

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

SHOLOM RUBASHKIN,

Defendant

CASE NO. 08-cr-1324

**DEFENDANT RUBASHKIN'S
SENTENCING MEMORANDUM**

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Defendant Sholom Rubashkin is scheduled to be sentenced on April 28 and 29, 2010. In light of the Supreme Court's recent decisions in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), it will be the Court's duty at that time to impose the sentence which is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to fulfill the purposes of sentencing listed under *id.*(a)(2). *Booker*, 543 U.S. at 259-60. Section 3553(a) identifies the purposes of sentencing:

- (a) provide just punishment for the offense;
- (b) afford adequate deterrence to criminal conduct;
- (c) protect the public from further crimes of the defendant; and
- (d) to provide the defendant with needed medical care or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (emphasis added).

For the reasons discussed in this memorandum, a sentence of no greater than 72 months below the advisory guideline range is more than sufficient to satisfy the factors set forth in § 3553(a). Additionally, such a sentence will allow the Bureau of Prisons to place Mr. Rubashkin in a minimum security federal prison camp such as the Federal Prison Camp at Otisville, New York which has a

long history of effectively and humanely incarcerating observant Jewish inmates. FPC Otisville is uniquely positioned to help facilitate the Bureau's housing of Orthodox Jewish inmates such as Mr. Rubashkin.

I. Defendant's Background, Character & History

Defendant Sholom Rubashkin became involved in the offense conduct as a result of his involvement in his family's business. Aside from his involvement in the offense conduct, he has led a life that is both productive and positive. He is uniformly described as a devoted and dedicated husband and father. He has spent most of his life trying to give back to his family, to the Hasidic Jewish community, and to the larger community of Postville, Iowa.

Mr. Rubashkin's friends and family uniformly describe him as extremely generous, both to individuals and the community. Fishel Brownstein, Chairman of the Crown Heights Jewish Community Council puts it well:

Mr. Rubashkin's altruism would be difficult to overstate and went far beyond merely writing checks. In every instance, his approach to helping was to take a personal interest in another individual's wellbeing. He would not allow people to suffer, if there was anything he could do to alleviate their pain or misfortune.

Brownstein Letter, Exh. __. Jena Morris, a friend of Mr. Rubashkin's, has described Sholom's character:

His kindness went beyond the Jews. It was legendary. He was as generous to the non-Jews of

Postville as he was to the Jews. When the city decided to build a new retirement home for the elderly, Sholom donated the land. When he first moved to Postville, there was no rental housing available, so Sholom created a company that purchased and renovated dilapidated housing and then rented it at below market costs for families who could not afford to buy homes. He bought a night club that was going out of business and then turned it into a grocery store and coffee shop whose prices he subsidized so that everyone could afford to eat there.

Letter of Jena Morris, attached as Exh. __. Ms. Morris also described his generosity to individuals:

One more poignant story that stands out is about a troubled young woman whom I will call Grace... Grace had been living with the Rubashkin family since her teens. After Sholom and Leah were married, she slept on their couch. When Grace married, Sholom and Leah made the wedding for her. Grace and her husband showed up in St. Paul shortly after the Rubashkins did. Although there were three children, Grace's marriage was not a happy one and the couple soon divorced. Once more Sholom and Leah welcomed Grace into their home, along with her three small children. When Sholom went to synagogue, he took the two little boys with him, his arm resting lightly on their shoulders. Even if you were only seven, if you were with Sholom, you knew that you mattered to him.

Id.

Joseph Neumann, a former Agriprocessors employee, also has some insight into Sholom's character:

Sholom had come to New York for a wedding and he was sitting in his brother's office. I walked in to discuss with his brother an account which owed about eight thousand dollars. I told them that the owner of this account said that he can't pay up -- he is having financial problems and will be closing his store soon. ...Sholom then asked me to

try and inquire if the story is true. I found out that the owner of the store had indeed sold all his restaurant equipment at an auction when he called me to try to settle his payments. The owner had five children and he didn't have a penny to his name. I remember that when Sholom heard this, he was crying from pain. He couldn't tolerate the fact that a father has to go home to his wife and children and can't put some bread on the table. At that point, not only did Sholom not take a red cent but he sent money secretly to this person.

Letter of Joseph Neumann, attached as Exh. __. Dvora Leah Minkowicz, one of Sholom's inlaws, has similar comments:

I know of one person who's personal dentist bills were sent straight to Mr. Rubashkin, and he never even knew who was paying or how many hundreds of dollars his dentist charged for the many procedures he required. Perhaps it is the single mother of seven who had an open tab at the grocery store and the butcher, and was able to feed her children nutritious and delicious fresh food that was completely out of her budget. Is it the school children who have winter coats because Sholom Mordechai heard that they were without and couldn't (and didn't) sleep until they each received one, or the tens of families he hosted each year at his family's retreat in Parksville NY.

It is noteworthy that individuals who are not personally close to Mr. Rubashkin have praised his unusual generosity to the community. Bella Wilenkin, who runs a food pantry in Brooklyn, stated:

I was desperately looking for a sponsor to donate poultry for the holidays to feed 800 needy people which I was unable to do with the amount of money allotted for food purchasing for the food pantry.

I contacted Mr. Sholom Rubashkin and explained my dilemma. He never heard my name before and didn't know who I was, yet responded, "tell me how much chicken you need and it will be delivered to you". We never signed a written contract. Everything was arranged verbally by phone. Not only that, I got more than I asked for....

That was not the only time that he donated food to our food pantry. He generously donated hot dogs when we had a community barbecue. If he heard someone was hungry, it was never a problem to obtain chicken from his farm. I was amazed and humbled by his compassion for another human being -- be it a virtual stranger or not. He always treated all requests equally, with kindness and compassion. He never asked for anything in return and did not expect to be honored for his generous and benevolent acts of kindness which he extended to all human beings.

Wilenskin letter. Similarly, David Zweibel, the director of Agudath Israel, has written:

Sholom Rubashkin's true character is reflected in his remarkable devotion to charitable causes, which has led him to provide generous support to countless needy individuals and worthwhile endeavors. The many beneficiaries of his charitable activities -- Jews and Gentiles; local, national and international -- will themselves feel the terrible impact of their benefactor being placed "out of commission" through any lengthy prison sentence Your Honor might impose.

Zweibel letter, Exh. ___. Mr. Zweibel has offered his organization as a place for Sholom to perform community service.

Even Agriprocessors' competitor, Empire Poultry, concurs

We know that Sholom Rubashkin has always cared very deeply about that community and not just from a business standpoint. It is well known that any member of the community facing a difficult time, with nowhere else to turn, could reach out to Mr. Rubashkin and he would do his best to help ameliorate that difficulty, even if it meant spending money out of his own pocket.

Letter of Greg Rosenbaum & Rabbi Israel Weiss, Empire Kosher Poultry, Exh. __.¹

Hundreds of letters have been provided to the Court. Over 16,000 people have signed their names to an internet petition for a compassionate and merciful sentence. People believe in him because the mission of Agriprocessors was to provide an important means for Jews to become closer in their connection to God. People believe in Sholom's character because of his history of selfless devotion to others. Jews in America and elsewhere saw that Agriprocessors had been attacked, and they knew that the attacks went to very fabric of their religion. The attacks were against Kosher slaughter. The world was watching because the fate of Kosher slaughter hung in the balance. One man stood up to these attacks. That man was Sholom

¹ Defendant also has submitted a videotape of interviews with various individuals who have provided additional information about Sholom Rubashkin's character and good works.

Rubashkin. These are the reasons there is such an outpouring of support.

Mr. Rubashkin stands convicted of serious offenses. But his life is far more than the commission of a series of crimes. Viewed as a whole, his life has been one of selfless contributions to both the Jewish community and the greater community at large.

While Sholom Rubashkin certainly lost his way, Sholom Rubashkin is not the average fraud defendant in terms of offense behavior. Moreover, his character is not that of the typical fraud defendant.

II. The Offense Conduct

Defendant incorporates by reference his statement of the offense conduct, submitted to the probation officer, and his objections to the presentence report.

Defendant has been convicted by a jury of various counts of bank fraud, making false statements to a financial institution, money laundering and violations of the Packers' Act. While he has been convicted, much of the trial evidence provides support for a mitigated sentence. In particular, Sholom Rubashkin's motivation for the offense was to keep his father's company going, and continue its mission of providing Kosher food to Jews. Furthermore, the circumstances of the offense, namely

family pressure and the lack of responsible management at Agriprocessors, strongly supports a mitigated sentence.

Agriprocessors was a dysfunctional company that had no centralized control over finances, including the incurrence of debt, expenditures, and payment of accounts payable.

(trial testimony of C. Abrahams/T.Bensasson/A.Rubashkin.) The company operated on a very thin margin, which made such controls critical. (testimony of Abrahams, Bensasson, Phillip Lykens.)

In entering into and remaining at Agriprocessors, Sholom Rubashkin became involved in a chaotic environment, with problems that he was unqualified to handle and which he was unable to repair. (See testimony of Abrahams, defendant Rubashkin, and Elizabeth Billmeyer). Sholom Rubashkin had no authority to decrease expenditures or control costs, but was responsible for trying to pay all of the business expenses that were incurred, not only by the Postville facility, but by his father and siblings on projects that they undertook.

Trial witnesses testified that Sholom Rubashkin was not part of the team that made decisions about how and when to spend money: he did not have a voice in making decisions regarding increases or decreases in production, nor on new projects or expansion. (testimony of Abrahams, Bensasson, Billmeyer.) Yet, it was his job to try to cover these expenses, both by obtaining the necessary cash, and juggling available cash among various obligations.

Importantly, Sholom Rubashkin did not intend to cause any loss to any person or entity. (Testimony of Bensasson & defendant Rubashkin). Agriprocessors successfully made every payment on its obligations until the bank pulled the loan.

Sholom understood his obligation to Agriprocessors as one of faith and special familial obligation, based on the Commandment to "Honor thy Father and thy Mother." He believed he owed a duty to his father. The Rubashkins also believed that making Kosher products available to a broader community was a religious calling.

Finally and importantly, the jury found that Sholom did not commit the charged offenses for personal gain and that he did not benefit personally from the offense conduct. (Verdict Forms- Special Interrogatories). This jury finding contradicts the suggestion made by the government that Sholom drew an excessive salary or otherwise took money from the company.

A. Sholom Did Not Control Agriprocessors

Production, not financing, drove Agriprocessors. Heshy Rubashkin and the managers who reported directly to him, controlled Agriprocessors by fiat. Heshy Rubashkin accomplished this, in part, by keeping Sholom out of the process of hiring managers. Sholom lacked the authority to make decisions regarding expansion projects, the on-site rendering plant project, leases, production levels, employee levels and numerous other facets of the business

conducted by Heshy's and his management team. Additionally, the operations conducted in New York and Florida were not subject to his orders or control and did not report to or consult with him in any meaningful way. For example, Agriprocessors provided significant inventory weekly to New York and Florida, but had no control over when and how much New York and Florida repaid Postville. First, Sholom lacked unilateral or direct authority to terminate any employee on the basis that the employee was the subject of a no-match letter. He did not have the unilateral authority to close the plant, halt a production line or stop the purchase of cattle. (Testimony of Sholom Rubashkin/Chaim Abrahams). He did not control the hiring of employees. (Testimony of Billmeyer).

Sholom Rubashkin's attempts to terminate employees who appeared to be working under false social security numbers were vigorously opposed by his brother Heshy, who was in charge of operations, and the managers who reported to him, strongly opposed the termination of employees who appeared to be working under false social security numbers. Heshy, who was not charged by the government, halted a second round of layoffs by appealing to Aaron Rubashkin. (Testimony of Abrahams, Sholom Rubashkin).

Until his death, Donald Hunt largely handled the financial management of the company. Judy Meyer handled customer accounts until her death in the summer of 2007. She worked with Toby Bensasson who designed the practice of inflating accounts receivables. Sholom had little

involvement in the inflation until Judy Meyer's death. After her death, Sholom became Toby's liaison with Darlis Hendry.

B. Agriprocessors' Financial Difficulties

Sholom moved his family to Postville in June, 1993. At the time, Agriprocessors was in a serious financial crisis. Various managers signed checks at Agriprocessors, including Heshy. (Trial- Misc. Trial Testimony) There was no cross-checking or accountability. Agriprocessors lacked a centralized system for decision-making, bill paying and expense management. As a result, managers reported information to Aaron Rubashkin in New York that was inaccurate or incomplete. Aaron had expended huge sums on expansion and by 1998-99, Ambassador Factors, Agriprocessors' predecessor lender, was threatening to pull the line of credit.

Sholom became involved with monetary tasks in an attempt to save his father's plant. He tried to find ways to reduce costs. He also sought tried to raise monies from the "community" via loans and Heter Iska, traditional Jewish investment agreements. (Trial- Michael Engleman/Steve Cohen from Twin City Poultry/Misc. Trial Testimony). Under Jewish monetary law, investment agreements under Heter Iska need not be in writing to be enforceable. Sholom obtained some significant monies from Joe Schocket and others. Although these monies were intended for Agriprocessors, morally and ethically, Sholom

pledged his personal obligation to repay these loans and investments.

The food industry operates on a thin profit margin. (Trial- Misc. Trial Testimony). Agriprocessors' thin profit margin was affected by various factors including the constant expansion of the plant and its products. Agriprocessors made poor business decisions, such as adding new and unprofitable products such as organic chicken. Customers frequently demanded credits or returned product. The majority of customers often had balances due of 30% or more. (Government Trial Exhibits- Monthly Reports to FBBC). Sometimes, Agriprocessors overproduced products, which then incurred storage expense. (Lykens testimony). Because production dominated over logic or finance, Agriprocessors had difficulty making a profit, especially after 2004. (C. Abrahams testimony).

In 2000, Agriprocessors terminated the second poultry shift for economic reasons. In 2004, Heshy restarted the second shift when Trader Joes became a poultry customer. Sholom opposed re-opening the second shift.

As early as 1994-1995, Sholom's concern over financial problems brought him into conflict with his brother Heshy and increased managerial dysfunction at the company. Although Sholom wanted to leave Agriprocessors, he did not feel able to do so, both because he felt obliged to save his father's plant, the investments from friends, and to continue building the Jewish Community in Postville.

C. Agriprocessors' Financing and Relationship with FBBC

In 1999, Agriprocessors entered into a loan agreement with FBBC for a revolving note amount of \$22,000,000.00. During the course of refinancing, Sholom was required to execute a personal guaranty of \$1,000,000.00. Aaron Rubashkin turned over a CD worth approximately \$2,200,000.00 to FBBC to be held as security.² FBBC conducted due diligence before agreeing to become Agriprocessors' asset-based lender. (Government Exhibits, Lykens testimony). There was no inflation of the accounts receivables making up any portion of the \$22,000,000.00 revolving note in 1999.

At some point, Aaron Rubashkin pressured Sholom to execute a personal guaranty in the amount of \$1,000,000.00 to FBBC. Sholom's personal guaranty was reaffirmed in one or more loan modifications to made through the summer of 2008.

The FBBC line of credit is considered to be a loan with higher risk and higher profit potential. (Lykens testimony; Offers of Proof Abe Roth & James Smith). Indeed, FBBC's internal documents characterize such asset-based loans as "evergreen loans" meaning that the principal is never expected to be repaid in full. The anticipated end is either to sell the loan or default. (Defense

² FBBC ultimately held additional security as well, including half the value of inventory, trademarks, the dry goods inventory, and the live chicken inventory, among other things. FBBC secured the revolving loan with "AR", inventory, the trademarks and later Local Pride. FBBC held a second position in the plant itself.

Exhibit 6571). In other words, FBBC's loan to Agriprocessors was similar to sub-prime loans. (Lykens testimony; Offers of Proof Abe Roth & James Smith). FBBC's asset based line of credit involved a revolving credit limit that fluctuated based on the actual accounts receivable and physical inventory balances that the company had.

FBBC knew about Agriprocessors' consistent undercapitalization and lack of compliance with the debt-to-equity covenants. As the trial testimony established, FBBC knew that Agriprocessors was dependent daily on advances and if they did not receive daily infusion, Agriprocessors was functionally insolvent. Throughout the term of the loan, FBBC also knew that Agriprocessors was frequently out-of-covenant on the debt to net worth covenant. (Lykens, Bensasson testimony; Defense Exhibit 6576A). Over the term of the loan, Sholom had very little contact with FBBC, which communicated nearly daily with Bensasson. Aaron Rubashkin's accountant consultant, Norman Lipshie, also had periodic contact with FBBC about Agriprocessors' financial issues. (Misc testimony).

Furthermore, at least twice per annum, FBBC conducted field exams at Agriprocessors, during which FBBC personnel were given access to whatever financial data they wished to review. FBBC intentionally and recklessly refrained from conducting a thorough inspection of the financial and accounting information. FBBC never audited the physical inventory of product stored in warehouses. (Lykens, May &

Bensasson testimony). At any given time during the term of the loan, Agriprocessors reported to FBBC and calculated for borrowing base purposes over \$10,000,000.00 in inventory value. (Government Exhibits) At times, Agriprocessors actually had more inventory than they reported to FBBC. FBBC knew that a large percentage of this frozen inventory was aging, but accepted the inventory value claimed at all times through October of 2008. The filing of bankruptcy did not proximately cause any diminution of value of the pre-petition physical inventory.

In 2007 and 2008, FBBC instructed Agriprocessors to sell large blocks of its inventory. Heshy and Sholom solicited promises to supply large blocks of inventory from various customers. (Lykens testimony). Some of the claimed false invoices were documentation that supported customer promises to buy large quantities in the future. These types of transactions were called bill and hold. (Sholom Rubashkin testimony).

FBBC knew that Agriprocessors supplemented its financial needs and expansion projects by obtaining monies from outside private loans and investments. Prior to May 12, 2008, FBBC never directly asked to see such third-party loan information or nor did it inquire how Agriprocessors accounted for and repaid such loans. (Lykens, May, Bensasson testimony). Documentation was admitted at trial that FBBC acquired in the June of 2008 field exam data informing FBBC that millions of dollars were flowing

through "1510" and the account nominated as Sholom's loan account.

Aaron and Sholom Rubashkin generated the outside funds for Agriprocessors which were supposed to be booked through "1510."³ Although the monies were intended for Agriprocessors, the providers of these monies may have considered the transactions to be between themselves and Aaron Rubashkin or Sholom. (Shmuly Rubashkin/Aaron Rubashkin testimony). Some loans were made by customers, and others by investors under terms of Heter Iska. (Trial-Misc. Trial Evidence) From a religious point of view, Jewish law does not allow a borrower to hide behind a corporation; all loans must be repaid, regardless. Therefore, Sholom felt personally obligated to try to ensure that private lenders and investors were repaid.

Some loans and investments were repaid in whole or part directly by Agriprocessors, but sometimes Agriprocessors made a check payable to Sholom and he wrote a personal check to the investor. (Shmuly Rubashkin testimony).

Agriprocessors' sole theoretical source of income was its accounts receivables. (Lykens testimony) Under the terms of the loan agreement, Agriprocessors was required to remit to FBBC all accounts receivables for deposit into the

³ The accounting department at Agriprocessors created an account in the APGEN system numbered 1510, which was the loan and exchange account in which investments made by outside sources were booked. Bensasson/Meltzer testimony; Defense Exhibits "1510" APGEN data)

account at the Decorah Bank. FBBC swept the account daily, applying the payments to the principal and interest on loan. (Lykens testimony). Since customer payments were Agriprocessors's only real source of income and the amounts borrowed were insufficient to cover daily costs, FBBC necessarily knew that Agriprocessors was delaying deposit of accounts receivable into the sweep account. (Trial-Offer of Proof of Abe Roth). It is erroneous to allege that all deposits to Decorah were made in round numbers. Millions of dollars of wires in odd numbers went into that account.

The bank fraud in this case turned on Agriprocessors' provision of inflated invoices which had the effect of overstating the collateral which the bank may have believed to be present. (Lykens, Bensasson, Meltzer testimony) The false invoices never totaled more than \$10 million. (Bensasson testimony).

During the period of the loan, loan amendments, and periodic short-term loan increases, FBBC received approximately \$20,000,000 in interest payments from Agriprocessors. (Misc. Trial Testimony). FBBC received more money than it was entitled to, because Agriprocessors also paid interest on the inflated accounts receivables that it carried on its accounting books. (Government Exhibits).

D. Packers Act Violations

In 2002, a Complaint was filed with the Department of Agriculture charging Agriprocessors with violating provisions of the Packers & Stockyards for failure to comply with the 24-hour payment provisions for the purchase of cattle. (Government Exhibit) During all times material to the Complaint, Don Hunt controlled cattle purchasing and authorized payments for cattle. Sholom had no personal role in any late payments that were the subject of the DOA Complaint. (Trial- Misc. Trial Evidence; Sentencing Evidence or Allocution)

Sholom became involved with the settlement between Agriprocessors and the Secretary of Agriculture because one of his roles at Agriprocessors was to deal with legal problems. While he signed the cease and desist agreement in 2002, by 2007-2008, he had forgotten about it.

By 2007 and 2008, Sholom was one of five people who signed checks for expenses. Benssason had authority to sign checks for expenses, including cattle, and often did so. (Trial- Misc. Trial Evidence) Again, Sholom did not control what or how much Heshy, Aaron, New York, or Florida bought or spent. He saw "bills" and invoices and tried to figure out when and how they could be paid. He did the best he could to see that cattle payments were paid as close to timely as possible.

Sholom also lacked decision-making authority over how many cattle or chickens Agriprocessors purchased and slaughtered in a given week. Heshy controlled production,

and his managers controlled the production and beef kill. Sholom lacked authority to tell Heshy that Agriprocessors was not going to buy any cattle in a given week or cancel a week's beef kill on the basis that Agriprocessors had insufficient cash to cover the obligation. Mark Schweitzer controlled the cattle "line up" for the week and had independent communication with some of Agriprocessors's cattle purchasers. (Trial- Misc. Trial Evidence) Sholom was cut out of the loop.

Sholom sometimes had contact with cattle buyers for the purpose of authorizing the price that the buyer was authorized to extend. (Trial- Misc. Trial Evidence). Defendant disputes that Elvira routinely provided him with the checks for invoices within the 24 hour time period; the checks were not always provided on a timely basis. Sometimes, Bensasson took possession of checks for cattle payment. When Sholom complained that the checks had to be sent, Bensasson replied that he would send them when the sellers called. (Trial- Misc. Trial Evidence). Sholom sometimes refrained from sending the checks, because Agriprocessors had insufficient funds to pay for the cattle. (Trial- Misc. Trial Evidence).

E. Unauthorized Employees and Immigration Violations

During the offense conduct, Sholom Rubashkin did not possess direct or unilateral authority to fire large numbers of employees who were the subject of no-match letters. He did not have the unilateral authority to close

the plant. He also did not control the hiring of employees. (Trial- Misc. Trial Evidence; Sentencing Evidence or Allocution)

Elizabeth Billmeyer, Agriprocessors' Human Resources director, reported directly to Heshy Rubashkin. (Billmeyer testimony). She knew about the conflicts between Heshy and Sholom and did not like to get involved between them. Production demanded that she hire new employees to cover expansion and turnover. She also knew that Sholom wanted to reduce staff.

Billmeyer was responsible for ensuring that Agriprocessors complied with hiring rules and regulations. She was Agriprocessor's admitted gatekeeper, but hired hundreds of employees without certifying the I-9's. She admitted at trial the hundreds of illegal aliens obtained employment under her watch. Her hiring process was fundamentally flawed. She regularly reviewed applicants' paperwork reviewed without looking at the potential employee.

Sholom was not trained to examine immigration or social security documentation to determine their legitimacy. (Billmeyer testimony). Sholom believed that Billmeyer had been trained to detect flaws in the immigration or social security documentation. (Billmeyer, S. Rubashkin testimony). Agriprocessors' HR Department also employed Laura Althouse, Karina Freund, Shawn Meyer and Penny Hanson to ensure the company's practices were administered appropriately.

Agriprocessors hired new employees through "bottom up" activity. Once hired, employees helped family members and friends get jobs at Agriprocessors. Several U.S. citizens from Iowa who worked at Agriprocessors were married to illegal aliens who worked in the plant, including Laura Althouse's cousin (Carlos Guerrero's wife and the apparent reason he was paid by Agriprocessors after his arrest without Sholom's knowledge) and Agriprocessors manager Nicole Miller and her sister Alisha Arias (whose car was used for the trip to Minneapolis to buy the fake documentation in May of 2008). Elizabeth Billmeyer was the "HR" director and reported directly to Heshy. (See Sentencing Exhibit 10120; Trial Testimony of Billmeyer regarding chain of command chart)

She was Agriprocessor's admitted gatekeeper. She hired hundreds of employees without even certifying the I-9's. She admitted at trial the hundreds of illegal aliens obtained employment under her watch. Her hiring process was fundamentally flawed. Applicants would applications downstairs and the paperwork would be brought to her and reviewed without ever even looking at the potential employee in the vast majority of situations.

Latin American immigrants apparently provided Agriprocessors with false identification cards. (Billmeyer, S. Rubashkin testimony).

In December, 2003, a fire destroyed the Iowa Turkey Plant ("ITP") plant. (Misc. Trial Testimony) Subsequently, Hispanic employment at Agriprocessors increased

dramatically. (Defense Exhibits marked but not offered in trial). After the ITP plant was destroyed, Ron Wahls from the Postville School District and State Senator Mark Ziemann asked Agriprocessors to employ the newly unemployed IPT workers. Agriprocessors believed that the Hispanics employees' prior ITP employment strongly suggested that their papers were legitimate and authentic. (Misc. Trial Testimony)

Sholom understood that on or about May 5, 2006, Agriprocessors received two no-match letters. (Billmeyer testimony) The letters listed social security numbers for over 200 employees. Sholom asked Billmeyer how this could have happened and she explained that until recently Toby had been submitting this documentation in writing to the federal government rather than electronically. (Billmeyer, S. Rubashkin testimony). Agriprocessors received other individual no-match letters in March of 2007.

Sholom believed that Billmeyer began working on correlating the social security numbers on the lists with the actual employees. (Billmeyer, S. Rubashkin testimony). Sholom understood that Billmeyer had assembled a list of the employees around December of 2006. Agriprocessors management did not see a simple solution to the no-match problem. Neither Heshy nor Aaron would authorize Sholom to terminate all the no-match employees. (Billmeyer/S. Rubashkin testimony). Moreover, Agriprocessors' management, including Sholom, knew that there was an

ongoing debate between the Bush Administration and Congress regarding possible guest worker status or amnesty. The public debate contributed to a lack of urgency in Agriprocessors' dealing with the no-match problem.

Between January and May of 2007, letters were sent to all affected employees telling them that they had to resolve their no-match problem. (Billmeyer, S. Rubashkin testimony). The notices were reviewed and approved by counsel. Sholom did not instruct Billmeyer to only send out letters to one of every six employees identified as having a no-match problem. Billmeyer's testimony on this point was mistaken. The error in her testimony is evidenced by the fact that approximately 200 affected employees walked out over receipt of the letter. If only one out of six had received the letter, then only 20-30 employees would have had reason to walk out. Thus, the math does not support Billmeyer's recollection.

During this period, Agriprocessors consulted with its lawyers on the no-match situation. (Billmeyer, S. Rubashkin testimony) Sholom understood that Billmeyer was supposed to be determining which listed employees were still working at Agriprocessors; checking Agriprocessors's records for those workers to determine if any error had been made; notifying the employees in question that a no-match letter had been received and requesting that the employee advise Agriprocessors whether their documentation information was correct. For those employees who stated that their documentation was correct, Billmeyer was to

instruct those employees to resolve the situation with the SSA. If the information was not correct, the employee had to provide correct information. Billmeyer also had direct access to and contact with Agriprocessors' attorneys for any of her questions. (Billmeyer, S. Rubashkin testimony) Sholom believed Billmeyer's records analysis took a long time. (Billmeyer, S. Rubashkin testimony)

In approximately May 2007, in an attempt to comply with yet proposed DHS "safe-harbor" regulations, Agriprocessors attached notices to paychecks of affected no-match letter employees requiring the employees to resolve the discrepancy with the SSA and report back to Agriprocessors on or before July 19, 2007. (Government Exhibit). Ron Wahls was listed as a community person who would help affected employees. (Government Exhibit; Billmeyer & S. Rubashkin testimony).

The May 2007 notices advised employees that they had 60 days to address their no-match problem. (Government Exhibit; Billmeyer, S. Rubashkin testimony) After consulting with its lawyers, Agriprocessors offered an additional 45 day extension for employees to respond to their no-match issues. Then, in August 2007, the Department of Homeland Security proposed safe harbor procedures for employers who received a no-match letter. (Government Exhibit; Trial- Misc. Trial Testimony/ Billmeyer, S. Rubashkin testimony). The safe harbor procedures were challenged in a lawsuit in the Northern District of California. *AFL v. Chertoff*, 552 F. Supp.2d 999

(N.D. Cal. 2007). In September of 2007, the *Chertoff* court issued an injunction, making the already unclear law regarding an employer's obligations upon receiving a no-match letter even murkier. Sholom and Billmeyer knew about the stay and relied upon counsel's advice on this point. (Billmeyer, S. Rubashkin testimony; Sentencing Exhibit 10313 "Cunningham" note). Billmeyer recorded the message from Immigration specialist Tom Cunningham as: "Re: No Match letters Ruling by Court, all actions are halted." Sholom relied upon this advice to equally halt use of no-match letters to fire affected employees. (See also March 28, 2008 Letter- Sentencing Exhibit 10314)

On or about the first week of May, 2007, between 100-200 employees protested the letters issued by Agriprocessors. (Government Exhibit; Trial- Misc. Trial Testimony). A walkout occurred, which was engendered by a combination of Agriprocessors's letters to the no-match employees, and misinformation spread by a Union organizer, Virdania Nunez. (Government Exhibit; Billmeyer, S. Rubashkin testimony). The Union spread the rumor that Agriprocessors had reported the employees to the government so that they would be fired, lose their vacation pay, and be rehired only with new paperwork and at a loss of previous benefits. (Defense Exhibits marked but not offered in trial or otherwise excluded; Penrod-Union Tape/Transcript).

These rumors were false and in reality, Sholom obtained a raise for employees and was working with Ron

Wahls in Postville to provide no-match employees with legitimate consultation on their immigration problems. (Defense Exhibits marked but not offered in trial or excluded).

Sholom believed, based on advice of counsel, that Agriprocessors had to be extremely careful in terminating any employees during the pendency of the Salazar lawsuit in federal court in Cedar Rapids. Arthur Kaufman, a New York attorney largely involved in defending Agriprocessors on the East Coast from Union certification activity, told Sholom that he should not terminate any employees during the pendency of the lawsuit. The concern was that termination, even for no-match deficiencies, would be perceived as illegal retaliation against the potential class that the Plaintiffs were attempting to certify. The Salazar lawsuit was dismissed in or around March, 2008. (See Generally Sentencing Exhibits 10314 & 10315)

On or about March 26, 2008, the *Chertoff* litigation resolved and DHS promulgated safe harbor procedures. (Trial- Misc. Trial Evidence) On March 28, 2008, Sholom received specific advice from the Nyemaster Law Firm to resolve the no-match problem, which he tried to follow.

Around the same time, Agriprocessors lost its largest account: Trader Joes.

Shortly after March 28, 2008, Agriprocessors Postville held a management meeting with Aaron, Yossi and Heshy Rubashkin, Chaim Abrahams, Bensasson (at times), Randy Vogt, Mark Halbe, and perhaps others. Sholom and Heshy

each proposed plans regarding staffing. Sholom wanted to terminate approximately all of the no-match employees and end the second poultry shift. He wanted intended to rehire the employees from the second poultry shift who did not have no-match problems to work on the first shift. Sholom told the group that Agriprocessors were legally compelled to deal with the no-match employees. Sholom's plan involved terminating the second shift because of the loss of the Trader Joe's account. This provided an economically-based reason to terminate all of the no-match employees and avert additional difficulties with the Union.

Heshy did not want to fire all of the second shift or deal with the no-match employees at all. He wanted to limit the second poultry shift. (See Sentencing Exhibits 10120, 10121, & 10128)

A few days later, Sholom began trying to suspend the second poultry shift for what the employees were told were economic reasons. The economic reason was truthful, but also was intended as a cover to terminate second shift poultry employees with no-match letters. Agriprocessors did not tell the employees that they were being terminated because of the no-match problem, because Sholom feared that it would cause more labor unrest.

Meanwhile, Heshy and his supporters worked behind the scenes to undermine the effort. Heshy ultimately refused to authorize a second round of no-match firings. Around April 18, 2008, Heshy went to Florida. In the interim, Sholom worked with Billmeyer to compile the no-match

notices. When Heshy returned from Florida, the second round of firing plan was underway. (Sentencing Exhibit 10315)

The Wednesday before the raid, Billmeyer distributed no-match notices to what Sholom believes was the balance of the presently-known no-match problem employees. (Trial-Misc. Trial Evidence; Sentencing Evidence or Allocution) Agriprocessors anticipated that this round of layoffs would result in a labor deficiency for beef kill and the remaining poultry shift. (Misc. Trial Evidence) Therefore, to obtain adequate staff, Agriprocessors engaged in a confused "application" taking process on May 11, 2008. Sholom's intention was that applications would be taken from new employees and former employees terminated in the first round who did not have no-match problems. These applicants would then fill necessary spots in the beef kill and first shift poultry, after their documents were reviewed by Billmeyer and counsel. (Trial- Misc. Trial Evidence; Offers of Proof of Nyemaster Counsel Neil Westin). No employees were actually hired on May 11, 2008.

On May 12, 2008, Immigrations and Customs Enforcement raided Agriprocessors and detained 389 illegal immigrants. The week following the raid, FBBC representatives, including Lykens, met with Agriprocessors staff, including Norman Lipshie and Aaron Rubashkin, but not Bernie Feldman. (Lykens' testimony). Phil Lykens said he had "no information but what [he] read in the papers." (Lykens testimony). When Lykens asked Agriprocessors how long it

would take to rebuild, Sholom replied that Agriprocessors would bring people from Nebraska and hire new employees. (Lykens testimony). Sholom did not intentionally misrepresent Agriprocessors' knowledge regarding the employment of illegal aliens. He told Lykens that Agriprocessors had been attempting to comply with the rules which the March 28, 2008 communication from Jay Eaton corroborates. (Lykens testimony).

Lykens told Aaron Rubashkin and Norman Lipshie that if they found outside monies, FBBC would extend more credit. (Lykens/Aaron Rubashkin testimony). Aaron Rubashkin pumped into Agriprocessors at least \$3,000,000 of his own monies (possibly as much as \$ 6 million) and additional investor monies after the raid. (Trial- Phil Lykens/Aaron Rubashkin; Defense Exhibits [FBBC Loan Status Reports]) These monies were raised by taking out mortgages on the homes owned by Aaron Rubashkin and Joseph Rubashkin.

F. Hunt Payroll

The Hunt payroll was established so that Agriprocessors could perform necessary work during the weekend Sabbath period and other Jewish holidays. (Kohn testimony). Under religious doctrine, Agriprocessors was prohibited from even asking non-Jews to work on the Sabbath and other holidays. (*Id*) Jewish law permits "work" if the work is performed by a legal entity owned by a non-Jew is separate from the Jewish employer. (*Id.*) These

requirements are necessary for the meat produced to be Kosher.

Don Hunt initially established the "Hunt" payroll to hire employees to perform Sabbath work. Agriprocessors needed approximately 50-55 employees at any given time. Because of turnover, the employee list was not constant. Laura Althouse monitored the Hunt payroll. (Althouse testimony)

Sholom consulted with Rabbi Kohn on this matter. (Kohn, S. Rubashkin testimony) Rabbi Kohn's trial testimony is incorporated by reference. Rabbi Kohn recommended that instead of some employees working for Agriprocessors during the week and then for Hunt on the weekends, that they be made full-time Hunt employees. (Kohn, S. Rubashkin testimony). Sholom implemented this recommendation. (*Id.*) Rabbi Ben Chaim Schlomo agreed to act as the document gatekeeper for the Hunt payroll. Sholom believed that Rabbi Ben Chaim Schlomo had learned to distinguish legitimate from illegitimate documents. (Kohn, S. Rubashkin testimony).

Sholom understood that the pink cards issued by ICE were still remained valid until 2008 despite Billmeyer's complaints about them. The ICE agent testimony at trial corroborated Sholom's understanding. Billmeyer was unaware of Rabbi Kohn's recommendations for the Hunt payroll and about Rabbi Schlomo's independent training and analysis. Instead, Billmeyer mistakenly believed that the "pink" cards were generally invalid.

Of the 86 people on the Hunt payroll (of which perhaps 50-55 were active), 24 of the cards were the white cards, which contain a hologram and are more difficult to fabricate. A similar number were the old pink cards that were valid until the Spring, 2008 -- when the raid occurred. (ICE Agent Testimony). In early Spring, 2008, attorney Jay Eaton evaluated the Hunt payroll, and recommended that it be discontinued. Sholom accepted the advice of counsel and voluntarily discontinued the full-time Hunt payroll arrangement, before the raid occurred. (S. Rubashkin trial and detention hearing testimony).

III. Objections to the PSR

Mr. Rubashkin timely submitted objections to the presentence report on March 8, 2010. As of the time of filing this memorandum, the probation officer had not amended his report. Defendant realleges and incorporates by reference his objections to the presentence investigation report, filed on March 8, 2010. These objections must be resolved at sentencing.

IV. Defendant's Objections to the Calculation of the Advisory Guidelines

a. The Actual Loss Overstates the Seriousness of the Offense Conduct and Was Unforeseeable to Mr. Rubashkin, Because the Bank's own Recklessness Contributed to the Amount of the Loss.

The amount of the pecuniary loss attributed to the defendant, whether actual or intended, must be reasonably foreseeable. U.S.S.G. 2B1.1 cmt. n.3(A)(i)-(iv). Not

every part of actual loss is necessarily a reasonably foreseeable one. In certain circumstances, loss may be caused by an independent intervening cause. In such a situation, courts must attempt to differentiate the loss stemming from the offense conduct, as opposed to the loss caused by the independent factor. United States v. Rutkoske, 506 F.3d 170, 178-79 (2d Cir. 2007); United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005).

In this case, the amount of the pecuniary loss was not reasonably foreseeable to defendant Rubashkin for several reasons. First, a reasonable person would not foresee that, even with the revelation of false accounts receivable, a corporation with a \$40,000,000 plus book value, would be sold for pennies on the dollar and that FBBC would not make substantial recovery from the assets on which it held the first secured interest.

Second and more significant, most of the actual loss to the banks resulted from an independent intervening cause, namely, the bank's adoption of an unreasonable position regarding the sale of Agriprocessors after it became apparent that the company was in trouble. In November, 2008, shortly before a trustee was appointed, Mordechai Korf offered the bank between \$21.5 and \$22 million to purchase Agriprocessors.

Korf became interested in acquiring Agriprocessors in or about October of 2008. He toured the plant and learned that he needed to deal directly with FBBC. Despite presenting his qualifications to the bank, Korf had a very difficult time getting FBBC personnel to meet with him. The bank inexplicably and strangely seemed uninterested in selling. Eventually Korf met with Phil Lykens and FBBC's Chairman Dennis Herstein. Lykens told Korf before the meeting that FBBC wanted to get the full amount of their loan and absent such an offer, there was no point in meeting. In the meeting, Lykens and Herstein acknowledged that they felt there was still between \$27M and \$29M at risk. Nonetheless, they rejected outright Korf's offer of between \$21.5M and \$22M in cash. Korf offered to put money into escrow while the details of the deal were arranged and made clear that the Rubashkins would not have any ownership interest in the business.

Korf emphasized to the bank that if the company went into bankruptcy and a trustee was appointed, the value of the plant would decrease. One of the things that made Agriprocessors attractive was the company's very strong position in the kosher meat market.

The bank rejected Korf's offer outright, without countering, and closed negotiations. The bank insisted

that it would not take anything less than full payment of its loan. Days later, the Trustee was appointed.

Had the bank accepted Korf's offer, a trustee would not have been appointed, Agriprocessors would have continued, and the bank would have lost a far lesser sum of money than is currently claimed. The bank's own malfeasance is the direct cause of a substantial portion of the bank's losses.

Additionally, part of FBBC's actual loss stems from the governmental interference amounting to misconduct. The government has not accused Aaron Rubashkin of any federal crime relating to Agriprocessors. Yet, during and prior to the bankruptcy, the U.S. Attorney's Office for the Northern District of Iowa insisted that none of the Rubashkin family retain an ownership interest in the company.

Agriprocessors' sole owner was Aaron Rubashkin, whose name had immense value and good will in the Orthodox Jewish community. The government's position had the effect -- foreseeable to the government but not the defendant -- of reducing the sale or liquidation value of Agriprocessors.

Accordingly, in this case, the actual loss stemmed, not only from Mr. Rubashkin's offense conduct, but also from the independent intervening factors set forth above, including the bank's greed and the government's conduct,

neither of which were reasonably foreseeable to defendant Rubashkin. Therefore, the loss caused by those factors should not be attributed to him. U.S.S.G. 1B1.3.

Because the bank's greed and the government's conduct substantially contributed to the loss, it is appropriate to limit the loss for which Mr. Rubashkin is held accountable. Here, a reasonable estimate of the loss stemming from the defendant's conduct is 85% of the fraudulent invoices, or approximately \$8.5 million. The estimate should be further reduced by the amount of interest earned on the fraudulent invoices. Abraham Roth, CPA, has calculated that the bank earned approximately \$4 million in interest on the fraudulent invoices. This is money that the bank would not have earned otherwise, and should be subtracted from its losses. In calculating loss, therefore, it is appropriate to take 85% of the \$10 million in fraudulent invoices, and subtract from that figure the monies that FBBC earned in interest on those invoices. That brings the actual loss figure to approximately \$4.5 million, well below the \$7 million cutoff. Mr. Roth will be available to testify at the sentencing hearing regarding his calculations. Mr. Korf is also expected to testify about his fruitless efforts in dealing with FPBC.

b. Guideline Commentary and Case Law Preclude Application Of The Two-Level Upward Adjustment For Between Two and Ten Victims.

Defendant objects to the PSR's recommendation that a two-level upward adjustment for the number of victims be applied. No adjustment for this factor should be applied. There was one victim in this case, FBBC. All loans and personal guarantees were between Agriprocessors and FBBC. The Metropolitan Bank was not in privity of contract with Agriprocessors and therefore cannot be classified as a victim. Indeed, under the participation agreement, FB is liable to Metropolitan. In the alternative, there were two victims in this case, FBBC and Metropolitan. The other persons and entities listed by the probation officer are not victims of the offense conduct.

U.S.S.G. 2B1.1, App. Note 1 defines a victim as "any person who sustained any part of the actual loss determined under subsection (b) (1)." Actual loss means the reasonably foreseeable pecuniary harm that resulted from the offense. Thus, a person is a victim only if his, her or its losses are included in the loss calculation. *United States v. Icaza*, 492 F.3d 967, 969-70 (8th Cir. 2007); *United States v. Armstead*, 552 F.3d 769, 780-81 (9th Cir. 2008).

The cattle suppliers did not suffer a pecuniary loss. Stress, frustration or delayed payment do not render them victims. All of the cattle suppliers were paid in full, either during the offense, or by March, 2009, as a result of the bankruptcy. See PSR at 111, ¶ 312. Accordingly, the entities and individuals identified by the PSR as victims did not suffer pecuniary harm. *Id.*

The government contends that Waverly Sales is a victim of the offense and that Waverly Sales' injury includes lost interest. The government's analysis is directly contrary to the sentencing guidelines, which direct that

(D) Exclusions from Loss.--Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on agreed-upon return or rate of return, or similar costs.

U.S.S.G. §2B1.1, Application Note 3(D). The government's suggestion that somehow, because Waverly Sales did not have a financing agreement with Agriprocessors that interest on a loan is included in loss is notable for its lack of authority in the sentencing guidelines. Thus, the amount claimed by the government to constitute a loss to Waverly should not be included in the overall loss amount either.

Additionally, all of the cattle suppliers knowingly acquiesced in the untimely payments and all ultimately

profited from their transactions with Agriprocessors. Finally, in 2007-08, the Department of Agriculture required Agriprocessors to maintain at the Luana Bank approximately \$1.2 million in cash to pay any outstanding P & S claims or any returned checks. The only victims of the offense of conviction are the two banks, rendering the two-level upward adjustment for more than 10 victims inapplicable.

c. Role in the Offense

Defendant concedes that a three-level upward adjustment for holding a supervisory role in the offense is appropriate. However, it is factually inaccurate to characterize him as an organizer of the offense pursuant to U.S.S.G. §3B1.1.

U.S.S.G. §3B1.1, App. Note 4 directs that in distinguishing a leadership or organizational role from one of management or supervision, the court should focus on the factors of the exercise of decision making authority, the nature of participation, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime and the degree of control and authority exercised over others. While Mr. Rubashkin certainly supervised others, he lacked significant decision making authority that would have allowed him to stop the illegal conduct.

He did not claim a right to a larger share of the fruits of the crime. Indeed, the jury found that he did not personally gain from the offense. When he attempted to engage in actions that would have reduced costs and eliminated undocumented employees, he was thwarted by others. Accordingly, he should not receive a four-level upward adjustment for role in the offense.

d. Abuse of Trust

This Court should not impose a two-level adjustment for abuse of trust, because Mr. Rubashkin did not hold a position of trust vis-à-vis the bank. See *United States v. Caplinger*, 339 F.3d 226 (4th Cir. 2003); *United States v. Bollin*, 264 F.3d 391, 415 (4th Cir. 2001); *United States v. Garrison*, 133 F.3d 831, 841 (11th Cir. 1998). Mr. Rubashkin stood in an arms-length position in relation to the bank. The mere fact that he held a position involving limited managerial discretion did not place him in a position of trust with regard to the bank. Furthermore, his position did not facilitate the concealment of the offense. In fact, the offense conduct was committed in a rather open and notorious manner. Accordingly, this Court should not impose an upward adjustment for abuse of trust.

e. Double-Counting

Defendant objects to the imposition of the upward adjustments both for holding an aggravating role in the offense and for abuse of trust. Imposing both adjustments on Mr. Rubashkin for his participation in the offense conduct constitutes double counting. The offense conduct was committed because of Mr. Rubashkin's role at the bank. His role as a manager was the exact same thing as his holding a position with discretionary authority. See *United States v. Thorn*, 317 F.3d 107, 122 (2d Cir. 2003).

The probation officer has concluded that Mr. Rubashkin qualifies for a two-level upward adjustment for abuse of trust, because he held a position of public trust as a vice-president of Agriprocessors. This factual basis, however, is exactly the same factual basis that supports imposition of the upward adjustment for role in the offense. Accordingly, the two-level upward adjustment for abuse of trust should not be applied.

f. Money Laundering

Defendant objects to the use of the guideline provisions in Section 2S1.1. to calculate his base offense level and offense characteristics. Notwithstanding the

district court's ruling (doc.# 854) on Defendant's post-trial motion, the money laundering convictions are legally defective. The government failed to prove that the charged laundering involved the proceeds, *i.e.*, profits of the specified unlawful activity which was bank fraud and making false statements to a bank. *United States v. Santos*, 553 U.S. 507 (2008); *United States v. Lee*, 558 F.3d 638, 642-43 (7th Cir. 2009); *United States v. Yusuf*, 536 F.3d 178, 190 (3d Cir. 2008). Accordingly, Mr. Rubashkin's sentence must not be based on the money laundering charges.

In support of this argument, Defendant incorporates by reference his oral and written arguments in support of judgment of acquittal and motion for new trial, and the Jury's answer to Interrogatories 62B, 63B, 64B, 65B, 66B, 67B, 68B, 69B, 70B and 71B.

Additionally, the money laundering guidelines must be reduced, because the bank fraud guidelines were incorrectly calculated as explained *supra* at 42. Correctly calculated, the offense level for bank fraud is 28. If a two-level upward adjustment is added for a conviction under 18 U.S.C. § 1956, then the adjusted offense level is 30.

g. Sophisticated Laundering

The adjustment for sophisticated laundering does not apply to the facts of this case. "'Sophisticated laundering' means complex or intricate offense conduct pertaining to the execution or concealment of the [money-laundering] offense." U.S.S.G. § 2S1.1, cmt. n.5(A). It "typically involves the use of (i) fictitious entities; (ii) shell corporations; (iii) two or more levels (*i.e.*, layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or (iv) offshore financial accounts."

In this case, funds were paid to Kosher Community Grocery ("KCG") and Torah Education Program ("TEP"), and later, funds were repaid to the bank. KCG and TEP were legitimate business entities that were a part of Agriprocessors's religious mission and the religious infrastructure of the Jewish community in Postville. Agriprocessors employees handled accounting for KCG and TEP.

Defendant's conduct in this case in regard to the money transfers was simple and straightforward: it involved the diversion of payments into other accounts that

Agriprocessors clearly and openly controlled, and then repaying the funds to the bank. The offense conduct did not involve two or more levels of layering, nor the use of shell or offshore corporations. As such, defendant's conduct does not qualify for the upward adjustment for sophisticated laundering.

h. Abuse of Trust as to Money Laundering

The upward adjustment for abuse of trust is simply inapplicable. Furthermore, the adjustment is duplicative with the upward adjustment for role in the offense. See *supra* at 38. Furthermore, Rubashkin's position as vice-president did not facilitate the concealment of a money laundering scheme, and he did not hold a position of trust vis-à-vis the bank. See *supra* at 38-39.

i. Obstruction of Justice

The presentence report recommends that Mr. Rubashkin receive an upward adjustment for obstruction of justice for a variety of alleged behaviors. See PSR at 117-18. The government has contended that Mr. Rubashkin gave false testimony when he testified that 1) The defendant claimed that he never asked Darlis Hendry to create bills-of lading to go with the false invoices (see lines 4 to 9 on page 12 of the November 5, 2009, Excerpt Testimony of Sholom

Rubashkin), and 2) The defendant claimed that he did not ask April Hamilton to add "round-up" checks to the deposits containing diverted customer check (see lines 11 to 13 on page 123 of the November 5, 2009, Excerpt Testimony of Sholom Rubashkin). The government also alleges that Mr. Rubashkin destroyed copies of Hunt I-9 forms gathered from Althouse. The government also contends that Mr. Rubashkin provided false testimony at his post-trial detention hearing when he stated that he placed employees on the Hunt payroll purely for religious reasons.

U.S.S.G. §3C1.1 provides for a two-level upward adjustment for a variety of obstructive behavior, including giving materially false or perjurious testimony, or destroying or concealing evidence material to a judicial proceeding. Importantly, the mere fact that a jury convicted the defendant despite his testimony is an insufficient basis to impose an upward adjustment based on perjury. Instead, the court must both conclude that the defendant willfully gave false testimony and identify the specific testimony that is materially false. *United States v. Dunnigan*, 507 U.S. 87, 95-96 (1993); *United States v. Abdul-Aziz*, 486 F.3d 471, 479 (8th Cir. 2007).

Sholom did not willfully give false testimony at trial or at the detention hearing. The testimony identified by

the government is the type about which two witnesses easily could differ. Sholom did not testify falsely at the post-trial detention hearing about the Hunt payroll.

Substantial evidence at trial supported his testimony that the Hunt payroll was established for religious reasons.

The probation officer's suggestion that Sholom's involvement with the destruction or concealment of documents should be rejected. As stated in the objections to the PSR, Sholom took the copies of the I-9s long before May 12, 2008, and it is likely that Ms. Althouse is mistaken in her recollection. In any event, Sholom knew that originals were available and there is no evidence that he attempted to destroy or conceal the original documents.

Finally, with respect to the statements contained in ¶325 of the PSR regarding the alleged deletion of diverted checks in October, 2008, and the alleged concealment of or destruction of fabricated customer invoices, bills-of-lading, and related papers, there is insufficient reliable evidence to support those allegations. Furthermore, there is no evidence that the destruction and/or concealment of the above-referenced documents materially hindered the investigation. U.S.S.G. §3C1.1, App. Note 4(d). Thus, even if true, these allegations are insufficient to support an upward adjustment for obstruction of justice.

j. Revised Advisory Guideline Calculation

Defendant respectfully suggests that the following advisory guideline calculation should be applied in this case:

Base offense level	7
Loss (between \$2.5 & \$7 mil.)	+18 ⁴
Role in the Offense	+3
Total	28

As previously mentioned, defendant disputes the applicability of the money laundering guidelines to this case. If, however, the money laundering guidelines are applied, then the following calculation is applicable:

Base offense level	25 (2B1.1)
Conviction under § 1956	+2
Role in the Offense	+3
Total	30

Therefore, the greatest applicable offense level is 30, with a corresponding range of 97-121 months.

⁴ In his objections to the PSR, defendant argued that the loss was less than \$7 million, but erroneously noted an upward adjustment of 20 levels. An upward adjustment of 18 levels applies to a loss of between \$2.5 and \$7 million, and an upward adjustment of 20 levels applies to a loss of between \$7 and \$20 million.

V. Disparity in Sentencing

Section 3553(a) (6) directs courts to consider the "need to avoid unwarranted sentence disparities between defendants with similar records who have been found guilty of similar conduct." The sentence achieved by the advisory guidelines would result in the imposition of a sentence that is tremendously disparate when compared with defendants convicted of similar offenses. The advisory guidelines prescribe a sentence that is disproportionate both to sentences imposed on codefendants and to the seriousness of the offense conduct.

As this Court is aware, codefendant Toby Bensasson was recently sentenced to serve 41 months' imprisonment. Bensasson held a supervisory role at Agriprocessors, and had a degree in business. Codefendant Mitch Meltzer, who has not yet been sentenced, was allowed to plead guilty to a single count of violating 18 U.S.C. § 371, carrying a maximum penalty of five years. Meltzer also was permitted to pleading guilty to an offense carrying a maximum sentence of five years.

While these defendants cooperated with the government, and Sholom Rubashkin did not, the maximum sentences allowable are extremely disparate. The government is seeking a sentence that is more than five times the maximum sentence to which Bensasson was exposed. Even considering cooperation, such a sentence is disparate in the extreme.

Likewise, the sentence suggested by the advisory guidelines is disparate, both with similarly situated defendants in this case and with similarly situated offenders in other cases. Both the advisory guidelines and the government would impose a sentence on Sholom Rubashkin that is more severe than that imposed on many defendants convicted of large-scale Ponzi schemes who defrauded vulnerable victims of their life savings. In other words, the government urges this Court to treat Sholom Rubashkin like defendants who acted out of greed, avarice and for personal gain. Indeed, the sentence urged by the government is greater than the mandatory minimum sentence imposed on major, large scale drug traffickers who have used a weapon in their offense with a prior conviction and dangerous armed bank robbers. See 21 U.S.C. §§ 841(b) (1) (A); 851. 18 U.S.C. § 2113.

For example, the government has suggested a sentence for Mr. Rubashkin that is close to the sentences imposed on Jeffrey Skilling and Marc Dreier, who deprived a large number of persons of their life savings. Furthermore, the advisory guideline sentence greatly exceeds the sentence imposed on many defendants who inflicted far greater losses. For instance, the government's suggested sentence is greater than the sentences imposed on defendants Bernard Ebbers, who inflicted a loss of \$11 billion and on John Rigas, who inflicted a loss of over \$100 million. Notably, Joseph Nacchio, who inflicted a loss of \$28 million (approximately the same alleged by the government here),

was sentenced initially to serve 72 months' imprisonment, about 25% of what the government seeks in this case.

An analogy closer to home provides more support for the conclusion that both the advisory guideline sentence and the government's suggested sentence are unreasonably disparate. Mark Turkcan, an insider at the First Bank, was recently convicted of bank fraud involving a loss of approximately \$35 million. Mr. Turkcan was sentenced to serve a year and day. *United States v. Turkcan*, Eastern District of Missouri, No. 4:08CR-428 (Sentencing Exhibits 11201A-E) Mr. Turkcan's apparent motive for the fraud was not personal gain but to conceal trading losses.

Similarly, in the Eastern District of Missouri, Cathy Giesecker was sentenced to nine years in prison for bilking 179 farmers out of in excess of \$27,000,000. *United States v. Giesecker*, Eastern District of Missouri, No. 4:09CR-460 (Sentencing Exhibits 11200A-E). Her motive, like Turkcan's and unlike Mr. Rubashkin's was greed.

VI. A Sentence of 72 Months Is More Than Sufficient To Achieve The Goals Of Sentencing.

Defendant respectfully requests this Court to impose a sentence no greater than 72 months. Such a sentence is sufficient, considering Mr. Rubashkin's positive history and character, his extraordinary family circumstances, and the arbitrary nature of the advisory guidelines as applied to the circumstances of this case and to the defendant. A

sentence of 72 months constitutes a downward departure or variance of approximately four years from the lower end of the advisory guideline range of 121-151 months.

Considering Mr. Rubashkin's unusually positive history and character, his sense of obligation to his family and their circumstances, and the arbitrariness of §2B1.1, a four-year reduction is a reasonable one.

Section 3553(a)(2) provides for consideration of four factors in imposing sentence. The first factor to be considered under § 3553(a) is just punishment. In imposing a "just punishment," this Court should consider Mr. Rubashkin's history, his motives, and the nature of his conduct. Mr. Rubashkin's conduct was not undertaken for personal gain. This Court also may wish to consider that both Mr. Rubashkin, and his extended family, have suffered greatly from the failure of their business.

Consideration of Mr. Rubashkin's history and characteristics, as directed by § 3553(a)(1), strongly supports imposition of a reduced sentence of 72 months. Mr. Rubashkin's history of positive social conduct is unusually good. It is rare to find any person, let alone a criminal defendant, who has given so much to others, both within and without his community. Additionally, as this Court is aware, Mr. Rubashkin's disabled son is suffering

greatly as a result of being separated from his father.
See Motion for Downward Departure and/or Variance.

Second, deterrence would be adequately served by a sentence of no more than 72 months' imprisonment. Mr. Rubashkin has been completely deterred from further criminal conduct. His offense conduct was situational and committed because of the pressures to keep his father's business going. He is genuinely remorseful for his conduct. A 72 month sentence is a harsh one that would serve to deter similarly situated offenders.

Third, a sentence of 72 months is more than sufficient to protect the public from further crimes of the defendant. Mr. Rubashkin will never reoffend. He is done with Agriprocessors as is his father. His goal in life is to return to what he loves and does best - helping other Jews find a way to strengthen their connection to God. When released from prison, he wants to return to a simple life like the one he led in Atlanta.

Additionally, a 72 month sentence is close to twice the sentence imposed on codefendant Bensasson and one year longer than the maximum sentence that Bensasson faced. By comparison, the sentence suggested by the government would be between four and six times as long as Bensasson's maximum term. The sentence suggested by the government

would create a noteworthy disparity between Mr. Rubashkin and other participants in this case, as well as between Mr. Rubashkin and other similarly-situated offenders.

Finally, a 72-month sentence will allow the Bureau of Prisons to place Mr. Rubashkin in a minimum security federal prison camp such as the Federal Prison Camp at Otisville, New York which has a long history of effectively and humanely incarcerating observant Jewish inmates. FPC Otisville is uniquely positioned to help facilitate the Bureau's housing of Orthodox Jewish inmates such as Mr. Rubashkin.

VII. CONCLUSION

Based on the foregoing argument, and upon evidence to be presented at sentencing, defendant respectfully requests this Court to sentence him to a term of no more than 72 months' imprisonment.

Respectfully submitted,

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The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on **April 9, 2010**, by CM/ECF.

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