UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	Docket No.: 16-CR-483 (JSR) (BCM)
-v-	:	
STEFAN LUMIERE,	:	
Defendant.	:	
STEFAN LUMIERE,	:	Docket No.: 18-CV-9170 (JSR) (BCM)
Petitioner	:	
-v-	:	
UNITED STATES OF AMERICA,	:	
Respondent	:	

DECLARATION OF ERIC M. CREIZMAN

I, ERIC M. CREIZMAN, hereby declare under penalties of perjury pursuant to 28 U.S.C. §1746:

1. I am an attorney duly admitted to practice law in the courts of the State of New York and before this Court. I am a partner of the law firm of Pierce Bainbridge Beck Price & Hecht, LLP, and respectfully submit this declaration in response to Stefan Lumiere's petition under 28 U.S.C. §2255 for relief from his conviction in the above-captioned criminal case on the ground of ineffective assistance of counsel. I submit this declaration in light of Mr. Lumiere's written waiver of the attorney-client privilege to disclose confidential communications: (1) only in response to the Court's Order, and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by Mr. Lumiere's motion. (DE 136).

2. I was retained to represent Mr. Lumiere in March 2016, in connection with a criminal investigation of his conduct while he was an employee at Visium Capital Management ("Visium"). Specifically, the investigation concerned Mr. Lumiere's alleged participation in a scheme to mismark the value of the securities in the Visium Credit Opportunities Fund (the "Credit Fund") to dupe investors into believing the Credit Fund was performing better than it was.

3. When I was retained by Mr. Lumiere, the investigation had been going on for well over two years and he had been previously represented by at least three different law firms. In March 2014, Mr. Lumiere, accompanied by counsel, participated in a proffer session during which Mr. Lumiere essentially maintained that he was innocent of any wrongdoing. Mr. Lumiere told me that his prior attorneys had encouraged him to cooperate with the government, that he participated in a proffer and was truthful with the prosecution team, that the prosecutors did not believe his account of the facts, and that he was determined to fight the charges against him.

4. In his habeas petition, Mr. Lumiere asserts that I provided ineffective assistance of counsel based on the following grounds: (i) I was operating under a conflict of interest because Visium advanced payment of my legal fees, and pressured him to agree to an advancement of fees from Visium; (ii) I failed to perform an adequate defense investigation; (iii) I failed to adequately prepare for trial; and (iv) I failed to provide competent representation at trial. As set forth below, each of Mr. Lumiere's contentions lack merit.

I. I did not operate under a conflict of interest.

5. Mr. Lumiere's central contention appears to be that his brother-in-law, Jacob Gottlieb, who founded and was the Chief Executive Officer of Visium, sought to scapegoat Mr. Lumiere for the allegedly fraudulent valuations in the Credit Fund. Accordingly, Mr. Lumiere reasons

that because Visium paid my fees, I was more loyal to Visium than Mr. Lumiere and sought to further its objective of having Mr. Lumiere take the fall for Visium's wrongdoing.

6. There simply was no conflict of interest here. *First*, contrary to Mr. Lumiere's allegations, I did not pressure him in any way to seek indemnification and advancement of legal fees from Visium. Before I was even retained by Mr. Lumiere, he had already retained a law firm, Gilbert LLP, to pursue indemnification from Visium, and it had attempted to do so, with no success. In June 2016, prosecutors from the Southern District of New York contacted me to arrange a voluntary surrender of Mr. Lumiere on a criminal complaint. At that point, Mr. Lumiere informed me about his efforts to have Gilbert LLP seek indemnification and advancement. Although he said that Gibson Dunn had referred him to Gilbert LLP, he was not necessarily seeking to have Gibson Dunn represent him in the criminal case. Because Gilbert LLP was not having any success, Mr. Lumiere asked me to represent his interests in pursuing indemnification and advancement from Visium. I made it clear to Mr. Lumiere that in the event Visium agreed to advance his fees, I would not stand in the way of him retaining whichever attorney or law firm he chose to represent him in the criminal case. Mr. Lumiere asserts that he wished to hire the law firms, Gibson Dunn or Kobre and Kim. (Lumiere Pet. at 5). To the extent either firm attempted to negotiate indemnification and advancement of legal fees with Visium, I did not impede any such efforts in any way whatsoever.

7. *Second*, I made it clear to Mr. Lumiere on many occasions that if he did not want to obtain advancement of fees from Visium, then I was more than willing to represent him without such advancement and would represent him for the capped fees and on the terms he and I had agreed to. Mr. Lumiere's assertion that I told him indemnification "would be really good for me as I would make a lot more money" is false, and the suggestion that I pursued indemnification

and advancement that he did not want so that I could benefit economically is false. During the negotiations with Visium for advancement, Mr. Lumiere at times expressed his reservations about sharing information with Visium on numerous occasions and about pursuing indemnification and advancement. I obeyed Mr. Lumiere's instructions concerning negotiations with Visium at all times. Ultimately, Mr. Lumiere agreed to the terms of advancement as evidenced by his signature on the agreement with Visium to indemnify and advance legal costs. (A64).

8. *Third*, I apprised Mr. Lumiere of each and every meeting I had with attorneys for Visium and with attorneys for its executives. I also apprised Mr. Lumiere of any information or materials I shared with attorneys for Visium and with attorneys for its executives. I never shared any information or materials with any attorneys for Visium or any attorneys for its executives without Mr. Lumiere's permission. The letter Mr. Lumiere includes in his appendix from me to Roberto Finzi, Jacob Gottlieb's attorney, was never sent to Mr. Finzi. (A62). Nor was any hard drive provided to him. (A62). I obeyed Mr. Lumiere's explicit instructions not to send Mr. Finzi any materials.

9. *Fourth*, the common interest communications with counsel for Visium and counsel for its executives were extremely helpful in preparing for trial. For example, I spent many hours with counsel for Visium during which counsel provided a chronology of events, an explanation of processes and procedures, an explanation of various records produced by Visium in the litigation, information about certain government witnesses that would be useful for impeachment during cross examination, and thoughts and opinions about documents and information that would be helpful and harmful to the defense. In addition, I met with counsel for several Visium executives who were called by the government as witnesses. Counsel for several of those

witnesses provided me an overview of what their clients' testimony would likely be and asked questions of their clients for information I requested, and they provided me with the substance of their clients' responses. In addition, solely because of a meeting I had with counsel for a Visium executive, I was able to subpoena and obtain documents and information to effectively impeach one of the government's principal cooperating witnesses, Christopher Plaford.

10. In sum, there were shared interests between Mr. Lumiere and Visium, and my communications with counsel for Visium and counsel for its executives were limited to obtaining information and providing information that furthered those shared interests. To be clear, I found no evidence of Visium or Jacob Gottlieb scheming to make Mr. Lumiere the scapegoat for any wrongdoing the company or Mr. Gottlieb may have committed. That said, I was mindful of Mr. Lumiere's concerns of such a scheme and did not share any information with Visium's counsel or Mr. Gottlieb's counsel that would enable them to successfully carry out any such plot. No information that I provided counsel for Visium or counsel for Mr. Gottlieb did, or could have, furthered any scheme to falsely implicate Mr. Lumiere.

11. *Fifth*, Mr. Lumiere's assertions that he never agreed "to allow Defense Counsel to enter into a Joint Defense Agreement and Common Interest Agreement with Visium and Gottlieb," and that he only "uncovered" evidence of such an agreement "after trial" are both false and misleading. (Lumiere Pet. at 5). As an initial matter, there was never a written Joint Defense or Common Interest Agreement with Visium or Gottlieb or anyone else. All communications with attorneys for Visium or Gottlieb or other Visium executives were made on the mutual understanding that they were subject to a joint defense or common interest privilege. And I apprised Mr. Lumiere of each and every such communication and each and every exchange of information or documents.

12. *Sixth*, I never compromised Mr. Lumiere's defense in any way based on Visium's agreement with Mr. Lumiere to pay my legal fees. To the contrary, I presented evidence to the jury at trial that was contrary to the interests of Visium and Gottlieb, as well as other of Visium's executives. For example, during trial, I cross-examined Visium's General Counsel about a communication between him, Jacob Gottlieb, and another executive that suggested their knowledge of, and involvement in the alleged mismarking scheme.

12. Mr. Lumiere falsely suggests that, as a result of my non-existent "conflict," I advised him not to pursue cooperation with the U.S. Attorney's Office or prevented him in some way from doing so. (Lumiere Pet. at 6-7). This is absolutely false. As evidenced by the memorandum to file Mr. Lumiere included in his appendix, which was contemporaneously shared with him, there were numerous discussions about cooperating with the government. Mr. Lumiere, however, expressed time and time again that he was innocent of any wrongdoing, and understood that to the extent he declined to accept responsibility for the alleged wrongdoing, the prosecution would not believe him, and he therefore would not be entitled to any credit for any cooperation he attempted to provide. Mr. Lumiere expressed repeatedly that he was not prepared to admit to knowingly participating in the alleged wrongdoing and plead guilty to a crime he did not commit, and I made it clear that I was obligated as his attorney not to allow him to do so. Mr. Lumiere's previous attorneys repeatedly tried and failed to persuade prosecutors that he was innocent. I tried and failed to do the same. Mr. Lumiere was not prepared to admit his guilt and, as a result, he could not pursue cooperation with the government. I explained this to Mr. Lumiere on countless occasions, and there is no question in my mind that he understood this fact. He expressed on countless occasions that he desired to go to trial.

II. Mr. Lumiere's allegations that I was unprepared for trial and failed to conduct a sufficient investigation are baseless.

13. Mr. Lumiere includes a portion of my itemized invoices in his appendix that, on their face, demonstrate my exhaustive investigation of his defense and substantial preparation for trial. (A65). That said, my vigorous defense of Mr. Lumiere is demonstrated in several other ways. *First*, I engaged in extensive motion practice in connection with pretrial motions and motions in limine. I submitted substantial pretrial motions for: (i) a bill of particulars; (ii) suppression of electronic evidence seized and imaged pursuant to the execution of a search warrant; and (iii) early production of an exhibit list. (DE 14, 15, 19, 24, 46). The Court granted my motion for bill of particulars, requiring the government to provide a list of the securities which values that it contended Mr. Lumiere and his co-conspirators mismarked, as well as a list of the unindicted coconspirators. (DE 20). In addition, we successfully prevailed on our motions for early production of the government's exhibit list and of *Brady and Giglio* material. (DE 20). Furthermore, the Court admonished the government to provide 3500 material reasonably in advance of trial or the trial would be adjourned. (*Id.*). The Court also held an evidentiary hearing on the motion to suppress and accepted further submissions on the motion, which the Court ultimately denied. (DE 28, 36-43). I also filed and responded to motions in limine and requests to charge that were vigorously litigated. (DE 49-54, 59, 62).

14. *Second*, I performed a substantial pre-trial defense investigation. For example, I successfully obtained leave to serve 24 pretrial subpoenas to a number of entities, *including Visium,* pursuant to Fed. R. Crim. P. 17(c), which yielded helpful information on a number of relevant issues necessary to prepare for trial. (A copy of my *ex parte* memorandum of law in support of those subpoenas is annexed hereto as Exhibit A). Several of those and other subpoenas sought information and documents that Mr. Lumiere falsely alleges that I failed to

pursue. I also served at least 10 trial subpoenas, annexed hereto as Exhibit B, several of which resulted in obtaining useful information and materials. (Copies of certain of those trial subpoenas are annexed hereto as Exhibit B). We conducted background investigations of several witnesses and potential witnesses. In addition, I contacted and interviewed numerous witnesses or their attorneys—witnesses who were identified by Mr. Lumiere and witnesses who I identified in connection with my investigation. I also had numerous discussions with Mr. Lumiere's prior attorneys.

15. *Third*, contrary to Mr. Lumiere's allegation that I did not understand the nature of the securities at issue or the valuation issues involved in the case, we not only retained a testifying expert witness, but a consulting expert witness. My co-counsel and I spent many hours discussing aspects of the case with both the testifying expert witness and the consulting expert witness. Mr. Lumiere complains that we did not call the expert witness to testify at trial. Based on the advice of the consulting expert witness, and our preparation of the testifying expert witness, we determined that calling the testifying expert witness at trial would be extremely harmful to Mr. Lumiere's chances of an acquittal. In other words, we determined that the government would successfully transform our expert witness into a favorable witness for the government.

III. Although the trial resulted in a guilty verdict, my performance at trial was more than competent.

16. On a telephone conference with the Court on January 31, 2017, Mr. Lumiere moved to substitute Jonathan Halpern in place of me as his attorney in his case. During that telephone conference, Mr. Halpern requested an extension of time to file post-trial motions to March 31, 2017 (nearly two months from the date they were due) on the ground that he wished to investigate whether my representation of Mr. Lumiere was constitutionally ineffective. (DE

89). Judge Rakoff praised my performance at trial and demanded that Mr. Halpern offer a good-faith basis to warrant the extension that Mr. Halpern requested. After Mr. Halpern was unable to articulate any good-faith basis to extend the deadline, Judge Rakoff set a deadline of February 6, 2017 to enable Mr. Halpern to demonstrate a good-faith basis to assert that I provided Mr. Lumiere with a constitutionally ineffective defense. On February 8, 2017, the Court determined that Mr. Halpern failed to demonstrate the requisite showing. (DE 89). In the Court's Opinion and Order, dated April 19, 2017, denying Mr. Lumiere's post-trial motions, the Court noted:

> Following the trial, Lumiere retained new counsel, who expressed an interest in "investigating" whether Lumiere's trial counsel was constitutionally ineffective. . . . The Court denied the defendant's motion for a lengthy extension of time to file post-trial motions in order to investigate ineffective assistance after the defendant failed to identify a single good-faith basis warranting such an "investigation." . . . In the end, defendant's counsel advanced no such argument on this motion.

(DE 97 at 34-35, n. 8).

17. The transcripts of trial demonstrate what I believe is skillful and effective cross-examination. Indeed, at the same time Mr. Lumiere argues that I was ineffective, he cites to answers that I elicited on cross-examination to establish that the government knowingly presented false testimony. Mr. Lumiere's assertion that I lacked knowledge as to how to properly impeach witnesses is belied by a review of the cited portion of the transcript. Furthermore, where the Court criticized my failure to object to certain questions or answers on direct examination, I did not object because I reasonably believed the testimony was helpful to the defense or based on some other tactical reason.

18. The decisions not to call any witnesses were based on tactical determinations. As discussed above, the determination not to call the expert witness was based on a considered evaluation of the risks and benefits of the expert witness's likely direct testimony and his likely answers on cross-examination, which we were able to predict based on our preparation of the

expert witness, and based on the analysis of our consulting expert witness. For example, my notes of a conversation with the consulting expert witness on January 10, 2017 reflect the following:

> • "Only defense here is that Stefan believed in marks. Can't get into whether they were valued correctly because pretty obvious that most were marked wrong."
>
> • "Using thumb drives [to provide certain brokers with the portfolio's view of the appropriate values in order for the brokers to validate them, as Mr. Lumiere did on one occasion] is very sketchy – could have easily used Excel to mark 100 bonds. You can send Excel over Bloomberg IM. You send CUSIP, description, maturity, coupon and then the broker's job is to type in the price. [Brokers] would never [as the brokers to whom Lumiere sent his proposed values] get a price already in Excel—MOST you would ever give is the price for the last month."
>
> • "If 99% of time price gets spit back from broker, Stefan SHOULD have known what he was doing was wrong"
>
> • "Impossible that broker never, not once came back with different price on a security."
>
> • "This was not 2008-2009 when Lehman blew up and NO ONE knew where any bonds were valued. Here we are dealing with a calm time in the market."
>
> • "Why is Lumiere involved in getting quotes – the trader should be working with his relationship because all of this is over Bloomberg. Weird for Stefan to get broker quotes."
>
> • "PAINTING THE TAPE: (1) Size of odd lot was 400k; (2) He bought 1 mil; (3) You pay up incrementally – instead of paying 30 for 400k you pay 33 for more; (4) Difference if you went from 400k to a block (3-5 million) – then you CAN PAY UP FOR THE BLOCK OF BONDS; (5) Can't make the tender offer argument because then you are trading on insider information; (6) This is a huge problem as opposed to valuation issue which can be massaged a bit."
>
> • "Knows guys at Odeon, sometimes they are shady. He considers them lower quality brokers, along with PrinceRidge and Janney."
>
> • "October 2012 marking CMED at 34 and everyone else is marking at 5 – big, big problem."

19. I did not call Mr. Lumiere's sister as a witness because most, if not all, of what she had expressed—i.e., that she knew her ex-husband, Jacob Gottlieb, with whom she was embroiled in a bitter and nasty matrimonial litigation, had sought to "frame" Mr. Lumiere—was

inconsistent with the evidence and, in any event, did not undermine the evidence of Mr. Lumiere's conduct.

20. With respect to Mr. Lumiere's after-the-fact complaint that he did not testify, I advised Mr. Lumiere that it was his decision whether or not to testify, and he understood that it was his decision and his decision alone. He made the decision not to testify, which I believe was the best decision at the time. I also believe that had Mr. Lumiere testified, he not only would have still been convicted, but also would have received a harsher sentence.

21. My decision not to introduce evidence of Visium's after-the-fact analysis that attempted to justify the valuations in question was based on several reasons, including: (i) it was doubtful that such after-the-fact analysis would have been admissible at trial; (ii) the analysis did not consistently support the valuations attributed to the securities in question and at times suggested that Lumiere had a more substantial role at Visium than the minor role he alleges he had; (iii) the lack of evidence that Mr. Lumiere ever considered the underlying analysis; and (iv) the lack of evidence that Mr. Lumiere provided such analysis to the same two brokers who provided the quotes Mr. Lumiere had suggested to them, or that those brokers otherwise independently considered that analysis.

22. To the extent that the Court wishes me to respond to any other specific allegation in Mr. Lumiere's petition, or to respond in more detailed fashion to any allegation that I have addressed in this declaration, I am prepared to do so.

23. I have never prepared harder for a trial or wanted to prevail at trial than I did in this case. After the trial, I outlined several issues that I believed were colorable post-trial motions. I discussed them in depth with Mr. Lumiere's new counsel and spent substantial time working with new counsel to provide them with all of the discovery material and case file and

information they requested. I only wished the best for Mr. Lumiere, and it was extremely difficult for me to have to prepare this declaration to respond to his allegations. I am disappointed that Mr. Lumiere, who up until the verdict, repeatedly praised me for my hard work, availability to him and his sister, preparation, willingness to stand up to the prosecution (nicknaming me "Braveheart"), sincerity, empathy, desire to obtain an acquittal, and my trial performance (especially my cross-examinations and closing argument), now squarely blames me for his predicament. I tried my best, and provided Mr. Lumiere with a vigorous defense. Although I did not represent him at sentencing, I believe that the well below-Guidelines sentence is at least partly attributable to my pretrial and trial representation.

I hereby declare that the foregoing is true and correct to the best of my knowledge under penalty of perjury under the laws of the United States of America.

/s/ Eric M. Creizman
Eric M. Creizman

Dated: New York, New York
August 1, 2019