think you are on shaky ground here. And I
3 don't think there is any Fourth Circuit law that you have cited
4 that supports your position on this, is there?

5 MR. KUGLAR: Well, the Fourth Circuit Court hasn't
6 ruled on the definition of "proceeds" under this subsection.

7 I would like to focus on the specific items that go
8 to the forfeiture because there are numerous problems with each
9 of them. And again, if you look at page 5 of the bench brief,
10 the reason that we would like to argue, and I have argued so
11 strenuously in our briefs, is because this isn't the typical
12 case where there is a \$50,000 drug deal and the Government is
13 looking to forfeit \$50,000.

14 Here we have the Government seeking to recoup money
15 that they allege that Mr. Farkas obtained from TBW, which was
16 an entity, a corporate entity.

17 Now, the point that slides 5 and 6 make are that it
18 is uncontradicted that between 2002 and 2009-- First of all,
19 before the scheme began, the 2002 audited financial statements
20 of Taylor Bean & Whitaker reflect that Taylor Bean & Whitaker
21 had \$13.8 million in retained earnings. And that is taking
22 into account amounts that were currently owed by Mr. Farkas.
23 And \$36 million of stockholder equity.

24 So, before the fraud began the financial statements
25 reflect that Taylor Bean & Whitaker had money to loan Mr.

1 Farkas. And there is nothing wrong, there is nothing criminal
2 with someone borrowing money from a company.

3 In addition, throughout the time period it is
4 uncontradicted that Taylor Bean & Whitaker made substantial
5 amounts of cash from its legitimate mortgage operations. Those
6 operations include interest income, loan sale revenue and
7 mortgage servicing revenue. And I will focus on the mortgage
8 servicing revenue because that's the one I think is memorable
9 from the trial.

10 You will recall that Taylor Bean & Whitaker was
11 serving close to a million loans at the end of its existence.
12 And that every month it got paid a certain amount to service
13 those loans.

14 And so, the amount that it took in, minus its costs,
15 generated substantial legitimate revenue from those operations.
16 And in fact, if you look at the 2008 financial statements,
17 which we attached as Exhibit 6 to our reply, at page 22 of
18 those 2008 statements the notes reflect that in 2008 alone the
19 servicing fees generated from that activity resulted in cash,
20 this is real cash to Taylor Bean & Whitaker, of \$136 million.

21 In addition, other fees collected from that operation
22 brought in \$14.9 million. And you also heard testimony that
23 they had a sophisticated hedging operation. In that particular
24 quarter, which is not contradicted, there was a net gain on the
25 hedges, they had a successful hedge that brought in \$31,093,000

1 in cash.

2 Now, what the Government has done, has said, well,
3 we're not going to seek from Mr. Farkas forfeiture of
4 everything that TBW ever made because he was responsible for
5 that. What they try to do is say, okay, we're going to just
6 look at moneys that he obtained indirectly or directly from TBW
7 throughout the relevant time period and argue that all of that
8 had to have come from the crime.

9 And that is the problem here. The Government has not
10 met its burden of tracing the money to the crime as opposed to
11 the cash flow that was being thrown off by the legitimate
12 operations.

13 THE COURT: But isn't the Government's theory that
14 TBW after 2002 would not have existed, it couldn't have gone on
15 without the criminal activity? And, therefore, any funds that
16 were received are tainted by that illegality?

17 MR. KUGLAR: That's the theory, Your Honor, but I
18 don't see it under Section 982(a)(2), which doesn't talk
19 about-- They essentially argue that this is some, it is almost
20 akin to a RICO enterprise, and everything that is attributable
21 to that enterprise is forfeited.

22 But that's not what we're dealing with here. We're
23 dealing with a specific statute under Section 982(a)(2) which
24 requires the Government to prove beyond a preponderance that
25 the property they are seeking to forfeit was derived from

1 proceeds that Mr. Farkas obtained directly or indirectly as a
2 result of the violation.

3 There is no provision, nor have I seen case law which
4 suggests that if there is a crime being committed, that all of
5 the legitimate money that is generated by that business is
6 forfeitable to the Government.

7 They cited one case in their brief that seems to
8 suggest this proposition. It was a Medicare fraud case where
9 the doctor had been improperly billing Medicare. Say it was
10 \$50,000 in improper billings, okay, to Medicare. Well, the
11 doctor argued, I should only have to forfeit 80 percent of that
12 \$50,000 because the other 20 percent was covered by insurance
13 companies and/or individuals.

14 And the Court said, no, no, no, no, no, you wouldn't
15 have obtained that money but for this \$50,000. So,
16 specifically as it pertained to that \$50,000 fraud, the full
17 amount was forfeitable.

18 There hasn't been a case that suggests that all the
19 legitimate proceeds of a business are tainted because that
20 business is engaged in a crime--

21 THE COURT: But the problem here is the business
22 would not have been there to obtain the legitimate funds but
23 for the illegitimate activity. I think that's the problem you
24 have got here.

25 MR. KUGLAR: Well, Your Honor, the business was there

1 in 2002 and had been there for a long time. And the audited
2 financial statements as of 2002 demonstrate that that business
3 had been profitable and was worth money. And a good portion of
4 the money that they seek to recoup was loaned to Mr. Farkas
5 before or at that 2002 time period.

6 So, the Government cannot trace that money to illegal
7 proceeds or proceeds of the scheme.

8 THE COURT: All right. Let me ask the Government to
9 respond to that particular point because I think it would be
10 correct to say that what happened at TBW before 2002 is not
11 tainted.

12 MR. NATHANSON: We agree with that, Your Honor. I
13 mean, as we mentioned before, we're not seeking to identify
14 money that was paid out to Mr. Farkas prior to the fraud
15 scheme. We are not calling that proceeds.

16 The money that we have identified in our filings
17 really was money that was paid out to him or accrued to his
18 benefit during the course of the fraud.

19 And as the Court has correctly recognized, the
20 testimony at trial was that beginning in 2002 the company only
21 existed because of the fraud scheme. Sweeping began in 2002.
22 It was very quickly in the tens of millions of dollars. And
23 Ray Bowman and others testified that it was keeping the company
24 in business.

25 Mr. Kuglar is correct, this wasn't a criminal

1 enterprise per se. There were legitimate operations at this
2 business that were creating cash flow, money was coming in.
3 But to say that, to argue that that's the money that is going
4 to Mr. Farkas in light of the fact that the business only
5 existed because of the fraud scheme, just doesn't make any
6 sense.

7 And the cases that we have cited in our June 20
8 filing and in our reply filing at pages 3 and 4 clearly set out
9 that proceeds include assets the defendant would not have
10 obtained or retained but for his criminal activity.

11 The case law seems pretty clear on that, and the
12 defendant has not cited case law to the contrary.

13 THE COURT: All right.

14 Well, it's an interesting issue, and I guess we will
15 invite the Fourth Circuit to address it finally, we will get a
16 definition of "proceeds."

17 But I think having reviewed the papers, the
18 Government has the better argument in this respect. And I am
19 going to, therefore, find that the reduced amount of 38 million
20 and change, which should be in the proposed-- Do you have the
21 new order with you? I am going to go ahead and enter that.

22 MR. NATHANSON: Yes.

23 THE COURT: And we will give you, because this is
24 apparently an issue perhaps of first impression in the Fourth
25 Circuit, a written opinion to supplement the Court's findings.

1 Obviously, you won't get that today, but you will have that for
2 the record.

3 And I will delay any time for appeal not to start
4 until that aspect of the sentence has been fully developed.
5 All right. Thank you.

6 So, I am granting the Government's motion for
7 forfeiture and entering the preliminary order of forfeiture.

8 Now, it's preliminary. I guess it's subject to
9 further revision. But the reasoning and the way in which I
10 will make clear the Court's view of the word "proceeds" under
11 this statute and in the facts in light of this case, I would
12 assume would apply to any revisions other than just
13 mathematical issues. All right.

14 Unless there is any other preliminary matter, I don't
15 believe a motion for a new trial was filed. Maybe I missed it.

16 MR. ROGOW: It was not, Your Honor.

17 THE COURT: I didn't think so. All right. So, we
18 are ready to proceed to sentencing then, correct?

19 MR. ROGOW: We are, Your Honor.

20 THE COURT: All right. A new set of counsel will be
21 addressing this issue or not?

22 Did you need time with Mr. Farkas?

23 MR. ROGOW: No.

24 THE COURT: No. All right. Have counsel had enough
25 time to go over the presentence report themselves and with the

1 defendant?

2 MR. ROGOW: We have, Your Honor.

3 THE COURT: All right. Are there any, leaving aside
4 the Guideline issues, are there any factual corrections,
5 changes, additions or deletions you want made to report itself?

6 MR. ROGOW: None, other the corrections we have made,
7 which I think have been addressed by Ms. Moran.

8 THE COURT: All right. Then as you know, and this is
9 a bit of a complicated case, the Offense Level here is a Level
10 43. That's what has been calculated. A Criminal History of I.
11 Counts 1 through 7 and 10 and 11 each carry a possible maximum
12 sentence of 360 months, with a three to five-year period of
13 supervised release.

14 Counts 8 and 9 each expose the defendant to a maximum
15 of 240 months, and two to three years of supervised release.

16 And Counts 14 through 16 carry a maximum of
17 300 months incarceration, with a three to five-year range of
18 supervised release.

19 The fine range in this case is 25,000 to
20 \$4,147,734,860.

21 And because there are 14 counts of conviction, there
22 would be a total of \$1,400 in special assessments.

23 And that's how the Probation Office has calculated
24 things, correct?

25 MR. ROGOW: Yes. And that has been paid, the 1,400.

1 THE COURT: All right. Now, I know that there are an
2 extensive number of objections to various enhancements that
3 have been used by the Probation Office in calculating the
4 various elements here. I don't really think that any of them
5 make a significant difference to the final outcome of this
6 case. But for the record, Mr. Rogow, if you want to address
7 any of those issues, I will give you time to do that.

8 MR. ROGOW: I agree, Your Honor, I don't think it
9 makes any sense to argue that. It is at least a 43 under any
10 kind of computation. So, we start at that point.

11 THE COURT: All right, that's fine. Then let me hear
12 from the Government.

13 And I recognize the Government is asking for an
14 astronomical number, and I know that you have pointed out some
15 similar types of fraud, large fraud cases, such as the Madoff
16 case, that have gotten significant periods of incarceration.

17 My own view, however, is that a sentence ought to
18 have some degree of rationality on its face. And sentencing
19 someone to 4 or 500 months of imprisonment results in multiple
20 life sentences, in a case of this sort doesn't to me make good
21 sense.

22 Neither the Government nor the Court should look like
23 it is doing something silly. And I think most people think
24 that that is just plain silly.

25 So, I hope that, I understand your initial position,

1 but I want to hear the more realistic position.

2 MR. STOKES: Your Honor, to be clear, our position
3 was less tied to a number and more tied to the Guidelines. Our
4 point was that this is a case in which the Guidelines, the full
5 force of the Guidelines should be put into effect.

6 The statutory maximum, of course, is what it is. And
7 that is driven purely by the counts.

8 Our real point though, Your Honor, and I think we
9 made this point in the sentencing memorandum, is that we
10 believe the defendant should be sentenced to a term of years
11 that would ensure he spends the rest of his life in jail. And
12 we think we want to focus on two principal reasons for that,
13 Your Honor.

14 First, we think that he deserves to be punished
15 severely in light of the enormity of his crimes. I mean, the
16 losses from this case are in fact off the charts, and literally
17 so under the Guidelines.

18 He has destroyed lives and institutions. He has
19 caused just staggering economic loss to banks and individuals
20 and others.

21 He's also showed no remorse. He lied on the stand.
22 He's told the same lies in his submission to the Probation
23 officer. And we think that warrants a severe sentence to make
24 clear that that sort of behavior in light of his crimes
25 shouldn't be tolerated.

1 We also think a term of years that would ensure that
2 he spend the rest of his life in jail is appropriate and
3 necessary to send the strongest possible general deterrence
4 message. And the Court, of course, has emphasized that aspect
5 of the sentencings with all of the co-defendants that have been
6 sentenced thus far. And we think that in this instance it is
7 the strongest factor, the strongest driving force for giving a
8 sentence that would ensure that.

9 Your Honor, what a specific sentence is, we recognize
10 that the numbers, once the Guidelines are capped and it becomes
11 a term of years, that the range is astronomical. And our point
12 to the Court is that any sentence above his actual likely life
13 span is a symbolic sentence. But that symbolism is important.

14 And we think, therefore, a term that does ensure that
15 he spends the rest of his life in jail is an important message
16 not only to the defendant, but to the community as a general
17 deterrence message.

18 Now, the Court has heard plenty of evidence on this,
19 so I don't want to dwell on the five phases of the fraud
20 scheme, but I would like to just point out this about those
21 five phases. Each of those phases caused losses of more than
22 \$120 million.

23 The sweeping scheme itself was pegged at
24 approximately 120 to 140 million. Plan B on COLB was
25 approximately 250 million. Plan B on AOT at the end of the day

1 left a hole of approximately \$500 million. Ocala Funding left
2 a hole of approximately \$2.4 billion in Colonial Bank, Deutsche
3 Bank and BNP. And the TARP fraud resulted in an intended loss
4 of more than \$500 million.

5 And that doesn't include the loss to the
6 shareholders, which is substantial. That doesn't include the
7 losses due to the inflation, the manipulation of the mortgage
8 servicing rights.

9 Each one of those phases, if prosecuted separately,
10 would under the Guidelines have garnered a recommended sentence
11 of life imprisonment.

12 So, we think that in order for a sentence to reflect
13 the full range of conduct, the staggering nature of these
14 crimes that the defendant implemented, led, directed, used
15 other people to commit, should reflect that. And we
16 respectfully submit to the Court that anything less than a term
17 of years that would ensure his life imprisonment would send the
18 wrong message.

19 We think that, of course, with any defendant there
20 are factors weighing in favor of mercy. We recognize a number
21 of letters were submitted in this case. We don't want to
22 address the specifics of letters, but what we would point out
23 is that in terms of any factors weighing in favor of mercy for
24 the defendant, we think those factors are heavily outweighed by
25 the economic damage that he caused and intended to cause.

1 The numbers here, the entire loss, which is more than
2 \$2.9 billion, Your Honor, is something that, it's difficult to
3 fathom. It's just such a large number, it is somewhat mind
4 boggling.

5 So, if I can just briefly, I want to focus on some
6 specific damages that the defendant caused and his fraud scheme
7 caused to help all of us sort of comprehend a little better
8 just how enormous this was and how destructive his activities
9 were over an eight-year period.

10 He killed a bank, Colonial Bank. He killed his own
11 company, TBW. Colonial Bank was a bank that was founded in
12 approximately 1981 in Montgomery, Alabama. It was a community
13 bank. And it grew over the years through hard work, became one
14 of the largest, 25 largest banks in the country.

15 And it's not just a bank. It was part of the
16 community. It was part of the fabric of the economy, providing
17 loans to small business owners, home owners, car owners, to the
18 community, helping drive the economy.

19 The defendant's actions drove that bank. That alone,
20 of course, doesn't lead to the economic crisis, the financial
21 crisis in 2008, but it certainly contributes to it.

22 His own company he drove out of business. Left
23 thousands of individuals in Ocala, Florida, certainly not a
24 hotbed of high paying jobs, left thousands of employees out of
25 jobs.

1 The same for Colonial Bank employees. We heard from
2 Sarah Moore, the CFO of Colonial Bank, that hundreds, if not
3 thousands, of individuals in Alabama and Florida, particularly
4 back-office employees, were left without jobs after the
5 collapse of the bank.

6 He has wiped out the stock value for more than 9,000
7 shareholders of Colonial BancGroup, the parent company of
8 Colonial Bank. And it is sometimes difficult to comprehend
9 what that means, but I would direct the Court to the PSR and
10 the victim statements in that. I don't want to mention the
11 names since it is under seal, but one individual in paragraph
12 50, initials JS, as he wrote into the Court, has paralytic
13 polio, he has no other source of income other than social
14 security than what was his Colonial Bank stock, and that's
15 gone.

16 David Gaynor testified at trial about his losses and
17 his family's losses. About his father having built up a bank,
18 Jefferson National Bank, which was purchased by Colonial Bank,
19 or Colonial BancGroup, and their life savings wiped out by this
20 crime.

21 So, this crime had real impact for individuals, not
22 just banks.

23 But the defendant, as the Court is well aware, stole
24 billions of dollars from banks as well. Deutsche and BNP, two
25 large international institutions, the defense in opening stood

1 up and said, essentially, who cares? They are big banks, what
2 does this really matter? They have trillions of dollars, I am
3 sorry, billions of dollars. What does this loss mean to them?

4 It actually does mean something, Your Honor. These
5 are depository institutions in their own countries. These are
6 institutions here in the United States that are lending to
7 homeowners and other banks that are funding homeowners. And
8 because of these sorts of losses, banks of that nature are
9 withdrawing from the mortgage markets, are making mortgage
10 lending more difficult, and are certainly absorbing gigantic
11 losses themselves as a result of this fraud.

12 He stole from his own company in the basest of ways.
13 He was the chairman of a mortgage lending company. He created
14 fake mortgages and turned around and sold those to banks. That
15 just shows such a stunning disregard for rules, regulations,
16 the banks that he was dealing with, and any principle of fair
17 business dealing.

18 He, as I mentioned, has caused a number of employees
19 to lose their jobs. Not only at TBW, but throughout Colonial
20 Bank as well, and the various branches around the country.

21 He has, to no small point, Your Honor, the
22 co-conspirators in this case, he has frankly ruined their
23 lives. We don't for a moment want to make any excuses for
24 them, they committed these crimes, they have been punished, and
25 they deserve to be punished for those crimes, but I think the

1 evidence was overwhelming that each of those co-conspirators
2 got pulled into this fraud by the defendant, used by the
3 defendant, manipulated by the defendant.

4 As Ray Bowman himself said in his allocution before
5 the Court, the defendant-- Cathie Kissick made one bad
6 decision and then the defendant steamrolled her time and time
7 again.

8 As Ray Bowman testified at trial, the defendant had a
9 saying when it came to Cathie Kissick and why she kept giving
10 TBW money. It was that, hey, if I owe her a dollar, I have got
11 a problem. If I owe her a million dollars, she's got a
12 problem.

13 That was exactly right, he had her over a barrel. He
14 had Teresa Kelly over a barrel. And he just kept pulling more
15 and more money out of the bank, using them with false promises
16 that he would pay them back.

17 In the meantime, he is buying jets, cars, vacation
18 homes, living lavishly, spending money at a fast and furious
19 pace at TBW in a way that showed he had no intention of ever
20 paying Colonial Bank back.

21 And at the same time, was also stealing from Ocala
22 Funding. Which meant he was stealing from Deutsche Bank and
23 BNP to keep his lifestyle and TBW going in the way that he had
24 it.

25 On top of all that, these crimes that happened in the

1 past, he is charged, he comes into court, he takes the stand
2 and he lies. He lies for hours on the stand about his
3 knowledge of the scheme. He tries to convince the jury, the
4 Court, everyone in the courtroom through a pack of lies that he
5 had no knowledge of this, and that the Government caused the
6 six co-conspirators to plead guilty based on pressure, based on
7 fear. And he has continued to submit his lies in his
8 submission to the Probation officer.

9 For all of those reasons, Your Honor, we see that--
10 We don't think there is any reason that the defendant should
11 receive anything other than a term of years that would ensure
12 that he spend the rest of his life in jail. We think that
13 would send the appropriate message here.

14 THE COURT: All right. Mr. Rogow.

15 MR. ROGOW: May it please the Court.

16 It wasn't Mr. Farkas who made the argument that the
17 defendants pled guilty because they were afraid of the
18 Government. It was my argument, not Mr. Farkas' argument.

19 And I think what this case showed was that delusion
20 is no defense to criminal activity because these people all
21 operated under the delusion that it would work out.

22 And I think that when I think about this case and how
23 the sentence should be approached, I am glad the Government has
24 stepped back a bit from the 385 years to 50 years, which they
25 think will be a life sentence. And I have suggested 50 years.

1 And I want to tell the Court why I don't think I am being
2 delusional in suggesting that the sentence should be 15 years.

3 And here is why. And you have heard it this morning.
4 This would not have occurred, the business would not have been
5 there were it not for Cathie Kissick. This started with a 2002
6 sweeping. Mr. Farkas had no control over the sweeping.
7 \$140 million was swept.

8 Any other account holder, if they were \$140
9 overdrafted, there would have been overdraft reports. This
10 began when those overdrafts were covered up by Cathie Kissick.

11 Cathie Kissick got eight years. And I am not putting
12 the onus on Cathie Kissick for everything that happened
13 afterwards, although certainly she was a factor in terms of
14 Plan B and creating Plan B. But if we go to the beginning and
15 what the Court said with regard to the forfeiture, that
16 everything that happened after 2002, and the Government has
17 argued it that way, is part of the fraud, this would have been
18 over the minute the overdrafts were stopped. And if Cathie
19 Kissick had said, I cannot let you do this, there will be no
20 overdrafts, then TBW would have been gone and there would not
21 have been any of the consequences that came afterwards.

22 And Cathie Kissick was given a sentence of eight
23 years by this Court. Cathie Kissick was someone who had
24 control over the life of TBW.

25 And I know it has been said that Mr. Farkas exploited

1 her somehow or other, manipulated her, but there was no
2 manipulation in terms of covering the overdrafts. Which is the
3 genesis for this whole matter. There were no bribes paid to
4 Cathie Kissick. It was not a matter of sexual power that Mr.
5 Farkas had over Cathie Kissick.

6 She made a decision that this was a viable company
7 and that it would keep going and that it would do well. And
8 maybe that was a delusion. And that's why I started off by
9 saying that a delusion is not a defense. But it continued.

10 And to hear about exploitation and manipulation and
11 control and a quote from Ray Bowman, an offhand quote that is
12 made with regard to the relationship between Colonial and
13 Cathie Kissick and TBW, I think misses the whole context of
14 this.

15 And so, when I start with the notion that no more
16 than 15 years should be the sentence, I take that from the
17 eight-year sentence given to Cathie Kissick because Cathie
18 Kissick was the person who could have stopped this at the very
19 beginning.

20 And she came late to the party in terms of pleading
21 guilty. She had all of this time to reflect upon what she was
22 doing. And she continued to help, to fund, to create Plan B
23 and to encourage Plan B. Why? Because she believed in Mr.
24 Farkas and she believed in TBW. A delusion? Yes. But she
25 did. It was a flawed business plan.

1 These were decent people, as the Court has said in
2 the sentencing with regard to the other people, and Mr. Farkas
3 is a decent person.

4 The sweeping, 2002, \$140 million. The COLB, Plan B,
5 the Plan B AOT, all of these things, that all stems from
6 Colonial Bank and the person who had control of that, which was
7 Ms. Kissick, who got eight years in prison.

8 And eight years in prison is a long time. 15 years
9 in prison is a long time. For the Government to throw out
10 numbers like 385 and 50 misses the point completely in terms of
11 what punishment is about. 15 years in prison is a lifetime in
12 prison. And anybody who serves substantial time in prison
13 knows what that is.

14 And Colonial Bank is important in this. And once
15 again you heard Mr. Stokes say that he destroyed, Mr. Farkas
16 destroyed Colonial Bank.

17 You know, I remember when Ms. Moore testified at the
18 beginning of the trial, testified about the lie that Colonial
19 Bank brought to the public generally with regard to whether or
20 not they were going to get TARP funding. Talked about how they
21 consulted with their lawyers and their president and everyone
22 else about whether or not they should put in the press release
23 that the TARP people had a condition on the funding.

24 They didn't do that. I think it took them 30 days to
25 try to figure out how to come up with a press release that

1 would mislead the public. And clearly it did mislead the
2 public.

3 For anyone to say that Lee Farkas killed, destroyed
4 Colonial Bank is to be willfully blind to what the Inspector
5 General, the TARP Inspector General said. It was pointed out,
6 and we submitted this in our submission, that although the
7 Mortgage Warehouse Lending operations caused significant
8 losses, Colonial's Mortgage Warehouse Lending operations, the
9 exposures to bad loans would have brought down the bank by
10 themselves. They were 30 or \$40 billion under water on the
11 commercial loans that they made in Florida and in Texas and
12 other places.

13 And so, to magnify the role of TBW in this is
14 completely contrary to what the record reflects, and really
15 what the testimony reflects. And to talk about it being a
16 wonderful bank and people in the community were reliant on that
17 bank, that bank was a pack of lies.

18 And we heard it directly from the vice-president,
19 from Sarah Moore, that they lied even about the one moment when
20 they were trying to get TARP funds.

21 So, I don't think that TBW or Lee Farkas destroyed
22 Colonial Bank. Colonial Bank destroyed TBW and destroyed Lee
23 Farkas. And the person who did that was the person who allowed
24 it to go on and continue.

25 One of the things that Mr. Stokes said is he wants a

1 long sentence because of the symbolism. Yesterday in The New
2 York Times there was an article about Judge Chin's rationale
3 for the 150-year sentence on Mr. Madoff, and he talked about
4 symbolism. Symbolism is not a factor under the Sentencing
5 Guidelines under 3553. It simply isn't.

6 The factors that have to be addressed are factors
7 that focus on the individual case and the individual.

8 THE COURT: Well, I think on that one though,
9 symbolism may be just a different word for general deterrence.

10 I have said this in all of the other sentencings that
11 I have had in this case, this is, because it is a white collar
12 crime, it is a crime that is done with premeditation, with time
13 to think. This crime went on for seven years. And that's the
14 type of criminal behavior that can be affected by a rational
15 calculus.

16 And so, it is in these types of crimes, different
17 from crimes of violence or crimes of passion, here if you want
18 to use the word "symbolism," the impact of a high sentence has
19 the potential for real social benefit in terms of deterring
20 others who might think about playing fast and loose with
21 accounting principles, fast and loose with the regulators.
22 They'd think twice knowing that if caught the price to be paid
23 is extremely severe.

24 MR. ROGOW: And I agree with a rational calculus.
25 And that I think that is the focus, a rational calculus. 50

1 years is not a rational calculus.

2 15 years actually is more of a rational calculus for
3 this reason. That just as Your Honor pointed out before, if
4 you give these enormous numbers, 150, 300, because that's what
5 Judge Chin said about the 150, it was symbolic in that
6 situation. And whether or not he was speaking about rational
7 calculus or not, that is kind of the theory the Government is
8 making, make it a huge sentence, a big sentence, a life
9 sentence, a 50-year sentence, and that will deter other people.

10 I don't believe that, Your Honor. Crime has gone on,
11 fraud has gone on, it will continue to go on. And a 50-year
12 sentence, if anything, will make people think this is so
13 irrational, so silly, that it doesn't really affect me.

14 A 15-year sentence sends a message, this is real
15 time, this is hard time that you are doing for 15 years to be
16 away from everything that you know, family, friends, loved
17 ones.

18 And so, I think-- And the sentence you gave to Ms.
19 Kissick of eight years is a substantial sentence. It is a huge
20 sentence. I mean, every day in prison for eight years. You
21 serve 85 percent of your time in the federal system. It's a
22 long time no matter how you cut it.

23 That's why the rational calculus that I am suggesting
24 is a rational calculus that sends a message to people, you will
25 do real time. Not some fantasy 50 years or 300 years as the

1 Government is asking.

2 And so, the disparities are relevant too in terms of
3 the factors to be considered. And I started with Ms. Kissick's
4 eight. And Desiree Brown's six. Paul Allen, 3.4. This is
5 real time. This is serious time.

6 And these people, as the Court has said in the
7 sentencings, these were decent people. These were law-abiding
8 people. And that's why I started with they were all delusional
9 about this. They all thought this was going to work out in
10 some way.

11 I am not saying that the actions that were done were
12 legal. They were improper. To send loans that had already
13 been sold to someone else, that shouldn't happen.

14 But again, I come back to the genesis of it, the
15 sweeping of it. The taking money out of the investor accounts
16 and putting it in the master account to cover it up. All done
17 by Colonial.

18 So, when you look at the different factors, you have
19 got deterrence, obviously. General deterrence, specific
20 deterrence. And that's what Your Honor was talking about when
21 you talk about symbolism. I think a symbolic way to deter
22 people is to give a sentence that real people in these real
23 kinds of businesses will say, whoa, that is a long time and I
24 don't want to be exposed to that.

25 To say 50 years, 30 years, 20 years, I think that

1 what you are telling people then is the Court takes a number
2 and is engaged more in symbolism than it is in the rational
3 calculus.

4 And so, what else do we look at in this? The
5 victims. Colonial Bank was worthless. It was worthless before
6 Mr. Farkas was convicted. It was worthless before the raid in
7 August 2009 on the bank and on TBW. It was worthless.

8 To hold him responsible for the victims' losses--
9 And you heard Mr. Gaynor testify. He knew the stock was going
10 down all of the time. They decided to hold on to it, to hold
11 on to it.

12 So, again, I am empathetic with the notion that
13 people lose money in frauds, but to the extent that money was
14 lost in this case through Colonial Bank, it was not through Mr.
15 Farkas' actions. It was through Colonial Bank's actions. And
16 the Colonial Bank people were responsible for the company and
17 the company's failure.

18 So, I don't think that the victim aspect of this has
19 the same kind of gravitas as it had in the Madoff case because
20 clearly in the Madoff case, one of the things that affected
21 Judge Chin was the fact that there were thousands of victims,
22 impecunious people, people who relied upon it. Elie Wiesel, a
23 Nobel Prize winner, all of these people were taken advantage.

24 Here the advantage was taken by Colonial Bank's
25 decision through its officer, Colonial Bank's decision to let

1 this thing continue and to keep it going on.

2 When we look at the disparities in the sentences
3 within this group, that's why I say the eight years for
4 Kissick, the six years for Brown, the 3.4 for Bowman, to have
5 Mr. Farkas have almost five times the amount of Allen's
6 sentence I think is a rational calculus.

7 And remember, Mr. Allen pled guilty the day before,
8 the Friday before the trial began. He was not an early
9 acceptance-of-responsibility person. He played it out to the
10 very, very end. And on the Friday, and I am pretty sure I am
11 right, that was the Friday before the trial began, is when Mr.
12 Allen decided to plead guilty.

13 So, to have Mr. Farkas get five times what Mr. Allen
14 got-- And the big losses that they are talking about, which
15 are BNP Paribas and Deutsche Bank, that's on the watch of Mr.
16 Allen. That was Ocala Funding. There was Mr. Allen in the
17 middle of that.

18 Was he delusional too? I guess he was. And he was a
19 savvy, sophisticated fellow. He knew this business. And yet
20 he was there. Why? Because they believed, wrongly apparently,
21 they believed that TBW could see this thing through and could
22 survive.

23 Now, we talk about the amount of the losses. I saw
24 this morning in the Wall Street Journal that Bank of America is
25 talking about making good \$30 billion out of the Countrywide

1 failure. I'm not saying that \$3 billion is not a lot of
2 money-- And I don't agree that it is a \$3 billion hole here.
3 But that's the kind of number they put up. But again, I don't
4 think the numbers make any difference here. I think in terms
5 of deterrence, whether or not it is \$300,000 or \$3 million or
6 \$3 billion, the question is what kind of sentence is an
7 appropriate sentence for Lee Farkas.

8 You've seen the letters from the people who have
9 written on behalf of Mr. Farkas. He is not the ogre that the
10 Government paints him out.

11 And, you know, every criminal case, every criminal
12 trial, actually probably every major issue in a criminal trial
13 is a magnification of a small moment in time.

14 Now, here the moment in time, obviously, extended for
15 seven years, from 2002 to 2009. But even among that time, even
16 among the moments when loans were being sent over to Colonial
17 Bank at the behest and with the connivance and agreement of
18 Cathie Kissick, those were moments in time that are part of the
19 pattern. There is no question there was a pattern here of
20 difficult kinds of conduct in terms of trying to condone it.
21 But it is not the whole picture of Lee Farkas. It's not the
22 whole picture of TBW.

23 It is, by the way, the whole picture of Colonial with
24 all of the bad decisions that they made.

25 But you saw the letters from the people who wrote on

1 behalf of Lee Farkas. He was an asset to Ocala. He engaged
2 with his employees. And, yes-- You know, it's interesting too
3 because the only employee who seemingly got something a little
4 more generous was Desiree Brown. Everybody else worked for
5 their salary.

6 Cathie Kissick worked for her salary. I think that
7 was always kind of the stunning thing to me. Did you have to
8 bribe Cathie Kissick? No. Did you have some intimate
9 relationship with her that led her to do this? No.

10 And all of these employees, they worked for a living.
11 They were loyal. They believed in TBW. They were optimistic
12 about that.

13 So, all of these people paint a much larger and
14 broader and much less, much less benign, and a much more
15 benevolent picture of Lee Farkas.

16 The Government has magnified everything. They have
17 magnified all of this, but these are just brief moments that
18 they have magnified in terms of the decision for sweeping, the
19 decision for the Plan B. Those are brief moments. The rest of
20 the life of Lee Farkas is an important consideration.

21 And his life is not one of criminality. His life is
22 not one of taking advantage of people by bribing them, by
23 exploiting them in some way. What power did he have over them?
24 I never understood what power he had over these people. Not
25 really. I mean, they were working for a job.

1 Paul Allen could have walked out at any time. He was
2 making I think \$400,000 a year. And he took a job with TBW,
3 with Ocala Funding and he stayed. Why couldn't he have just
4 walked out? There was something about Lee Farkas that they
5 believed in, that they thought he could do it and that it would
6 be successful.

7 What does it show you that Lee Farkas, one, did not
8 flee? Remember the fellow from BNP Paribas, you know, he said
9 to Lee, why don't you flee. And I think the first question I
10 asked of Mr. Farkas on direct was why didn't you? He said, I
11 didn't think I did anything wrong.

12 Again, delusional? Yes. Optimistic? Yes. He
13 didn't even get a lawyer at the beginning. Here is a man whose
14 company is brought down and the fellow doesn't even lawyer-up
15 at the very beginning.

16 What does it show? It shows naiveté. It shows
17 something that I think is very unusual, and certainly not the
18 kind of organized criminal mind at all at play here. So, it
19 showed foolishness. It showed unbridled optimism for no
20 reason.

21 Did he buy a plane? Yes. But did the plane get used
22 for the business? Of course. They are in Ocala, in the middle
23 of nowhere. There is no airport there.

24 And so, all of these things that the Government tries
25 to magnify-- Does he have a house in Maine? Yes. Did he have

1 a place in Key West? Yes. These are not big deals, but they
2 have made this into some kind of enormous taking advantage of
3 the economics of TBW that I think is completely inappropriate
4 in terms of having a rational basis and looking at the whole
5 picture.

6 To show you how naive he is. After he was arrested,
7 and this came out at the hearing when we tried to get him out
8 on bond, or on release pending sentencing, they brought out the
9 fact of his investments. He invested 4 or \$5 million naively,
10 foolishly in these other companies with people who had worked
11 for TBW that he thought maybe they could start all over again
12 and they would be all right.

13 I mean, the picture that you have to have here I
14 think of Lee Farkas is a man uneducated really in terms of
15 formal education, graduated--

16 THE COURT: Why do you keep saying that? He had some
17 college. I mean, I am used to dealing with people with ninth
18 grade educations. That is somebody who hasn't had the benefit.

19 But someone who has the bit of college, you can't
20 really even say that.

21 MR. ROGOW: Well, you know, a bit of college these
22 days is not enough. All of college is what you are supposed to
23 have.

24 But the point is, he is-- Maybe uneducated is too
25 extravagant a term. But the point is, he is a man who worked

1 hard all of the time. He built this business and built it in a
2 way that was on sand.

3 So, here is a man who had a much broader impact upon
4 the community. Yes, Ocala lost TBW. But while TBW was there,
5 what did he do? He did things for Ocala. You saw a letter
6 from the mayor of Ocala. The people, all of these people
7 respected and appreciated what Lee was doing.

8 Did he do some things for himself in terms of
9 purchasing some things, cars and things like that? Yes, he
10 did. But again, it is a small part of him.

11 Looking at the bigger, broader picture of Lee Farkas,
12 is he a flawed person? Yes. We are all flawed in one way or
13 another. And, yes, he was flawed in this situation.

14 But in every other aspect of how he was trying to
15 operate, he tried to operate as a person who respected others
16 and who tried to encourage others.

17 So, where do we come to? The Government has given
18 you a little chart of other people who have gotten big
19 sentences. We talked about Mr. Madoff, 150. Scott Rothstein,
20 who is a lawyer in Florida and Fort Lauderdale who I knew, got
21 a 50-year sentence. Marc Dreier from New York, another lawyer,
22 got a 20-year sentence.

23 And the Government may say, well, those were not as
24 big a scheme as this was. But those were all in the hundreds
25 of millions of dollars. Those were all abuses of trust.

1 Rothstein is serving his time now, and I am sure there will be,
2 he is trying to cooperate, so I am sure something will happen
3 with his sentence.

4 But the point I am making is the other sentences in
5 this case are the ones that I think the Court has to look to.
6 I can't look outside all of the other cases with all of the
7 nuances of the other defendants. The focus has to be on the
8 people within this case.

9 Another point the Government makes is some long
10 sentences coming out of cases where people went to trial. That
11 is very bothersome, I think, that someone should be punished--
12 Sure, you don't get two points credit for acceptance of
13 responsibility if you go to trial, but you should not be bumped
14 up to 30, 40, 50 years because you do go to trial in a case.

15 And the Court has already said that you didn't
16 believe some of Mr. Farkas' testimony. Yes, there is a
17 two-point enhancement for that.

18 But the focus I think has to be on the other people
19 who were involved. Yes, did they come in, did they testify?
20 Did they plead guilty? Yes. Did they do it quickly? Other
21 than Desiree Brown. No, no one did it quickly. No one jumped
22 on the bandwagon and said, I was wrong the whole time, I was
23 lying, I was cheating, I was stealing the whole time. They
24 didn't.

25 So, what I'm suggesting in this situation is that Mr.

1 Farkas' sentence should be 15 years. That would meet the
2 sentencing, the factors to be considered under the Sentencing
3 Guidelines.

4 He did not kill a bank. He did not kill Colonial
5 Bank. He did not destroy the financial interests of the people
6 who held stock in Colonial Bank. Colonial Bank did that
7 themselves.

8 And the damages. Yes, there are damages. Yes, there
9 are losses. But the point now is, is what should the loss be
10 to Mr. Farkas in terms of the sentence. And my respectfully
11 suggested sentence is no more than 15 years.

12 THE COURT: All right, thank you.

13 Mr. Stokes.

14 MR. STOKES: Your Honor, if I may address just five
15 points. But preliminarily, Your Honor, I would just like to
16 let the Court know that there is, as we understand it, one
17 victim that does wish to speak, that we are aware of.

18 THE COURT: The victims speak before the defendant.
19 So, I will--

20 MR. STOKES: Understood. And I just wanted to make
21 sure the Court was aware of that.

22 And one other point I neglected to mention. I just
23 want to make sure. In our position paper we had indicated in
24 the-- The defense does not appear to be challenging this
25 enhancement under the Guidelines for the number of victims, the

1 adjustment for the number of victims.

2 We had said in our paper that from August 3, 2009,
3 until December of 2010, that the price only went down. There
4 actually was one day where the price spiked and then went back
5 down after that a few days after the search warrants.

6 So, I just wanted to make sure that was clear. I
7 don't think it makes any difference, but that was incorrect in
8 our paper.

9 THE COURT: All right.

10 MR. STOKES: Your Honor, Mr. Rogow has made these
11 arguments at trial, made this argument at trial and has made it
12 here, and I just want to quickly address it. And that is the
13 timing of the pleas.

14 It is certainly true that Mr. Allen, as we submitted
15 to the Court, came in relatively late, but simply all of the
16 evidence shows that Teresa Kelly, Cathie Kissick, Desiree Brown
17 began cooperating prior to the search warrants in this case,
18 and did so throughout. The timing of the pleas certainly makes
19 no difference. That was a matter of something that the parties
20 worked on the timing of that for various reasons.

21 So, we just want to make sure that is clear for the
22 Court.

23 Mr. Rogow spent a lot of time talking about Cathie
24 Kissick, shifting blame to Cathie Kissick, shifting blame
25 throughout his argument and downplaying or shedding Mr. Farkas'

1 responsibility in this case. A couple of points on that.

2 Cathie Kissick was involved in and pled guilty to
3 one-sixth of the fraud in terms of the loss amounts,
4 \$500 million. An enormous sum.

5 Mr. Farkas led Plan B, led sweeping. As all the
6 testimony at trial established, he was able to get this money
7 out of Colonial Bank.

8 Mr. Rogow repeatedly asked, why is that so? Well,
9 there was plenty of testimony on that point. The reason was
10 that once these people gave the initial sweeping amount, they
11 realized that Mr. Farkas had them over a barrel and they
12 couldn't stop.

13 But the fraud scheme went on. And Mr. Farkas', the
14 defendant's arguments acidulously ignore Ocala Funding, which
15 is a \$2.4 billion fraud scheme that he was directly involved,
16 and Colonial Bank, Cathie Kissick had nothing to do with. And
17 in fact, Colonial Bank was a victim of.

18 In terms of magnification. I suppose at some level
19 Mr. Rogow is correct that criminal trials magnify the bad.
20 This isn't, a, you know, here is your life, Mr. Farkas, we are
21 going to show you the good and the bad. We focused on the bad.
22 The bad here was eight years of bad behavior. This wasn't a
23 one-time event. This wasn't a single decision as Mr. Rogow
24 indicated.

25 Cathie Kissick and Teresa Kelly and Desiree Brown

1 testified that they spoke with Mr. Farkas, particularly Cathie
2 Kissick, on a weekly if not daily basis. Cathie Kissick
3 begging, crying, screaming, pleading to get Mr. Farkas to pay
4 back. Mr. Farkas said, of course I will, I have got a deal in
5 the works, it is going to happen. And instead, went out, stole
6 more money, spent more money on himself, led Cathie Kissick on.
7 Believing that, just give me this money this one time, every
8 Plan B transaction, I just need it this one more time and we
9 are going to take care of it. In the meantime, stealing more
10 money and living the lifestyle he was.

11 The reason these people got sucked into this, we
12 believe, we think the evidence strongly shows, is that Mr.
13 Farkas is the consummate fraudster. He knows how to play
14 people's emotions. He knows how to play people's weaknesses
15 and vulnerabilities. And that's what he did successfully over
16 eight years. You don't steal \$2.9 billion without being able
17 to play people. That's how he kept this scheme going for so
18 long, convincing people that he was something that he wasn't.
19 That TBW was something that it wasn't. And in the end when it
20 collapsed, a lot of people were shocked by that.

21 With regard to the collapse of the bank. Your Honor,
22 there is evidence that the bank was looking at suitors, was
23 looking at purchasers. And we don't have a crystal ball as to
24 what would have happened with the bank. It certainly had
25 tremendous real estate issues. Other banks were looking to

1 purchase it. We have no crystal ball and aren't able to say
2 what would have happened if there was no fraud scheme. Would
3 it have been purchased? Would it have collapsed? It was on a
4 Watch List, meaning that it was anticipated that it could
5 collapse in the future.

6 But what happened after August 3 after the fraud
7 scheme was revealed was it did collapse. There is no question
8 that this fraud scheme led directly to the immediate collapse
9 of the bank once people realized the magnitude of the problems
10 and the corruption at TBW and the bank, it went out of
11 business.

12 Mr. Rogow makes a number of points about comparing
13 this case to the co-defendants. I would point the Court to a
14 case, United States versus Jeffrey, Fourth Circuit, 631 F.3d
15 669. It is a 2011 case which makes very clear-- And this is,
16 I don't think, a new point to be made necessarily, but there is
17 Fourth Circuit case law backing this up. That the fact of a
18 disparity between a defendant and his co-conspirators who have
19 pled guilty, cooperated, and worked with the Government,
20 particularly where the defendant has gone to trial and
21 testified and lied, was the leader of the scheme, was the
22 primary beneficiary of the scheme, that there is no unwarranted
23 disparity there. There is no comparable there.

24 Comparing Mr. Farkas to Cathie Kissick, Desiree
25 Brown, Paul Allen, is comparing, you know, the leader of the

1 scheme to the pawns and tools of the scheme that enabled him to
2 get what he wanted.

3 No question, Cathie Kissick was the top of the scheme
4 at Colonial Bank. And no question she was a gatekeeper for
5 one-sixth of the fraud. But again, we think the testimony was
6 clear that Kissick in many ways felt compelled because of the
7 situation that she found herself in to continue this.

8 But there is no comparable between Mr. Farkas and
9 those co-defendants and their sentences. They cooperated.
10 They testified. They substantially assisted. The defendant
11 has done none of that, and has repeated lies.

12 And in the vein of Mr. Rogow said about delusion, a
13 story that is frankly delusional about what he knew and didn't
14 know. He has acidulously avoided addressing Ocala Funding and
15 the stealing of \$2.4 billion, instead trying to focus
16 exclusively on Plan B.

17 Your Honor, we think it is appropriate for the Court
18 to consider the other sentences, national sentences or national
19 cases. We think that's what the purpose of 3553(a) is. We
20 think that's the purpose of that language about ensuring that
21 there is no unwarranted disparities, looking to others.

22 And we think that this is the truly rare white collar
23 case, there are very few, in which an enormous sentence is
24 appropriate for general deterrence purposes, and certainly to
25 ensure that Mr. Farkas remains in prison for the rest of his

1 life.

2 As we've pointed out, there are crimes far smaller
3 than Mr. Farkas' for which individuals have been sentenced to
4 very substantial sentences that would serve, would effectively
5 mean that they spend the rest of their lives in jail, and we
6 think that is entirely appropriate here.

7 THE COURT: All right. Thank you.

8 MR. ROGOW: Your Honor, may I just say, we did object
9 to the 250 victims because our theory was that he was not
10 responsible for the Colonial Bank investors' losses.

11 THE COURT: I understand that. I understand that.
12 All right. There any victims who want to be heard?

13 MR. O'BRIEN: Yes, Your Honor.

14 THE COURT: Come up to the lectern, please.
15 Your name, sir?

16 MR. O'BRIEN: Good morning, Your Honor. Tom O'Brien,
17 I'm counsel for the FDIC, and I am here representing the FDIC
18 as receiver for Colonial Bank.

19 Because Colonial Bank and the FDIC have been harmed
20 by the fraud perpetrated by Mr. Farkas and his co-conspirators,
21 we ask to be heard briefly on the impact of that fraud.

22 We are not here to urge any particular sentence or
23 any adjustments under the Sentencing Guidelines. Rather, we
24 want the Court to understand our position with respect to the
25 impact of this fraud scheme on Colonial Bank and the FDIC. And

1 by any measure, that impact is enormous.

2 As the Court is aware, Colonial Bank failed on
3 August 14 of 2009, less than two weeks after the search
4 warrants were executed simultaneously against the bank's
5 Mortgage Warehouse Lending operation and the TBW headquarters.
6 It was the sixth largest bank failure in U.S. history. The
7 third largest during the current wave of bank failures since
8 the 2007 financial crisis.

9 The impact of the fraud on the failure of the bank,
10 which has been the subject of some discussion here, is laid out
11 in pretty good detail by the FDIC's Office of Inspector General
12 in a material loss report that was published in April of 2010.
13 Both sides have addressed that in submissions they have made to
14 this Court.

15 Suffice it to say that the fraud had a significant,
16 made a significant contribution to the failure of an
17 institution that was already on the ropes. Whether Colonial
18 Bank would have survived in the absence of the fraud is
19 something we'll never really know because once that fraud
20 became public and the criminal investigation was widely
21 publicized, Colonial Bank's fate was sealed at that moment.

22 Now, looking at the loss to the bank itself, there
23 have been estimates provided in the trial. We have submitted,
24 the FDIC as receiver has submitted a restitution claim. We
25 estimate the losses attributable to the fraud at \$1.8 billion,

1 roughly divided evenly between the COLB line and the AOT line,
2 the two main financing facilities that were provided to TBW.

3 Our estimates discount the value of some of the
4 collateral that was held by Colonial at the time it failed and
5 attributed to those lines. But even so, we expect the ultimate
6 losses will be greater than that because there are a variety of
7 factors that will come into play. It is difficult to make
8 these estimates at this point in time.

9 At trial the Government presented evidence suggesting
10 that the loss to Colonial Bank was 1.4 billion. And we
11 understand that the Government took a very conservative
12 approach on that to give the benefit of every doubt to the
13 defendant. They give the full value of all the collateral, for
14 example. Which we know in reality isn't going to happen, but
15 for purposes of a criminal proceeding we understand that
16 process, and we certainly don't have any objection to it.

17 The next point I would like to focus on though is the
18 loss to, a broader loss to the banking industry. The FDIC has
19 a Deposit Insurance Fund, it's the fund from which the FDIC
20 makes whole insured depositors when a bank fails. And that
21 fund sustains losses when a bank fails because invariably the
22 payout to insured depositors from the fund is greater than the
23 recoveries that the fund receives as the receivership
24 liquidates all the assets of the failed bank.

25 And making up the difference, of course, are

1 assessments that are imposed on the banking industry. So, open
2 banks pay, in effect, an insurance premium to the FDIC, and
3 that provides the funds for this Deposit Insurance Fund.

4 Well, the loss resulting from the failure of Colonial
5 Bank to the Deposit Insurance Fund is estimated at
6 \$4.2 billion. To give the Court some context for that, there
7 have been over 300 bank failures in this current wave of
8 failures since 2007. The 4.2 billion loss attributed to
9 Colonial is the third largest among all those banks. It
10 constitutes 5 percent of the total cumulative losses from all
11 of those banks put together.

12 So, in short, the impact of the fraud, the failure of
13 Colonial Bank has had a major impact beyond Colonial Bank
14 itself. It has disproportionately impacted the Deposit
15 Insurance Fund from which the entire banking industry must pay
16 in order to keep that fund available and to keep the confidence
17 in the ability to meet its obligations.

18 Finally, Your Honor, the FDIC as receiver will
19 continue to do what we do to go after others who contributed to
20 the demise of Colonial Bank. We investigate claims and we
21 bring claims, and we will continue to do that. It is all civil
22 litigation.

23 With respect to Mr. Farkas and his co-conspirators,
24 however, it's really restitution and forfeiture under the
25 criminal law that provides us in practical terms our only

1 source of recovery for the losses caused by them.

2 And so, we ask the Court to favorably consider our
3 request in due course when the time comes for that.

4 The FDIC appreciates the time, Your Honor, and we
5 thank you for this opportunity to appear.

6 THE COURT: All right. As I am sure you know, Mr.
7 O'Brien, all the other defendants, and I assume, Mr. Rogow,
8 that you are also going to agree with this, are putting off the
9 actual restitution decision for a further day when all the data
10 has been pulled together. And you'd certainly have an
11 opportunity to reappear at that proceeding or, obviously, the
12 comments you are making today would be incorporated in that.

13 THE DEFENDANT: Thank you, Your Honor.

14 THE COURT: Thank you. Were there any other victims
15 who wanted to be heard? We did receive, again, the letters,
16 they are in the presentence report, from various other victims.

17 All right, Mr. Farkas, this is your opportunity--
18 Come up to the lectern.

19 This is your time to say anything you would like the
20 Court to consider before sentence is imposed.

21 THE DEFENDANT: I wrote a little something that I
22 wanted to say.

23 THE COURT: All right.

24 THE DEFENDANT: So, I am going to read it to Your
25 Honor because I am nervous and it is hard for me to remember

1 what I want to say exactly.

2 I stand before you humbled in more ways than anyone
3 can imagine by the jury decision. Despite the position in
4 which I find myself, I still believe in justice and in the
5 legal process.

6 I appreciate that I live in a society that affords me
7 the right to be heard in a court in my own defense.

8 I am thoughtful, thankful to supportive friends and
9 family members who have written letters to you in hopes of
10 giving the Court and all interested a broader perspective of my
11 character than has been portrayed here.

12 Over the last two years I have lost many friends and
13 acquaintances, but those who know me best have stood by me. I
14 am grateful for that.

15 Throughout my life I have strived to be a good
16 person. I have always tried my best to do what was expected of
17 me. My actions have always been securely anchored by a moral
18 upbringing and my motives driven by the greater good.

19 I was a good boy who did as my elders asked. I was a
20 good student who listened to his teachers and studied hard. I
21 was a good soldier who carried out his duties in service to his
22 country. I was a diligent worker who persistently and at times
23 tenaciously pursued excellence.

24 After years of hard work, I was the business owner
25 who tried to create jobs and to provide employees with a

1 working environment in which each and everyone felt important.
2 Whether the person was president of my company or a custodian,
3 their jobs were just as important to them, their needs just as
4 valid, their expectations of me were evenly weighted.

5 In my personal life and in business, I developed
6 relationships in which I felt a personal responsibility to make
7 things right for everyone. I believed that everyone at Taylor
8 Bean & Whitaker and at Colonial Bank was acting together in
9 good faith to help each other to save both businesses.

10 My actions as chairman were driven by the desire to
11 make things right. I wanted all my friends to keep their jobs.
12 It was my job as chairman to act toward advancing these goals.
13 It was expected of me.

14 Excuse me. I toiled endlessly to improve my
15 company's processes and efficiencies. We developed cutting
16 edge automation to facilitate these ends. We employed top
17 flight auditors and legal advisors to keep us compliant.

18 When faced with the prospect of Taylor Bean &
19 Whitaker sinking, I had to take risks. I could not accept that
20 the company would not continue to succeed and many employees
21 and friends would lose their jobs. I knew, perhaps naively,
22 that the ship could be righted.

23 I let Taylor Bean get out of control by letting it
24 grow too fast, resulting in higher daily volumes of mortgage
25 transactions, creating more opportunity for error. But the

1 errors did not grow from seeds of greed and were not the result
2 of actions taken for illicit gain. More business meant more
3 jobs, but its also meant more errors, which is not uncommon in
4 the mortgage industry.

5 Yes, I made plenty of mistakes, and I am remorseful
6 for not having more success at correcting them. Many jobs were
7 lost and many lives were changed. I empathize deeply with
8 everyone who has been affected by Taylor Bean & Whitaker's
9 demise.

10 I stand before you, Your Honor, asking that you see
11 Lee Farkas as a real person, with emotions and a conscience,
12 with redeeming qualities, and not simply as the character
13 painted by the prosecution using a pallet limited to only the
14 darkest hues of greed and evil.

15 Thank you very much for hearing me.

16 THE COURT: All right. Well, you know, Mr. Farkas,
17 you have just presented the Court with quite an amazing
18 statement because I do not detect one bit of actual remorse
19 about the conduct itself or any true recognition that what you
20 did was unlawful. You engaged in fraud and you corrupted the
21 lives of the people who have already pled guilty and been
22 sentenced by this Court.

23 You regret that you were caught and you regret that
24 you were convicted. But the kind of remorse that I saw from
25 Mr. Bowman, Ms. Kissick and the other people I've sentenced in

1 this case struck the Court as genuine and real. And I am not
2 hearing that in your statement.

3 Nor was it present, frankly, in the statement
4 presented to the Probation officer, who also commented on the
5 same reaction.

6 I actually don't believe that you truly accept the
7 fact that you have committed these criminal acts. And that's
8 unfortunate because remorse is a factor which all sentencing
9 courts do look at with care.

10 I understand that in your life you have done some
11 good things, and I don't discount those. And I absolutely
12 accept at face value all the statements that were provided
13 through the letters of your friends and supporters, but they
14 are simply not enough to tip the balance significantly in your
15 favor.

16 This was a very serious crime, series of crimes. It
17 went on for a long period of time. And whether or not your
18 activities and the activities at TBW are truly responsible for
19 the demise of the bank, is an issue that will have to be
20 unsorted down the road with the restitution.

21 And I recognize that there are a lot of victims out
22 there. Your victims are somewhat different, I agree with you,
23 counsel, in this respect. In the Madoff case, that was a
24 direct, sort of person-to-person, true, traditional type of
25 fraud. The victims here, many of them were investors. And

1 investors do always assume a certain amount of risk. Not a
2 risk against fraud, but there is still a risk involved.

3 So, I am not as concerned about that type of victim
4 as I would be if there had been the type of fraud going on in
5 the Madoff case. However, this is a very serious case.

6 Now, one of the factors the Court has to look at, and
7 I have already talked about the importance of general
8 deterrence, in your case because I don't sense any true
9 remorse, the issue about individual deterrence is still there.
10 And whether or not if you were released at an early time you
11 would go out and try to do some other kind of potentially
12 fraudulent activity, is still a very real risk in my view.
13 And, therefore, does affect how the Court should go about
14 sentencing you.

15 The concept that you would try to put blame on Ms.
16 Kissick or the others for putting you in this position I find
17 is also tremendously misplaced, and is in incredibly stark
18 contrast with Mr. Bowman.

19 I think, Mr. Cummings, you were here, you have been
20 here for all the sentencings. Mr. Bowman absolutely struck me
21 as an amazing human being in that he spent a good portion of
22 his allocution begging for mercy for Cathie Kissick. And the
23 reason he gave that in part was because he described your
24 behavior as so overbearing that you basically were almost
25 extorting her, the pressures that you were putting on her.

1 So, to argue before this Court that it was Kissick
2 who could somehow have stopped all of this, when in fact the
3 evidence that I find in this case is that you were making it
4 impossible for her to do that, undercuts the validity of that
5 argument as well.

6 In terms of comparisons between the sentence the
7 Court is going to impose on you and that of the others who I
8 have already sentenced, the Government correctly points out
9 significant material differences.

10 One difference that is not at all material is the
11 fact that you chose to exercise your Constitutional right to go
12 to trial. I have never used that aspect of a case against a
13 defendant. You had every right to do that. And that is not at
14 all factoring in here.

15 You didn't have a right to lie, and I have already
16 explained to you that's why you were stepped back and put into
17 prison as soon as the conviction occurred. But you had a right
18 to go to trial and to have counsel present a vigorous defense.

19 But these other witnesses, these other members of
20 this organization or this operation, came in and helped the
21 Government. They have tried to make amends. They have
22 expressed true remorse. And you haven't done any of that.

23 And so, for those reasons, a disparate sentence is
24 clearly appropriate here.

25 At the same time, as I said earlier, sentences of

1 hundreds and hundreds and hundreds of months make absolutely no
2 sense. And I think in my view distort the whole criminal
3 justice process.

4 For all of these reasons, I am finding that a
5 sentence of 30 years incarceration, which is the statutory
6 maximum for Counts 1 through 7, 10 and 11 and 14 through 16, to
7 be imposed concurrent on each and every one of those counts, is
8 a proper sentence that meets all the goals of 3553(a) and is
9 not, in my view, unfair or out of sync with the ways in which
10 the other defendants in this particular case were sentenced.

11 Now, in terms of Counts 8 and 9, because the
12 statutory maximum for those counts is 240 months, the sentence
13 on those counts is 240 months per count, concurrent with each
14 other, and concurrent with the 360 months concurrent sentences
15 on the previously announced counts.

16 And lastly, in terms of Counts 14 and 16, the
17 statutory maximum is 300 months. So, it is a 300-month
18 sentence concurrent on 14, 15 and 16, again run concurrent with
19 all the previous sentences.

20 So, the total sentence is 360 months. Which, again,
21 is 30 years.

22 Each sentence will be followed by a period of three
23 years of supervised release. Each of those terms of supervised
24 release are run concurrent with each other.

25 The terms and conditions of the supervised release,

1 Mr. Farkas, are your uniform good behavior. Which means you
2 cannot violate any federal, state or local laws.

3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: You also have to comply with all the
6 conditions of supervision that will be printed on the judgment
7 order and explained to you by the Probation Office.

8 Do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: As special conditions of supervision, you
11 must provide full access to any and all of your financial
12 records to the Probation Office as directed.

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Secondly, you must make a good faith
16 effort to make full any restitution that is imposed on you.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: I can't even begin to determine what that
20 amount is going to be at this point or what the minimum monthly
21 payments would be. That will be announced at some point in the
22 future.

23 You will be required, if you should come into any
24 windfalls, inheritances, win the lottery, or anything of that
25 sort, you will have to first apply those funds to your

1 restitution obligations.

2 Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. I think because of the length
5 of the sentence, there is not much likelihood that there will
6 be employment. But just for the record, should you when
7 released seek employment, it can have nothing to do with the
8 financial or real estate industries.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: There is no history of drug abuse in this
12 case. And so, the mandatory drug testing is not imposed.

13 But the Probation Office has the right at any time to
14 demand a drug test from you, and you will have to comply with
15 that.

16 Do you understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: Because of the amount of forfeiture and
19 restitution that will be involved in this case, the Court finds
20 that you do not have the financial resources to pay the costs
21 of incarceration, any of the costs of supervision, or any of
22 the statutory fines.

23 For the record, the \$1,400 in special assessments is
24 imposed. And I will have it marked paid on the judgment order
25 since I understand that has been taken care of.

1 Do you want a recommendation as to a facility, Mr.
2 Rogow?

3 NOTE: A discussion is had between the defendant and
4 his attorney.

5 MR. ROGOW: The facility at Lexington, Kentucky is
6 what we would--

7 THE COURT: Lexington?

8 MR. ROGOW: I think it is Lexington. It is just
9 south-- It is a Kentucky facility. Let me get the right
10 address for the Court and then give that to you.

11 THE COURT: All right. Well, you need to get that to
12 us today so we can get the judgment order out.

13 MR. ROGOW: We will.

14 THE COURT: All right. Again, just for the record,
15 in terms of determining the restitution amount, you are not
16 objecting to that being done at a later hearing?

17 MR. ROGOW: That's correct. I am not clear on what
18 the Court said about staying the judgment pending the
19 forfeiture--

20 THE COURT: Well, I am not staying the judgment. I
21 mean, we are going to issue the judgment order today. It will,
22 the forfeiture amount I have determined, and that will be in
23 the judgment order.

24 MR. ROGOW: Yes.

25 THE COURT: The restitution amount, the Government

1 hasn't yet given me an idea as to when they are going to be
2 able to do that. And we are going to have, I assume, a hearing
3 on that issue. Whether or not defendants want to be present,
4 you need to work out with the Government counsel.

5 Obviously, a defendant can waive his presence at such
6 a hearing. But I want to make sure that will be done in
7 writing. And, of course, if Mr. Farkas wants to be present,
8 then you need to make sure the Marshals don't start sending him
9 anyplace because we would need to get him back.

10 But I said that the time in which to appeal this
11 sentence, this case, this conviction, will not start until I
12 have given you my written opinion on the forfeiture issue. All
13 right.

14 MR. ROGOW: Yes.

15 THE COURT: And I will, when that opinion comes out,
16 then direct that from that time on, that's when your time in
17 which to note the appeal will start.

18 MR. ROGOW: Thank you, Your Honor.

19 THE COURT: All right. Mr. Stokes, was there
20 anything you wanted the Court to address that I may have made a
21 mistake on? I sort of saw some body language--

22 MR. STOKES: No, no, not at all, Your Honor. As far
23 as the restitution hearing, we have spoken with the defense,
24 and we will get back to the Court on a date. We anticipate--

25 THE COURT: Do you have any expectation as to when, a

1 ballpark figure?

2 MR. STOKES: I do. I don't want to commit the
3 defense, but we think end of July, beginning of August is a
4 time frame that--

5 THE COURT: How long do you think that is going to
6 take? My calendar is getting kind of busy right now, and I am
7 just trying to estimate.

8 MR. STOKES: Your Honor, the problem I have with
9 answering that question is I have heard varying things from
10 counsel. For the most part, I have heard people suggest that
11 there is not going to be much to challenge. If that's the
12 case, I think it would be very short and perhaps could be
13 submitted on paper.

14 But I don't know from Mr. Farkas' side what their
15 position is going to be on proving the restitution, the loss
16 amounts.

17 And so, I don't think from the cooperators there is
18 going to be a whole lot of argument. But I don't want to say
19 what Mr. Farkas' position will be on that.

20 THE COURT: All right. Mr. Kuglar, was there an
21 issue that you wanted to raise on the sentence?

22 MR. KUGLAR: Your Honor, on the order of forfeiture,
23 we would renew our request that under Rule 32.3(d) the order on
24 the forfeiture be stayed pending appeal. Particularly, whereas
25 here, the big, a huge chunk of this amount of forfeiture was

1 paid back the next day. So, we have this issue with proceeds.

2 And the substitute assets that the Government is
3 looking to seize upon is Mr. Farkas' homestead. So, we think
4 it is proper that-- And they have been restrained for a long
5 time, and they are still there.

6 And so, we would request that under 32.3(d) that you
7 stay the order of forfeiture pending the appeal.

8 THE COURT: Well, the relationship between the
9 forfeiture and the restitution is also in this case something
10 we haven't directly addressed, but clearly they are related.

11 I am assuming, as the Government has done in past
12 cases involving significant losses to victims, that resources
13 obtained through the forfeiture process become available for
14 restitution purposes.

15 Is that not the plan?

16 MR. STOKES: Your Honor, yes. I mean, the process is
17 that the victims then have to apply through the Asset
18 Forfeiture Money Laundering Section for remission of those
19 funds. But that certainly is contemplated and has been
20 discussed with a number of the victims, that that is the
21 process by which they would recover funds from the forfeiture.

22 But the Government does object to staying the
23 forfeiture, the preliminary forfeiture order, particularly for
24 this reason. A number of the assets, particularly ongoing
25 businesses, are left in limbo at this point. And there is a,

1 we believe, a significant risk that those businesses will fail
2 unless we can through the forfeiture process dispose of those
3 assets and conduct the sale of those assets.

4 THE COURT: I think the forfeiture procedures need to
5 get going, I agree with the Government in that respect.

6 So, that request is overruled.

7 And what I will do is try to get the opinion out to
8 you as quickly as possible so you can ratchet up the appeal.

9 But there are good reasons to have that forfeiture
10 order in place. So, I am going to, as I say, overrule that
11 objection.

12 Anything further in this case?

13 MR. ROGOW: Your Honor, I think it's Ashland,
14 Kentucky, but let me get to your office--

15 THE COURT: We are here all day. I would like to get
16 that judgment order out as soon as possible. All right. So,
17 thank you.

18 Anything further? If not, the defendant is remanded.

19 We will recess court for the day.

20 -----
21 HEARING CONCLUDED

22 I certify that the foregoing is a true and
23 accurate transcription of my stenographic notes.

24 /s/ Norman B. Linnell
25 Norman B. Linnell, RPR, CM, VCE, FCRR

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA . Criminal No. 1:10cr200
 .
 vs. . Alexandria, Virginia
 . April 15, 2011
 LEE BENTLEY FARKAS, . 10:30 a.m.
 .
 Defendant. .
 .

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

VOLUME 9 - A.M.

APPEARANCES:

FOR THE GOVERNMENT: CHARLES F. CONNOLLY, AUSA
PAUL J. NATHANSON, AUSA
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
and
PATRICK F. STOKES, ESQ.
ROBERT ZINK, ESQ.
United States Department of Justice
Criminal Division, Fraud Section
1400 New York Avenue, N.W.
Washington, D.C. 20005

FOR THE DEFENDANT: WILLIAM B. CUMMINGS, ESQ.
William B. Cummings, P.C.
P.O. Box 1177
Alexandria, VA 22313

(APPEARANCES CONT'D. ON FOLLOWING PAGE)

(Pages 2245 - 2315)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 FOR THE DEFENDANT:

BRUCE S. ROGOW, ESQ.
Bruce S. Rogow, PA
500 East Broward Boulevard
Suite 1930
Fort Lauderdale, FL 33394
and
CRAIG KUGLAR, ESQ.
Law Office of Craig Kuglar, LLC
1130 Piedmont Avenue, Suite 913
Atlanta, GA 30309
and
ZAHRA S. KARINSHAK, ESQ.
Krevolin & Horst
1201 West Peachtree Street
One Atlantic Center, Suite 3250
Atlanta, GA 30309

11 ALSO PRESENT:

LISA PORTER
SA SCOTT TURNER
JUDSON VAUGHN

13 OFFICIAL COURT REPORTER:

ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Fifth Floor
401 Courthouse Square
Alexandria, VA 22314
(703)299-8595

14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 (Defendant and Jury present.)

3 THE CLERK: Criminal Case 10-200. United States of
4 America v. Lee Bentley Farkas. Would counsel please note their
5 appearances for the record.

6 MR. STOKES: Good morning, Your Honor. Patrick Stokes,
7 Charles Connolly, Paul Nathanson, and Robert Zink for the United
8 States, along with Special Agent Scott Turner and Lisa Porter from
9 the U.S. Attorney's Office.

10 THE COURT: Good morning.

11 MR. ROGOW: Bruce Rogow, Craig Kuglar, William Cummings,
12 and Zahra Karinshak for the defendant, Lee Farkas, who is present
13 in court.

14 THE COURT: Good morning.

15 And good morning again, ladies and gentlemen. Thank you
16 for being here so promptly. Again, do any of you think you bumped
17 into any media coverage about the case or related topics?

18 (Jurors shaking heads.)

19 THE COURT: No? Nobody tried to talk to you?

20 (Jurors shaking heads.)

21 THE COURT: No? And you haven't shared anything about
22 the case with anybody; is that correct?

23 (Jurors shaking heads.)

24 THE COURT: Excellent. All right, we'll begin then, and
25 we're into the defendant's case. Mr. Rogow?

Farkas - Direct

2249

1 MR. ROGOW: Defense calls Lee Farkas.

2 THE COURT: All right.

3 LEE BENTLEY FARKAS, DEFENDANT'S WITNESS, AFFIRMED

4 DIRECT EXAMINATION

5 BY MR. ROGOW:

6 Q. Mr. Farkas, do you recall the testimony of Avi Pemper, the
7 fellow from BNP Paribas, when he came to see you in Ocala?

8 A. Yes.

9 Q. And did Mr. Pemper ask --

10 THE COURT: I'm sorry, I know this is formality, but for
11 the record, would you please state your name for the jury.

12 THE WITNESS: Oh, my name is Lee Farkas.

13 THE COURT: Thank you. Go ahead.

14 BY MR. ROGOW:

15 Q. Mr. Pemper, if you recall, testified that he asked you, "Why
16 are you sitting here instead of fleeing?" Do you remember that
17 testimony from him?

18 A. Yes, I do.

19 Q. And why are you sitting here instead of fleeing?

20 A. Because I don't believe that -- I didn't believe at the time
21 that I'd committed any crime, and I don't believe now that I've
22 committed any crime.

23 Q. Do you recall also in Mr. Pemper's testimony, he said
24 something about you saying, "Let me look at what countries have
25 extradition treaties"? Do you recall him testifying to that?

Farkas - Direct

2250

1 A. I do recall that, yes.

2 THE COURT: I'm sorry, Mr. Farkas, you're going to need
3 to lean closer to the microphone.

4 THE WITNESS: Okay.

5 BY MR. ROGOW:

6 Q. And did you say that to him?

7 A. I think I did, yes.

8 Q. Do you have a macabre sense of humor?

9 A. Well, I have a sense of humor. I don't know if it's macabre
10 or not. I do have maybe a peculiar sense of humor, yes.

11 Q. And when you said in an e-mail, I think it was that has been
12 introduced in court, something about sharing a suite with Martha
13 Stewart, was that another attempt at humor by you?

14 A. Well, it really was, because if you, if you sort of think
15 about it, it would be silly for me to be in a women's prison.
16 That was the joke, I guess.

17 Q. So some of these things that we have heard and seen in terms
18 of e-mails, do they actually reflect your true thoughts about some
19 of the subjects that were brought out in those e-mails?

20 A. Well, sir, we were during those years, I think, all of us in
21 quite stressful situations, and sometimes maybe we used humor to,
22 as a stress reliever, or at least I tried to, and I tried to be
23 funny to keep people from, from being too, overly serious.

24 Q. And is humor sometimes misinterpreted?

25 A. Well, I don't think the people that I was speaking to at the

Farkas - Direct

2251

1 time misinterpreted it, but it certainly could be misinterpreted
2 reading e-mails or, you know, looking back, recounting our
3 conversation.

4 Q. Now, how did Taylor, Bean & Whitaker begin for you?

5 A. Well, when I moved to Ocala, Florida, in 1986, late 1986, I
6 was working for a, a developer and a builder there who had brought
7 me there to help him with some real estate problems. The
8 gentleman was from Brazil, and I had met him while I was living in
9 St. Thomas, in the U.S. Virgin Islands, and he asked me to move to
10 Ocala or at least to come to Ocala with him and look at some of
11 his real estate properties, and he did have a subdivision and a
12 small, little horse farm there and asked me if I would come help
13 him, and I really didn't want to, frankly, but I said I would, and
14 so I did, and I went up to try to do something with some of these
15 properties.

16 He thought that I had expertise in that area, and I had,
17 I had done rather well in real estate over my life, and so I, I
18 met a loan officer named Renee Holly from Taylor, Bean & Whitaker
19 one afternoon, and that's how I became acquainted with the
20 company. It was a small, little mortgage brokerage organization,
21 and business was terrible, and I didn't have any customers, so I
22 used to go hang out really at the mortgage office, and I became
23 friendly with all the folks. There were about six of them that
24 worked there.

25 Q. And, and did your efforts for this gentleman from Brazil lead

Farkas - Direct

2252

1 you to realize that one of the important things in terms of
2 selling property was the access to mortgages?

3 MR. STOKES: Objection, Your Honor.

4 THE COURT: And the objection is?

5 MR. STOKES: Leading.

6 THE COURT: Yes, that's a leading question. This is
7 your witness, Mr. Rogow, so you cannot lead.

8 MR. ROGOW: I understand.

9 Q. So when you were working for the Brazilian, was there
10 anything that struck you with regard to the need for getting
11 mortgages?

12 A. Yes. I think one of the things missing from his marketing
13 program for these houses he was building and this land he was
14 developing was financing. It was absolutely necessary to find
15 financing for these houses, and I talked to a couple banks, and I
16 talked to Taylor Bean. That's really how the meeting with Renee
17 Holly came about. We, we were in need of financing for potential
18 home buyers for these homes.

19 Q. Had you been involved in the mortgage business before?

20 A. Well, yes and no. My father was a developer in New Mexico
21 years ago, and he sold mobile homes, subdivision lots, and what
22 have you, and provided financing, so I worked for him as a, as a
23 young man, and so I did understand the time value of money, and I
24 did understand the basics of a mortgage and direct lending.

25 I did not, however, have any experience in secondary

Farkas - Direct

2253

1 marketed -- secondarily marketed mortgages, such as working for a
2 mortgage broker or someone who sells their loans to another
3 company after they originate them.

4 Q. Well, how did it come to be that you bought TBW?

5 A. Well, TBW was formed in, in 1984 or so, and it was owned by
6 two businesspeople in Ocala. Then it was sold to a savings and
7 loan in Peoria, Illinois, and the savings and loan in Peoria,
8 Illinois, was taken over by the Resolution Trust, the RTC at the
9 time. So the company was owned by the federal government for a
10 short, nine-month period, and then those assets were bought by a
11 bank called First of America Bank in Kalamazoo, Michigan, who
12 owned the business, and it was a very small business, and they
13 bought it as a, I think in a bundle of assets. I'm not sure they
14 realized really that they even owned it. It was a very small
15 thing.

16 And they have notified Gary Covalleski, who was the
17 manager of the business, that they were going to close the
18 business and withdraw from that particular line of work.

19 Q. He was the manager of TBW?

20 A. Yes. He was the general manager of the Taylor Bean office.
21 And remember at that time, Taylor, Bean & Whitaker was about 1,900
22 square feet of office space and about six or seven employees.

23 Q. And so did you and the gentleman who was the general manager
24 have any discussion about buying the business?

25 A. Well, Gary came to me very distraught and said that he didn't

Farkas - Direct

2254

1 want to lose his job and the other jobs in the business and what
2 could we do about it, and so I said, "Well, I don't know. Let me
3 think about." Anyway, I said, "Well, why don't we offer to buy
4 it?" That was my solution.

5 Q. From the Kalamazoo bank that had it?

6 A. From First of America, yes.

7 Q. And did you buy it?

8 A. We entered into an agreement to buy the business and, and
9 did.

10 Q. And what did you pay for it?

11 A. It was purchased for \$75,000.

12 Q. All cash?

13 A. No. There was \$25,000 that, that I borrowed from a, a friend
14 of mine, a private loan, and there was \$50,000 that First of
15 America allowed Gary and I to withdraw from the business. So we
16 used really their own cash and \$25,000 borrowed money to buy the
17 business. Each of us put up \$2.

18 Q. And what year was that?

19 A. That was, it -- the deal concluded in 1991.

20 Q. And at that time, how much business did TBW do?

21 A. They, they were closing generally less than a million dollars
22 per month in loans. When they hit the million-dollar mark, they,
23 they had a big celebration and got a bonus, I think.

24 Q. Now, when you say a million dollars a month in loans, about
25 how many loans would that be at that time?

Farkas - Direct

2255

1 A. Well, back then, the average loan was maybe, the FHA maximum
2 line was, say, \$60,000, sixty-something thousand, so, you know, it
3 would be 20-30-40 loans a month.

4 Q. Taylor Bean -- Taylor, Bean & Whitaker at its height closed
5 how many loans a month?

6 A. Well, let's see. I think the highest month was over 25,000
7 loans.

8 Q. Now, when you started with the business, who was the source
9 of financing for it?

10 A. Well, in the very beginning, First of America for some months
11 allowed Taylor Bean to continue to fund loans through its, through
12 an informal warehouse line that they provided, and there were two
13 investors in those loans. It was them and one other mortgage
14 company from Michigan.

15 So really, it was simply a mortgage broker that could
16 sign a check on First of America's bank account and write a, write
17 a check for the closing. That's the way it went.

18 Q. That's what TBW was?

19 A. That's what TBW was.

20 Q. The -- did there come a time when the business began to grow?

21 A. Yes. Yes, we -- I got, I got busy and got us into some other
22 lines that we weren't in before. We started doing really my
23 business, the personal business started doing mobile home,
24 double-wide mobile home and land loans, which at the time, over 30
25 percent of all new housing in Marion County, which is where Ocala

Farkas - Direct

2256

1 is, was mobile home, was manufactured in a factory, and FHA
2 allowed these loans, and we thought it was a, it was going to be a
3 great niche for us to be in, and we were doing new construction
4 loans for builders, FHA loans. And so business, business went
5 pretty well.

6 Q. And did there come a time when you needed access to more
7 money than you were able to get from the people that supported you
8 at the beginning?

9 A. I don't think there was a time that we didn't need more
10 money, but certainly after First of America's agreement ran its
11 course, we had to start coming up with, with warehouse financing,
12 and we, we, we got a warehouse line with a tiny little bank called
13 Crown Bank in Orlando.

14 It was, the total amount of the warehouse line was
15 \$300,000, you know, so it would allow you to close maybe five
16 loans or something. It was a, excuse me, it was a very small
17 line, and after that, we went to a couple of other, we went to a
18 couple of other more traditional warehouse banks, and we were able
19 to get a pretty good line of credit, I think around \$10 million if
20 I recall from Norwest Bank, which later changed their name to
21 Wells Fargo.

22 Q. You talk about warehouse lines, and we've heard that term
23 throughout the trial. What, what does a warehouse line mean in
24 the mortgage business?

25 A. A mortgage warehouse is not a building where you store

Farkas - Direct

2257

1 furniture or goods. A mortgage warehouse is a short-term
2 borrowing for mortgages, so we would, we would fund a mortgage to
3 the borrower with borrowed money from the warehouse bank, and then
4 we would sell the loan, and in those days, we sold the entire
5 economic value of the loan. We sold the loan, what's called a
6 whole loan. That means the loan, the servicing rights, and
7 everything associated with that loan, we sold all the economic
8 value to another lender, would be in those days JPMorgan Chase or
9 Countrywide or someone like that, and then they would send the
10 money back, and the warehouse bank would take their proceeds and
11 then give us the profit, and we would, we would do it again. So
12 that's what a warehouse, warehouse bank did.

13 Q. And JPMorgan Chase, for example, what would they get when you
14 sold them the whole loan?

15 A. They got the, like I said, any economic value of that loan.
16 They got the note, the IOU from the borrower. They got all the
17 documentation that went with it. They were -- we assigned the
18 note to them with an endorsement. We endorsed the note over to
19 the lender that said Pay to the Order of JPMorgan Chase Without
20 Recourse, signed Taylor, Bean & Whitaker by such-and-such. So we
21 endorsed the loan.

22 We assigned the mortgage, so we would create an
23 assignment of mortgage form, and we would file that with the
24 county so that they would have the note and the security, and then
25 we would sign over a release of the servicing rights, which is the

Farkas - Direct

2258

1 right to collect the payments on the loan for the rest of the time
2 the loan was in effect, and we would release the, any and all
3 interest we had in other business with that borrower. For
4 example, we would say that we're not going to approach them to
5 sell them insurance or to sell them patio furniture or to sell
6 them anything.

7 Q. So was there value added to someone like J. P. Morgan, who
8 was buying all of this, including your release of any interest in
9 selling anything further to the borrower?

10 A. The -- these companies that bought loans from brokers such as
11 us were called aggregators, because they were aggregating
12 servicing, and they had in those days a voracious appetite to
13 acquire these type of assets. So they would put out price sheets.

14 There were probably in those days maybe 50 good choices
15 of different banks and other institutions that we could sell those
16 loans to, and so we would sell the loan basically to the highest
17 bidder, and they would bid every day on these rate sheets that
18 would come across our fax machines. So if we had a 6-1/2 percent
19 FHA loan, we had all these choices, and the difference in price
20 may be maybe 100 or 200 dollars, but all prices were fairly close
21 to each other.

22 Q. You said fax machines. It was not a computer time at that
23 time, was it?

24 A. No. When we first started, I remember there's a lady who's
25 passed now who, who used to type up the FHA closings, and you had

Farkas - Direct

2259

1 to type them in triplicate, and we were using carbon paper, and
2 she could type up an entire FHA -- and if you made a mistake, you
3 had to start over, because there was no strike-outs, no
4 white-outs, no nothing was allowed. Otherwise, it wouldn't go
5 into the Ginnie Mae pool. And so she used to be able to type an
6 entire package without making one key strike mistake, and she was
7 using a thing going ch-ch-ch, like that. So that was pretty
8 amazing to me actually.

9 Q. The mortgage servicing rights, you said, were also sold to
10 the whole loan, and what was the value of the mortgage servicing
11 rights to JPMorgan Chase or whatever buyer was buying it?

12 A. Well, they valued them in those days. They would pay one
13 price for the entire loan, but they did value them, so you knew
14 what we were getting for it. It was called, they called it an
15 SRP, which is a service release price, and the SRP was added to
16 the, to the value of the instrument itself, and they paid you a
17 total price, and in those days, you could sell -- it was, it was,
18 it was quite good. You could sell the servicing for around 2
19 percent of the value of the note.

20 Q. And the people that bought it, what were they going to get
21 for that money?

22 A. Well, they had the right to collect the payments for if it's
23 a 30-year loan, for the next 30 years or however long the mortgage
24 lasted, and so they would collect and get a fee for collecting the
25 payments, and it was really what it was all about. It was really

Farkas - Direct

2260

1 the reason that everyone -- although I didn't understand it at the
2 time, but it was really the reason to do mortgages at all was to
3 get the servicing rights, because if you had the servicing rights,
4 you had almost an annuity of a revenue stream.

5 So let's say it was a \$100,000 loan or something. You'd
6 maybe get \$40 a month to collect the payment, and every time the
7 people made a payment, you got to take \$40 off the top, and your
8 cost of collecting that payment in those days, as the same as it
9 is now mostly, ran around \$5 or so, so you would have a \$35 gross
10 profit -- or net profit, I mean, actually, net profit, in the
11 servicing, so it was a very lucrative business.

12 Now, there are many other risks and things to it, so
13 anything that's got a high return also generally has a high risk
14 attached to it, and the risk was that the borrower would pay off
15 sooner than expected, and we estimated in those days that a
16 30-year mortgage would last probably seven years or so, so if they
17 paid it off in two years, then whoever bought the servicing made a
18 bad deal, because they only got two years' worth of payments, and
19 they were expecting to get seven years' worth of payments.

20 Q. Did there come a time when you met the people from SunTrust
21 as a source of mortgage warehouse lending?

22 A. The history of mortgage warehouse lending since I've been in
23 the business, which, well, up until almost two years ago was 19
24 years before that, has been a volatile history. Banks, they like
25 it; they don't like it; they get in; they get out. People, I

Farkas - Direct

2261

1 mean, everybody who's in it has been in and out and in and out.

2 So what happened was we had a line of credit with -- we
3 had a line of credit with Norwest at the time, and they decided to
4 exit the business, and so they gave us a list of other
5 institutions that they thought would be a good mix, a match, I
6 guess, good partner for Taylor Bean to, to provide warehouse
7 lending, and it was, it was a very small line relative to the
8 numbers, you know, we've heard about today, but it was a \$10
9 million line, I believe.

10 So one of the -- there were two names on the list
11 that -- there were several names, but two of the names that we
12 liked and we contacted were PNC Bank and SunTrust Bank, and so I
13 guess Sam Bryan, who was our representative from Norwest at the
14 time, I guess he passed my name on to those people, and those
15 people actually came to Ocala and made a sales call on us.

16 Q. And who was the people -- or who were people from SunTrust
17 that came to make a call on you?

18 A. Well, there were two people that came or at least two people
19 that came. One of them was Melanie Carrington, and one of them
20 was Cathie Kissick.

21 Q. Is that the first time you met Cathie Kissick?

22 A. It is.

23 Q. And approximately what year was that?

24 A. You know, I'm not sure I remember. I'm not sure I remember.

25 Q. In the '90s sometime?

Farkas - Direct

2262

1 A. Yes.

2 Q. Early '90s?

3 A. It was in the middle '90s, I suppose.

4 Q. And, and what did SunTrust offer you?

5 A. Well, SunTrust made an offer, and what the -- I guess when we
6 were shopping for this facility, the difference was what the fees
7 were for each loan that they financed and what the interest rate
8 was. So we, we were looking at Cathie's proposal, and as chance
9 would have it, a fax came in, and somebody brought it into my
10 office and put it on my desk, and it was a proposal from PNC Bank
11 which was far superior to Cathie's offer that she had on the
12 table.

13 And so we were going to go out to lunch, and I said,
14 "Well" -- I just handed it to her and said, "What about this?"

15 And she said, "Oh, darn, you know, that's a pretty good
16 deal," and that was it.

17 What happened -- what eventually happened, I'll spare
18 you all of the details, but was that we did a line between
19 SunTrust, and PNC Bank was a participant in it, and we got the, we
20 got the better terms.

21 Q. With SunTrust?

22 A. Yes. With -- SunTrust was the lead. PNP was the participant
23 at that point.

24 And then we were growing, and we, we quickly went
25 through that line and needed more.

Farkas - Direct

2263

1 Q. How big a line was that?

2 A. I want to say it was 20 million at the time. I'm not 100
3 percent sure. I don't remember. But it was big, it was big to us
4 at the time.

5 So we got the 20 million, and of course, the next week,
6 as was the history at Taylor Bean, we, we needed more money, so we
7 had more loans to close than we had money to close them, and so I
8 called Cathie and I said, "Can we get some more? This is nice.
9 Can we have more?"

10 And she said, "Well, I don't know, but let me work on
11 it." And she gave us -- and a couple days later, she called me
12 and said, "I've got a great deal for you. Here's what I want to
13 do." She said, "I will give you -- we'll give you more money --
14 we can give you a lot more money, but what you have to do is
15 there's an affiliate of SunTrust Bank called SunTrust Equity
16 Partners," and the gentleman's name was Bob Dudiak.

17 And I met Bob Dudiak at this beautiful, shiny SunTrust
18 Tower in Atlanta, and it was in the late '90s still, and Bob said
19 to me, he said, "Look, I'll lend you \$2 million at higher interest
20 rates, and then you can borrow a lot more money at lower interest
21 rates from SunTrust Bank."

22 Q. Now, how does that work?

23 A. Well, this was something that they called, and I'd never
24 heard of it before, but it's called sub debt, and sub debt, which
25 is short for subordinated debt, also called mezzanine capital

Farkas - Direct

2264

1 today, is debt. Really, it's a debt, it's an IOU to the bank, but
2 the warehouse bank treats it as equity. So when they calculate,
3 leverage, and other kinds of ratios that they have to monitor,
4 they'll include this sub debt number in the amount of capital that
5 the company has.

6 So if the company at that time maybe had half-a-million
7 dollars in capital and we could get a \$20 million line and they
8 put in \$2 million, you'd suddenly have two-and-a-half million
9 dollars of capital, and you could get a much, much, much, much
10 larger line of credit.

11 Q. So was one arm of SunTrust loaning you money and then another
12 arm of SunTrust would be able to give you more money on the
13 warehouse line?

14 A. Yes. And you paid, example, 12 percent interest on the sub
15 debt piece, and then we paid whatever the prevailing rate was on
16 the warehouse, which would be considerably lower.

17 So the sub debt had some other, it had some other
18 features or benefits, I guess, to the lender that we, that we had
19 to live with.

20 MR. STOKES: Your Honor, I'm going to object just purely
21 on relevance grounds. We're talking about sub debt.

22 THE COURT: The term "sub debt" has come in before on
23 this case. This is the defendant's case. I'm going to allow him
24 some leeway. So the objection is overruled.

25 Go ahead.

Farkas - Direct

2265

1 BY MR. ROGOW:

2 Q. Go ahead, Mr. Farkas.

3 A. Thank you. So let's see. So -- I forgot where I was.

4 THE COURT: Mr. Rogow, you should be asking questions.
5 You don't want witnesses doing a narrative.

6 MR. ROGOW: I understand.

7 Q. Tell me, Mr. Farkas, you made this deal with SunTrust Equity
8 Partners?

9 A. Yes, I'm sorry. Thank you. And I was just about to say that
10 there were also warrants, there were warrants issued to SunTrust,
11 and warrants are, are something that allow SunTrust to own free of
12 charge 20 percent of the company. So SunTrust Equity Partners
13 essentially got a free 20 percent interest in the company, so
14 then, then they would be my partner. I would own 80 percent, and
15 they would own 20 percent if they exercised the warrants, and they
16 also had the right to put those warrants back to Taylor Bean,
17 which means that Taylor Bean would have to buy that stock back
18 from them at a later date at a specified price, and the specified
19 price was a, a predetermined formula based on loan originations
20 and based on gross revenues of the business.

21 Q. Now, your business was growing, and how, how was it growing?
22 What was it that you were doing that made it grow so?

23 A. Well, we, we -- I came up with an idea to go into the
24 wholesale market, and we were in -- we had stuck a toe into the
25 wholesale mortgage market. Now, the wholesale mortgage market

Farkas - Direct

2266

1 means instead of lending money to borrowers directly, we would
2 lend money to other lenders, and we would fund loans for mortgage
3 brokers, and my new idea was to acquire loans and fund loans for
4 community banks.

5 Q. And what are community banks?

6 A. Community banks are smaller banks, and there were seven or so
7 thousand community banks across the country that would be
8 interested in, in this program.

9 Q. Why would the community banks be interested in doing business
10 with you?

11 A. We, we did it as an online thing. It was a -- Fannie Mae in
12 partnership with us built a Web site called Community Banks
13 Online, and it was a great portal, great success, and the banks
14 liked it.

15 We started in Georgia, and we soon had almost 80 percent
16 market share in Georgia among community banks. We were the
17 preferred partner soon for the Georgia Bankers Association, and we
18 soon were introduced to the ICBA, which is the Independent
19 Community Bankers Association, and the ICBA -- and I worked on
20 that myself, that relationship, and we went to conferences and did
21 all kinds of things, and we, we promoted the business, and we were
22 very, very, very successful at recruiting community banks to do
23 business with Taylor Bean.

24 Q. The community banks, what's the difference between a
25 community bank and a large bank, for example, like Bank of America

Farkas - Direct

2267

1 or Citigroup?

2 A. Well, I'm not sure what the differences are in total, but as
3 far as we were concerned, the difference was that the community
4 banks did not have a separate mortgage department or a separate
5 mortgage company attached to it, and so they would originate loans
6 and then sell them off to another larger bank, but if they could
7 sell them to us instead, then they weren't really passing their
8 customer off to the Bank of America or Wells Fargo or JPMorgan
9 Chase or some big bank, and they could keep contact with that
10 customer.

11 So Taylor Bean would be transparent really to the
12 borrower. We could collect the payments, but the bank was allowed
13 to collect the payments and send it to us with a program we had
14 called Taylor-made Payments, and we had a lot of enhancements
15 specifically designed for the community banks, and that's what
16 made the business grow.

17 Q. And what was the advantage for the community banks to have
18 the customer making payments directly to them?

19 A. Well, I mean, one of the big benefits to doing mortgages for
20 banks of any kind are what they call cross-sell opportunities, and
21 anybody who's got a mortgage has probably been offered insurance
22 or other financial products through their mortgage company, and
23 so, for example, Countrywide, when they were operating, was a
24 master at cross-selling. So if we would sell the, sell the
25 mortgage servicing rights to Countrywide, then they would

Farkas - Direct

2268

1 immediately start marketing all kinds of services to the customer,
2 and that would try to take it away from the community bank.

3 So in our case, we were a non-depository. We couldn't
4 offer any checking accounts, savings accounts, safety deposit box,
5 or any other kind of loans, and they liked doing business with us,
6 so they would sell us -- they would have us fund the loan for
7 them.

8 Q. Did there come a time when SunTrust Equity Capital put the
9 warrants to you?

10 A. Yes. Well, contractually, actually, SunTrust Equity Partners
11 didn't. They -- when, when Cathie and her -- Cathie Kissick and
12 her employees decided to move to Colonial Bank, and so they left
13 SunTrust and went to Colonial Bank, and I wanted to go take our
14 banking business over there. We had become fond of Cathie and
15 Teresa and Joyce and Melanie and all the ladies that worked with
16 us at, at SunTrust, and so -- but we had this problem: SunTrust
17 didn't want us to leave without taking the sub debt with us.

18 Well, the sub debt had, had to be paid off, and the
19 warrants had to be purchased in order for us to get out. So
20 SunTrust calculated the value of the warrants, and they told me
21 that we had to come up with \$787,000 or something like that, which
22 I didn't have, and the sub debt was \$2 million, which I also did
23 not have in cash. So I looked around --

24 Q. What did you do?

25 A. Okay. So I looked around for an investor, someone to

Farkas - Direct

2269

1 purchase SunTrust's obligation, the \$2 million, and to buy the
2 warrants, and I found a company in, ironically, in Peoria,
3 Illinois, called RLI. It's a New York Stock Exchange company, a
4 Fortune 500 company, and "RLI" stands for Replacement Lens
5 Insurance, and they had made a lot of money selling contact lens
6 insurance, you know, years ago, and they had diversified since
7 then.

8 So the plan was that they would not only buy the
9 warrants from SunTrust for \$787,000 and that they would pay off
10 the sub debt, \$2 million; they would increase the sub debt to 5
11 million or 10 million dollars so that we could do even more
12 business and grow the business even more; and they would assume
13 the rights under the, under the warrant agreements, and they would
14 have the same put to Taylor Bean that SunTrust had and with the
15 same formulas.

16 Q. And did that, did that then free you up from SunTrust and
17 allow you to move to Colonial?

18 A. Yes. It was about a year, I think, or so after Cathie and
19 her group left that we then started banking at Colonial Bank.

20 Q. And what was the amount of the line that you had at Colonial
21 Bank?

22 A. I think the first line was around 50 million, but that's just
23 really a guess right now. I don't recall.

24 Q. And did there come a time -- what kind of accounts did you
25 have at Colonial when you went over there?

Farkas - Direct

2270

1 A. Well, we had a warehouse line; we had a working capital line,
2 which was short term; and we had deposit accounts.

3 Q. And did you have any trouble with those accounts?

4 A. Not that I know of.

5 Q. Did there come a time when there were issues with regard to
6 the amount of funds in the account and the overdraft situation
7 that you've heard about?

8 A. Well, yeah, that was a little later. In the meantime --
9 yeah, actually, after a while, there was.

10 In the meantime, Taylor Bean, its method -- and this, I
11 think, is important, you know, to understand what really happened.

12 THE COURT: All right. Now, at this point, Mr. Farkas,
13 you're way beyond any question that's pending.

14 BY MR. ROGOW:

15 Q. So tell me, Mr. Farkas, how the business worked with
16 Colonial. Once you went over to Colonial, what did you need from
17 Colonial?

18 A. Well, we needed, you know, again, we needed three things. We
19 needed warehouse line; we needed a working capital line, which in
20 mortgage banking is always secured and only secured by mortgage
21 servicing rights; and we needed deposit accounts for the servicing
22 accounts and for the warehouse accounts and for the operating
23 accounts.

24 Q. And Colonial and Ms. Kissick provided those account for you?

25 A. They did.

Farkas - Direct

2271

1 Q. And did there, did there come a time when you had any
2 difficulties with any of the accounts?

3 A. Yes. We had been doing quarterly sales of our mortgage
4 servicing rights, and again, the reason to originate mortgages
5 from a wholesale mortgage lender's point of view is to get the
6 mortgage servicing rights. That's what you want. You make a
7 small amount of money, very small, on the origination process, but
8 all the money is in the mortgage servicing rights. That's the
9 whole value of the transaction really.

10 What we did in those days was we would aggregate
11 servicing rights, mortgage servicing rights for three months, and
12 then we would put them out for bid, and they would go out for
13 bids, and there would be bids. There would be multiple bids on,
14 on the portfolio, and we would -- a third party would conduct an
15 actual sort of a small auction, and we would take the highest
16 price that contained the best terms for us, and we would -- and
17 then we would sell them, and the magnitude of those sales was
18 between, we would see proceeds between 25 and 60 million dollars.

19 Q. And during the three-month period, were you paying interest
20 to Colonial?

21 A. Yes, you were, but the mortgage servicing rights had a cash
22 flow, and so there was cash flow coming in to pay the interest and
23 to pay your expenses, and when you sold the mortgage servicing
24 rights, you sold them at a price higher than what you'd, what
25 you'd paid the mortgage broker or the community bank or the

Farkas - Direct

2272

1 affiliated lender. You sold them at a higher price, so you made a
2 profit on them.

3 So you had a gain on sale on selling the mortgage
4 servicing rights, you had interest on all that cash you were
5 holding for borrowers in the meantime, and, and you could then put
6 that cash, pay Colonial back, and start all over.

7 Q. If you, if you can, how large did the business grow after --
8 in the first few years after you moved to Colonial?

9 A. Well, it was, it was just, it was exploding. I mean, you
10 know, we -- I don't remember the, I don't remember the numbers. I
11 remember sending out e-mails to the company when we hit 100
12 million the first month and we hit 200 million in a month and so
13 on, and it grew and grew and grew and grew until the business at
14 the end, we were closing, gee, over a thousand loans per day. We
15 were funding \$200 million every single day. We would wire out
16 \$200 million to acquire loans every day.

17 Q. And how many loans a month were you acquiring?

18 A. We averaged at the end around 19,000 new loans a month, and
19 we had in servicing almost a million loans at the peak.

20 Q. And you had the MSR rights when you said the servicing; is
21 that right?

22 A. We did. The MSRs were, were capitalized properly on our
23 balance sheet, and the value of that, it, it -- because it was a
24 derivative asset, which means that it, it's not really -- it's an
25 intangible, it's not really something you can put your hands on

Farkas - Direct

2273

1 and say there's a mortgage servicing, here's a pile of mortgage
2 servicing assets, it's a contract, and it's the right to collect
3 those payments, and the value of it is the cash flow that's
4 generated from collecting them every month.

5 So if you get \$50 a month to collect the payment and it
6 costs you \$5 a month, you've got \$45 a month, but if you have a
7 million of those, which we did almost, you have \$45 million a
8 month in revenue coming in net of your expenses.

9 So it's a, it's a difficult asset to manage. It has to
10 be hedged against prepayment risk, because if the loan pays off,
11 your right to service it disappears, and your investment goes to
12 zero.

13 Q. What does that mean, it has to be hedged?

14 A. We would have to hedge it against prepayment risk where the,
15 where the borrowers would pay the loan off. If they paid it off,
16 the value of the MSR is zero, because you didn't have any payments
17 to collect anymore, and we would do that with all kinds of, of
18 different hedging methodologies, and that was the principal
19 reasons that we used -- well, half of the principal reason we used
20 the QRM system. QRM was a computer system we bought, licensed
21 from Chicago that would help us, you know, manage the risk on
22 these, on these MSRs.

23 Q. Well, explain what a hedge is.

24 A. Well, a hedge would be an investment in other kinds of
25 instruments that would move inversely to the, to the mortgages, to

Farkas - Direct

2274

1 the portfolio, so if the portfolio value went down, you should own
2 a different investment that would go up in the same amount.

3 Q. And how would you select those different investments?

4 Through QRM?

5 A. Well, you know, I don't know. I didn't do it, and it was
6 something I didn't know how to do.

7 Q. This was something that was done within Taylor Bean, though,
8 by the people you had working for you?

9 A. Mr. Allen was an expert in that area, was educated in that
10 area, and Jeremy Collett was -- became an expert in that area, and
11 QRM was a computer system that 19 of the top 20 lenders in the
12 country used, and it was -- it's a very -- they're very difficult
13 mathematical calculations of probability of prepayments. I don't
14 understand it.

15 I do know that, that it was an important part of our
16 business to make sure that it was properly hedged.

17 Q. Did you need cash every day to run your business?

18 A. Yes.

19 Q. Why?

20 A. In the mortgage business such as we were in, when you're,
21 you're acquiring mortgage assets at a high rate of \$200 million a
22 day, you spend more money to acquire them than you bring in. So
23 while your, while your company has a smaller portfolio and a large
24 origination platform, which means that the mortgage servicing
25 asset in relation to the amount that you originate every month is

Farkas - Direct

2275

1 low, you're not generating enough revenue from the servicing
2 portfolio to cover your operating expenses, and so you're really
3 going negative.

4 So the busier you are, the more money you make, the less
5 cash you have at that point.

6 Q. And did you have to pay an advance if these new loans were
7 being bought?

8 A. Yes. When you -- the way Taylor Bean did its business, it
9 purchased the mortgage servicing rights from the community banks
10 or the brokers at the closing table. So when we bought the loan,
11 we bought the entire package, so we would pay more for the loan
12 than the face value of the note.

13 Q. And what percentage, what kind of numbers are we talking
14 about?

15 A. Oh, generally 1 or 2 percent at the most, 2 at the most, 1 at
16 the least, more than the amount of a note that you acquired.

17 Q. Now, you've heard the testimony with regard to overdrafts and
18 sweeping, correct?

19 A. I did.

20 Q. When was it first brought to your attention that there was a
21 need to move money from one account to another at Colonial?

22 A. You know, I honestly -- I was trying to recall when I heard
23 about the overdrafts and when I heard about what Colonial was
24 doing. I really, I tell you, I can't remember the first time that
25 I, that I learned what they were doing.

Farkas - Direct

2276

1 Q. At some point, you did learn.

2 A. I did.

3 Q. And when was that?

4 A. It was -- again, the time period, I'm sorry, I don't
5 remember.

6 Q. The conversations that you would have with Ms. Kissick, would
7 they be daily conversations?

8 A. Well, yeah, we did. We spoke multiple times per day for
9 years.

10 Q. Why?

11 A. A lot of various and sundry things. Most of the time, I was
12 asking her -- 98 percent of our conversations related to me asking
13 her for more money to fund loans with. We always had more loans
14 that we wanted to fund than we had money to fund them with, so I
15 was always looking for a way to fund more loans.

16 Q. Was she accommodating?

17 A. She tried to be as accommodating as she could and, indeed,
18 was very creative in coming up with ways to help us fund more
19 loans.

20 Q. Did you have any conversations with the people in your
21 offices, TBW, with regard to what you were interested in every
22 day?

23 A. Yes. I mean, it was, it was known, well known that we only
24 really -- Taylor Bean only served two purposes to its customers.
25 One was to underwrite the loans and determine if the borrower's

Farkas - Direct

2277

1 credit was acceptable and that we could represent and warrant to
2 Freddie or Ginnie that, that the loans met their guidelines, and
3 number two, to provide the money to purchase the asset and the
4 servicing, that was what we did.

5 Q. And what would you ask the people in your -- in TBW's offices
6 with regard to that?

7 A. Well, I would ask that we try to -- that we would do
8 everything we could to, to fund the loans.

9 Q. Did you ask them, "Are we making money?"

10 A. Well, the way I tested -- my own way of managing the business
11 was to test every day, and I had two questions, one of our CFO and
12 one of our head of Capital Markets, who was Jeremy Collett most of
13 the time.

14 Q. And what were the two questions?

15 A. The question to Delton was, "Do we have enough assets to
16 cover the liabilities?"

17 Q. This is Delton de Armas?

18 A. Yes.

19 Q. And the second question?

20 A. To Jeremy Collett is, "Are you making money?"

21 Q. And would that be asked every day in an e-mail, or how would
22 you be communicating that?

23 A. Well, every day might be a little bit of an, of an
24 exaggeration, but multiple times per week I would talk to both of
25 those gentlemen and ask them, especially Jeremy, you know, because

Farkas - Direct

2278

1 the assets didn't change as fast as the, as the position did, you
2 know, "Are we making money? Are we in the black?"

3 Q. And what were they telling you?

4 A. I was assured that most of the time, Jeremy's trading was
5 positive, and all of the time, that the assets were properly
6 hedged, and Delton assured me every time I asked him that we had
7 plenty, in fact, excess assets to cover any and all liabilities of
8 the business as a going concern.

9 Q. And what would those assets have been? Would they have
10 included the MSR's?

11 A. We had facilities that included loans against MSR's. We had,
12 you know, two different facilities, and then Colonial had a second
13 on all those MSR's, and so the MSR asset, which was the largest
14 asset, single asset that the company owned, was -- and the most
15 important, was always included in the value, because that's what
16 we were acquiring at a very high rate. Also, the amount of
17 inventory of loans held for sale and the amount of inventory of
18 loans held for investment.

19 Q. You've heard the testimony from Ms. Kissick and Ms. Kelly
20 with regard to overdrafts and sweeping, correct?

21 A. I have.

22 Q. Did you have any control over the movement of money in terms
23 of sweeping from one account to the other?

24 A. The two accounts that Colonial was sweeping between were both
25 Colonial-controlled accounts. Taylor Bean could neither write

Farkas - Direct

2279

1 checks or make deposits to those accounts directly.

2 Q. And so who would then be able to make the decisions with
3 regard to sweeping money from one account to the other?

4 A. I don't know at Colonial, but it would be someone at Colonial
5 Bank who had the authority to, to make transactions in those
6 accounts.

7 Q. Did there come a time when Ms. Kissick talked to you about
8 some other idea to address the issues with regard to the bank
9 accounts?

10 A. We talked about a multiple -- we talked about multiple
11 solutions to the, to the overdraft and --

12 Q. And -- go ahead. What were the multiple solutions about
13 which you spoke?

14 A. Well, the first thing was that Ray Bowman thought that the
15 overdraft was caused by Colonial sweeping of itself, that Colonial
16 somehow was making errors and, and causing it, because his
17 analysis, that he -- his independent analysis showed that it
18 couldn't be, it couldn't be Taylor, Bean & Whitaker's fault and
19 that there couldn't be an overdraft and that he was sure that it
20 was something that Colonial Bank did wrong.

21 Q. Ray Bowman testified in this case, did he not?

22 A. Yes.

23 Q. And what was his role in TBW?

24 A. Ray was, originally he was head of Secondary Marketing, later
25 renamed Capital Markets, and then he was promoted to president.

Farkas - Direct

2280

1 Q. How long had you known Ray Bowman?

2 A. I met him when he interviewed for his position about ten
3 years ago.

4 Q. Now, you were talking about the creative -- or the ideas that
5 Ms. Kissick had. So -- and you were just talking about the fact
6 that before Bowman, Mr. Bowman thought that it was a problem on
7 Colonial's side.

8 A. He did.

9 Q. All right. And so did you address that with Ms. Kissick?

10 A. Yes. Dan Andrews, who was our comptroller, and Ray Bowman
11 and I don't know who else decided to do an independent
12 investigation into the overdraft, and --

13 Q. And how do you do such an independent investigation?

14 A. I, I don't know.

15 Q. How did they do it? Do you know how they --

16 A. I'm not sure what they did.

17 Q. All right. And what did they learn?

18 A. Well, I don't think they ever concluded anything, at least
19 nothing to my satisfaction that I could go back to Colonial and
20 categorically say, "It's your fault, and here's where you did it,
21 you know, we're having an issue."

22 Q. Did you believe that perhaps it was not Colonial's fault?

23 A. Well, generally speaking, in my experience, when you think
24 the bank made a mistake, you probably made a mistake. So I tended
25 to believe it probably was more our fault.

Farkas - Direct

2281

1 Q. And what would you be looking for to try to find the answer
2 to the question on your side of the equation?

3 A. Well, what I, I would generally try to do was somewhat of my
4 own kind of a reasonableness test: Is it reasonable to think that
5 you would, you know, this would be the position or whatever? So,
6 I mean, it looked to me that it didn't seem reasonable to me that
7 we would have those kind of overdrafts.

8 Q. Would there be an issue of what collateral you had or what
9 loans you had on your side that were not being properly accounted
10 for on the Colonial side?

11 A. I think not. I think that it had nothing to do, it had
12 nothing to do with loans. I think what it had to do with is the
13 funding process itself, and I think that they were taking Taylor
14 Bean's portion of the funding amount that goes to fund a loan. So
15 Colonial would lend us in those days, say, 97 percent of the loan
16 amount. Well, 3 percent of the loan amount would come out of our
17 account, and that would come from the master account.

18 So when, when they funded a loan out of the master
19 account, they would deposit the proceeds from the advance of the
20 loan to fund the loan in there, and then the master account wire
21 would go out. Well, when the master account wire went out, there
22 wasn't enough money in the master to cover the entire loan,
23 because it wasn't there, okay?

24 So I think that's where the overdrafts came from, and I
25 think the reason they increased, if you look at their progression,

Farkas - Direct

2282

1 you can map it directly with the production, and as the production
2 increased, so increased the overdraft.

3 So it looked to me like it was a lack of ability to fund
4 the haircuts. We called that a haircut. The haircut is at 3
5 percent. It's just a funny word they use in mortgage banking to
6 describe the mortgage banker's equity in the loan versus the
7 warehouse bank's. And it looked to me like that's what that was
8 and coupled with some, some operating expenses being taken out of
9 the, out of the operating account and some transfers from the
10 master into the operating account.

11 So there was two things going on. One is the mortgage
12 banking activity itself was, as you would expect, was using cash
13 instead of producing cash, and the operating expenses of the
14 business were further exacerbating that situation.

15 Q. And did there come a time when Ms. Kissick came to you and
16 said she had an idea for how to address this?

17 A. She told me that -- multiple times, she would talk to me
18 about the overdraft, and I still really didn't understand the
19 overdraft. I didn't -- because I'm looking in retrospect, you
20 know, that I understand it, but I didn't quite understand it, and
21 she said, "We can't do this." Now, she said, "Plan A is not
22 working. We've got to go to Plan B."

23 Q. Was that her terminology, "Plan B"?

24 A. Yes. Cathie used "Plan B" over the years to mean a lot of
25 different things, and this Plan B was one of those uses. She