UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	:	
	:	
- v. -	:	
	:	**No. CR 08-cr-1324 (LRR)**
	:	
SHOLOM RUBASHKIN,	:	
	:	
Defendant.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF SHOLOM RUBASHKIN'S MOTION FOR RECONSIDERATION OF HIS PRE-TRIAL DETENTION

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I. INTRODUCTION

Pursuant to 18 U.S.C. § 3142(f) and Local Criminal Rules 5(c) and 7, Sholom Rubashkin, the Defendant, moves this Court, John Stuart Scoles, United States Magistrate Judge, for reconsideration of the Order of Detention (hereinafter "Detention Order") entered on November 14, 2008 in 08-mj-381 (Doc.17), and Order Revoking Pretrial Release entered in 08-mj-363 (Doc.16), and an expedited hearing and ruling on this motion for reconsideration.

II. PRELIMINARY STATEMENT

On October 30, 2008, Sholom Rubashkin was arrested on criminal immigration charges and then released by this Court on bail in 08-mj-363. On November 14, 2008, he was arrested on bank fraud charges in criminal number 08-mj-381. When Sholom Rubashkin was presented on the second arrest, the government sought to detain him, claiming he was both a flight risk and a danger to the community. After holding a detention hearing on November 19, this Court issued a written Detention Order the next day, rejecting the government's contention that Sholom Rubashkin was a danger to the community, but detaining him as a risk of flight to Israel. Detention Order at 11.[1]

In this motion, Sholom Rubashkin brings new relevant matters to the Court's attention, and

cites legal authorities whose relevance was not anticipated earlier. First, the defense proposes significant, additional conditions of release that will insure that Sholom Rubashkin will not flee:

- An Iowa security company will provide, at Sholom Rubashkin's expense, 24-hour surveillance to enforce any order of release. The company's security professionals will have the authority and necessary experience to insure that Sholom Rubashkin will not flee. They will have the authority to arrest him, at gunpoint, should he violate any order of release; in that sense, his conditions will mirror those he confronts now in detention. The security professionals will take responsibility for his security at home, and will accompany him on any Court authorized excursions from the home, such as meetings with counsel.
- Sholom Rubashkin will execute a waiver of extradition.
- Sholom Rubashkin will post any additional security the Court deems necessary.

Second, in legal support of the new proposed conditions, the defense sets forth numerous cases showing that otherwise similarly situated defendants who are a far greater risk of flight than Sholom Rubashkin have been released on bail, with less stringent conditions than those now proposed by Sholom Rubashkin.

Third, the defense corrects the inaccurate characterizations made by the prosecutors in disparaging the efficacy of the extradition treaty with Israel; shows that the prosecutors' characterizations of the treaty are flatly inconsistent with the public position of the Justice Department; and demonstrates that Israel's Law of Return, when properly viewed in conjunction

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1 On November 20, 2008 both the immigration charges and the bank fraud charges were incorporated into one

with the extradition treaty, creates neither the opportunity nor the motive for Sholom Rubashkin to flee to Israel.

III. ARGUMENT

A. WITH THE PROPOSED NEW BAIL CONDITIONS, SHOLOM RUBASHKIN WILL NOT BE A FLIGHT RISK

1. The Proposed New Bail Conditions: 24-Hour Surveillance, Waiver Of Extradition, and, If Necessary, More Equity

At the detention hearing of November 19, the defense offered an extraordinary bail package.[2] Now, in addition to those conditions of release, Sholom Rubashkin proposes the Court order that he be subject to 24-hour surveillance by Global Security Services ("GSS"). GSS's proposal is attached as Exhibit A. The company, based in Davenport, has the capabilities of setting up sophisticated camera surveillance, and/or 24 hour manned home surveillance by experienced security personnel. Sholom Rubashkin will not be able to leave his home without the accompaniment of armed security personnel, who will also be able to enforce any other conditions imposed by the Court. Sholom Rubashkin's family will absorb the cost of this surveillance. The armed security personnel have the authority to arrest him at gunpoint if necessary.

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indictment, the Second Superseding Indictment in *United States v. Sholom Rubashkin, et. al*., 08-Cr-1324 (LRR).

2 In addition to the $500,000 (equity in a relative's home) that Sholom Rubashkin had previously posted in connection with the immigration arrest, and in addition to electronic monitoring, the defense offered home detention, (at least for an initial period until Agriprocessors was sold), an additional $1.5 million in real property from relatives' homes in NY; and an additional $225,000 in cash. Finally, in an impressive display of confidence in Sholom Rubashkin, some thirty-five families in the Postville community offered to post their homes to secure his release. *Id*. at 39-40; DX4 (List of Postville Homes Available for Securing the Bond). The homes had an additional $2 million in equity. *Id*. Thus, the defense offered a financial package of about $4 million in equity in a variety of homes of friends and family that would be lost were he to flee, $225,000 in cash, continued electronic monitoring and house arrest. The defense also offered to turn in the children's passports, in addition to the parents' passports which had already been submitted at the time of the initial arrest. Tr. at 52-53. Finally, while the matter was under consideration, the defense sent a letter to the Court advising that in addition to the property previously offered, there existed a piece of a commercial property in New York that a friend was prepared to post that was worth $6 million. That brought the total equity to $10 million.

The defense also offered other conditions relevant not to the issue of risk of flight, but to the government's contention that he is a danger to the community.

Sholom Rubashkin is prepared to sign any waiver of extradition proposed by the government (even though there exists, as the defense sets forth below, an effective extradition process with Israel).

Even though the defense has already proffered $10 million toward bail, friends are prepared to put up substantial additional property if necessary.

Finally, a review of the legal standards and case law under the Bail Reform Act leads to the conclusion that the rare application of pre-trial detention to a white-collar defendant is not appropriate here since the new bail conditions will more than "reasonably assure" Sholom Rubashkin's presence.

2. THE LEGAL STANDARDS UNDER THE BAIL REFORM ACT

a. Bail Conditions Must "Reasonably Assure," but not Guarantee, the Defendant's Appearance

With respect to risk of flight, a defendant may be detained before trial "only if the Government shows . . . by a preponderance of the evidence that no condition or set of conditions . . . will reasonably assure the defendant's appearance. . . ." *United States v. Kisling*, 334 F.3d 734, 735 (8th Cir. 2003) (quoting *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985) (en banc) (emphasis omitted); *see also* 18 U.S.C. § 3142(c).

The Eighth Circuit has made clear that the conditions need only "reasonably assure" the defendant's presence, not "guarantee" that presence, and has reversed when the courts below have, in effect, detained because of the absence of a guarantee. *Orta*, 760 F.2d at 891.

b. The Bail Reform Act's Standards Point Strongly in Favor of Sholom Rubashkin's Pre-Trial Release

The proposed bail conditions will more than "reasonably assure" Sholom Rubashkin's presence. This man will not cause 35 families in his community in Postville -- of which he is the backbone -- to lose their homes. He will not flee and cause his family members in New York who are posting their homes and their money to become homeless or impoverished. He will not forfeit the bail package that currently exceeds $10 million. He will not abandon his wife and children, especially his 15 year-old disable son who is so dependent on him. He has already given up his passport and his wife's passport. The family will give up the children's passports, as well. Finally, he will continue to be subject to electronic monitoring and geographical restrictions.

Further, with the new proposed conditions, it will not be possible for him to flee. He will be under 24-hour surveillance. He will be accompanied by an experienced, armed security professional whenever he leaves his home. He will be detained, handcuffed, and turned over to the authorities should he ever attempt to flee. Even more, the second proposed new condition—the waiver of extradition—insures there is no utility in attempting to flee.

Finally, should the Court feel that more than $10 million in equity is required, friends will put up any additional equity ordered by the Court.

This extraordinary bail package is being offered on behalf of a man who never fled, despite the repeated warnings by the government that he would be indicted. The warnings began in May with the initial raid on Agriprocessors, followed later that month with two target letters, one advising him that he was a target of the immigration investigation, the other advising him that he is the target of the bank fraud investigation. DX3. The warnings continued in September, when the government sent his attorney a letter stating that Sholom Rubashkin was also being investigated for possible money laundering and RICO offenses. *Id.* And then they continued yet again in early November

when the government executed a search warrant at Agriprocessors searching for evidence of bank fraud. At no time did he flee. And in October before his first arrest, at a time when it was perfectly lawful for him to do so, he traveled to Canada for a few days *and returned.*

In light of that background of no flight and the legal standard that requires a reasonable assurance -- but not a guarantee -- of a defendant's presence, the previously suggested bail conditions when coupled with the new proposed bail conditions are more than adequate. The government cannot meet its burden of proving risk of flight. Requiring anything more of Sholom Rubashkin would be tantamount to requiring a guarantee, in violation of the clear requirements of the Bail Reform Act. *Orta*, 760 F.2d at 891.

c. The Bail Cases Point Strongly in Favor of Sholom Rubashkin's Release

The prior proposed conditions of release, coupled with the new conditions, place Sholom Rubashkin in a situation where his bail proposal is far stronger than those routinely described in the caselaw. For example, in *Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978), the defendant, after having been convicted for violating the Espionage Act, sought bail pending appeal. He was Vietnamese and not a United States citizen, had not established permanent residence in the United States, his parents still resided in Viet Nam, and there was no means to procure his return should he flee to Viet Nam. *Id.* at 1329 & n.5. Justice Brennan, sitting as Circuit Justice ordered him released:

> But if these considerations suggest opportunities for flight, they hardly establish any inclination on the part of applicant to flee. And other evidence supports the inference that he is not so inclined. Applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail. He has resided continuously in this country since 1965, and has extensive ties in the community. He has produced numerous affidavits attesting to his character and to his reliability as a bail risk. He has maintained a close relationship

> with his sister, a permanent resident of the United States since 1969. The equity in his sister's Los Angeles home constitutes a substantial measure of the security for applicant's bail. In addition, applicant's reply to the memorandum for the United States in opposition informs us that the "American Friends Service Committee and the National Council of Churches have come forward with large sums which are now in the registry of the court in Alexandria."

Id. at 1329-30 (footnotes omitted).[3] Moreover, the defendant there was released even without the 24-hour security surveillance now proposed in this case.

The Eighth Circuit has consistently granted bail in cases involving risk of flight as great or greater than that presented here. *See, e.g., United States v. Leisure,* 710 F.2d 422 (8th Cir. 1983) (lowering excessive bond for defendants charged with "serious and extremely violent crimes" because defendants had lived in the area with their immediate families for many years, owned real property, and had been released on bond in the past without failing to appear); *Orta*, 760 F2d at 892 (reversing and remanding to district court to determine whether the presumption of detention in narcotics case was rebutted by combination of conditions that "would reasonably assure [defendant's] appearance in the proceedings"). Numerous similar District Court cases in the Eighth Circuit are set forth in the margin.[4]

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3 Although this was a pre-Bail Reform Act case, its pronouncement as to what constitutes a risk of flight is just as valid today, and it has been cited after the 1984 enactment of the act. *See Robinson v. Sears*, No. 07-Civ-2890 (GEL) 2007 WL 2962338, at *2 (S.D.N.Y. Oct. 10, 2007) (citing *Truong*).

4 *See also United States v. Garcia*, 801 F. Supp. 258 (S.D. Iowa 1992) (finding detention of alien drug defendant unwarranted based on employment history and residence in area for nineteen years with girlfriend, five children, parents, and siblings); *United States v. Bautista*, No. 07-00187-02-CR-W-NKL, 2007 WL 2080327 (W.D. Mo. July 16, 2007) (finding that substantial bond was sufficient to "reasonably assure" appearance of permanent resident defendant charged with "conspiring to encourage and induce illegal aliens to reside in the United States for commercial advantage and private financial gain; money laundering; and a notice of criminal forfeiture"); *United States v. Ochoa-Crespo*, Crim. No. 4-87-106, 1987 WL 18447 (D. Minn. Oct. 14, 1987) (finding that alien drug defendant had rebutted presumption favoring detention by showing permanent residency; GED, social security card, and New York driver's license; employment; marriage to a naturalized U.S. citizen and presence of two children with one on the way; and no criminal record); *United States v. Gray*, 651 F. Supp. 432 (W.D. Ark. 1987) (defendant charged with conspiracy to murder entitled to bail despite evidence of past bad acts, intent to alter appearance, and threat of further harms, because evidence was hearsay and because current employment, knowledge of pending charges for three months prior to arrest, and

In the Detention Order, this Court relied in part on the case of *United States v. Friedman*, 837, F. 2d 48 (2d Cir. 1988). Detention Order at 7. In *Friedman*, a child pornography case, the Second Circuit reversed the lower court's decision detaining Friedman:

> *[I]t is undisputed that Friedman is a life long New York resident, that he has no prior criminal records, that he has no passport, or known ability to evade surveillance, that he has worked gainfully in the New York area for 25 years prior to his arrest, and that he is married and has three children, all of whom live in the New York area.* Moreover, Friedman apparently took no steps to leave the jurisdiction after Federal Agents executed a search warrant at his home on November 3, 1987 and after he was arrested at home on state charges three weeks later.

Friedman, 837 F.2d at 49-50 (emphasis added). The bail facts in *Friedman* remarkably mirror the relevant bail facts presented in this case, yet Friedman was released even without 24-hour security surveillance.

A review of recent cases involving Jewish or Israeli defendants demonstrates that such defendants are frequently released in circumstances involving a much greater risk of flight and far more contacts with Israel than are present here. *See, e.g., United States v. Ezagui*, 08-MJ-00530 (E.D.N.Y. July 28, 2008) (Docket no. 11, Israeli citizen charged with $15,000,000 bank fraud released on bond with home detention and monitoring despite fact of arrest at Kennedy Airport with a one-way ticket out of the United States and wife's and children's residence in Israel); *United States v. Maximov*, No. CR-08-0368-PHX-DGC, 2008 WL 4185834 at *2 (D. Ariz. September 5, 2008) (Israeli citizen arrested on bank fraud and money laundering charges released on bond despite

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presence of wife expecting baby contradicted risk of flight); *United States v. Leyba*, 104 F. Supp. 2d 1182 (S.D. Iowa 2000) (finding that alien drug defendant had rebutted presumption of detention by showing legal residence; no previous attempts to flee despite prior arrests; third-party's agreement to enter custody order; and agreement to submit to electronic monitoring); *United States v. Bradai*, No. CRIM.04-16(01)DWF/SR, 2004 WL 413281 (D. Minn. Feb. 26, 2004) (overturning detention of alien defendant brought on false documents charges where defendant had resided in same area for five years; had strong ties to community as a graduate student, teacher, and member of Muslim community; had cooperated with authorities; lacked connections to terror groups alleged by government; and was generally "law

acknowledged risk of flight); *United States v. Karni*, 298 F. Supp. 2d 129, 132-33 (D.D.C. 2004) (Israeli citizen charged with violating international export restrictions released on $75,000 bond with home detention and monitoring despite no ties to the United States other than his arrest there while on vacation); *United States v. Shereshevsky*, 08-MJ-01766 (S.D.N.Y. Sept. 4, 2008) (Docket no. 14, Jewish convicted felon charged in $250,000,000 securities fraud action released on bond with home detention and monitoring despite substantial international ties and business operations in Israel and Africa); *United States v. Wein Reis*, 08-Cr-00165 (DFH) (S.D. Ind. Nov. 6, 2008) (Docket no. 49, Jewish defendant released on bond despite net worth of $100,000,000.00 and significant ties to Israel). These cases are but recent samples of many where the Courts have released Israeli or Jewish defendants despite risk of flight claims substantially greater than the risk presented by Rubashkin. These cases, combined with the new proposed conditions, militate very strongly in favor of release.

B. BECAUSE OF THE EXTRADITION TREATY WITH ISRAEL, THE LAW OF RETURN CREATES NEITHER AN OPPORTUNITY NOR A MOTIVE TO FLEE

1. BACKGROUND: THE ISSUE OF ISRAEL AT THE DETENTION HEARING AND IN THE DETENTION ORDER

On November 19, 2008, this Court conducted a detention hearing, at which the government sought to prove, in part, that if released Shalom Rubashkin would flee to Israel.

Significantly, Sholom Rubashkin is not an Israeli citizen and has no bank accounts, property or other assets in Israel. He does not have an Israeli passport or visa. His wife, children and parents all reside in the United States and are all U.S.—not Israeli—citizens. The only contact with Israel that the government demonstrated in the hearing was a hotel receipt from Israel found in the Rubashkin home during the execution of a search warrant. Tr. at 26. The receipt reflects a short

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abiding").

visit to Israel by Sholom Rubashkin almost a year ago.[5] *See* Detention Order at 6, 10; GX24 (Photo of Receipt).

The prosecution then 'proved' through hearsay newspaper reports that two other defendants, former supervisors at Agriprocessors, fled after the search. *See* Tr. at 21-22. One of the supervisors was a Muslim with Israeli citizenship, who was suspected by the government of having fled to Israel via Canada. *Id.* at 27-28. The government intimated that because that *Israeli citizen* fled, presumably to Israel, that Sholom Rubashkin was also likely to flee to Israel. *See id.*

The prosecution also introduced a copy of Israel's Law of Return, which gives Jews who move to Israel the right to automatic citizenship. *Id*. at 27; Israel Law of Return, GX28. But the prosecution did not demonstrate that Sholom Rubashkin had planned to exploit any opportunity presented by the Law of Return, nor did the prosecution demonstrate that Jews are more likely to flee because of the Law of Return. The prosecution then essentially argued that because the former Agriprocessor supervisor may have fled to Israel, and because Israel had a Law of Return under which Sholom Rubashkin could also obtain Israeli citizenship, that he too was a risk of flight to Israel. Tr. at 27.

In response, the defense pointed out to the Court that there existed a current, up-to-date extradition treaty with Israel. *Id*. at 43-44. The defense also stressed that the Bail Reform Act does not permit ethnicity or religion to be considered as a bail-risk factor. *Id.* at 65. In reply, the prosecutor stated:

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5 Millions of Americans have visited Israel. Roughly 541,000 Americans visited Israel in 2007 alone, *see* Tourist Arrivals by Country of Residence/Citizenship, Israeli Central Bureau of Statistics, http://www1.cbs.gov.il/shnaton59/st23_05.pdf, and over 331,000 Americans have visited Israel in the first half of 2008. Danny Sadeh, Ynet.com News, Iranian, Iraqui tourists visit Israel too, July 24, 2008, http://www.ynet.co.il/english/articles/0,7340,L-3572684,00.html.

> Counsel indicates that there is an extradition process, however, I don't believe that that is something the Court ought to consider when the question is whether or not there's a serious risk that the person will show up for a hearing or not, not whether or not we can get him back through an extradition process. It could take years. There's, of course, all sorts of reasons that that's a completely unacceptable alternative to having the defendant show up as ordered.

Id. at 75-76.

The next day, November 20, this Court issued a written detention order. This Court concluded that while Sholom Rubashkin was no danger to the community, he was a flight risk and should be detained on that basis. *Id.* In explaining the various reasons for the Court's determination that Sholom Rubashkin is a risk of flight to Israel, the Court made clear that it accepted the prosecution's argument regarding the Law of Return:

> Under Israel's "Law of Return" any Jew and members of his family who have expressed their desire to settle in Israel will be granted citizenship. At the time of the hearing the Government proffered that two supervisors at Agriprocessors, Inc. fled following the search on May 12, 2008. It is believed that Hosam Amara, a Muslim with Israeli citizenship, fled to Israel possibly through Canada.

Detention Order at 10. In light of the government's representations that the extradition treaty was "something the Court ought [not] to consider" and "totally unacceptable," that the treaty raised questions as to "whether or not we can get him back through an extradition process," and that, in any event, "[i]t could take years," the Detention Order did not mention the existence of the extradition treaty with Israel.

a. Law of Return

Counsel's Westlaw research has not uncovered a single instance involving a Jewish criminal defendant where the prosecution invoked the Law of Return in support of detention. Leonard Joy,

Esq., the current Federal Defender for the Southern and Eastern Districts of New York—which encompass New York City and its suburbs, and thus cover the largest Jewish population in the country—advises that in his decades of practice against the federal government, he can recall no instance where the prosecutor invoked the Law of Return in arguing that an American Jew is a bail risk.[6] If the argument has been pressed by the government in the past, it has not generated any published opinion. As shown below, an examination of the Law of Return, in light of the extradition treaty, shows that a Jewish defendant cannot succeed in trying to avoid trial and sentence by fleeing to Israel.

The State of Israel was founded in 1948. Israel's Law of Return, enacted just two years later in 1950, affirmed the already well-established right of any Jew to become an *oleh*, or immigrant, and to secure a visa, citizenship, and to settle in Israel. *See* GX 28 (The Law of Return 5710 (1950), http://www.knesset.gov.il/laws/special/eng/return.htm).

Because of the long history of persecution of Jews throughout the world, the Law of Return was drafted to apply to all Jews. In the words of the Law of Return, "*[e]very Jew* has the right to come to this country as an oleh." *Id*. at Section 1 (emphasis added). In the prosecutors' view, anyone subject to the Law of Return is an increased flight risk. Consequently, under that view, "every Jew" is to be viewed for bail purposes as a greater risk of flight than a non-Jew. That means that 5,300,000 Americans would be viewed as heightened bail risks simply because they are Jews.[7] The government's logic would extend, for example, even to a Jew whose family lived in this country

6 This representation was made on November 25, 2008, to Baruch Weiss, Esq., counsel who appeared before this Court at the detention hearing.

7 *See Haaretz.com, 12/09/07 at* http://www.haaretz.com/hasen/spages/903585.html (Israeli newspaper reporting on information collected by the Jewish Agency on the Jewish population of various countries). This is a conservative figure, because it includes only those who consider themselves Jews. Many individuals who do not consider themselves

since the first Jews arrived on the shores of New Amsterdam in 1654.[8] It would also extend to the ultimate superior of the prosecutors pressing the Law-of Return argument, *i.e.*, the current Attorney General of the United States Michael B. Mukasey; the ultimate superior of the Homeland Security agents who have investigated this case, *i.e.*, Secretary Michael Chertoff; and two sitting Justices of the Supreme Court, Justices Steven Breyer and Ruth Bader Ginsburg. It is ironic that a law designed to provide refuge to persecuted Jews has now become the basis for detaining a Jew who might otherwise have been released pending trial.

Whatever validity may exist with respect to the prosecutors' Law-of-Return argument, there exists a streamlined, effective treaty that undercuts the argument entirely.

b. The Extradition Treaty

An extradition treaty between the United States and Israel has been in force since December 5, 1963.[9] It was recently amended and improved in a number of significant ways in a protocol signed on July 6, 2005, and effective January 1, 2007.

Both the original treaty and the current amended version provide that each country must extradite its own nationals. Article IV of the original treaty provided that "[a] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party." That means, of course, that Israel has undertaken to extradite its own nationals to the United States. Pursuant to the original treaty, there were numerous extraditions by Israel to the United States. Indeed, in 2005, the Justice Department advised the Senate that from 1999 to 2005, "the United

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Jews would be so considered by the Law of Return. *Id.*

8 *See, e.g.*, Arthur Hertzberg, The Jews in America at 19 (1989).

9 Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, U.S.–Isr., Dec. 10, 1962, 14 U.S. T. 1707, corr. version in 18 U.S. T. 382 (effective Dec. 6, 1963) (DX B, attached).

States has extradited a total of 20 fugitives from Israel, *of whom 15 were Israeli nationals (including dual United States-Israeli nationals)* (emphasis added).[10]

Significantly, a number of those extradited cases involved fraud cases.[11] For example, in 2002, Michael Akva, an Israeli citizen, was extradited by Israel to the United States on securities fraud and insider trading charges.[12] In 2000, Sharon Haroush, an Israeli citizen, was extradited by Israel to the United States on fraud and theft charges.[13] Another notable case, similar to the scenario feared by the prosecution in the instant case, is particularly instructive. Chaim Berger, an American citizen from New York, was indicted in 1977 in the Southern District of New York for defrauding the government of many millions of dollars.[14] He fled to Israel where he had never lived previously, and claimed citizenship under the Law of Return. He was extradited back to the United States, pleaded guilty and was sentenced to six years imprisonment.[15] All of these extraditions took place under the pre-amendment treaty.

In its 2005 statement to the Senate, the Justice Department reviewed the state of extraditions from Israel to the United States, and found the pre-amendment approach "to be workable." DXC, Marlow Statement at 7.[16] Of course, that statement is entirely at odds with the prosecutors' characterization of the treaty as "totally unacceptable." Indeed, in 2006, the Attorney General of the

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10 Statement of Mary Ellen Marlow, Director, Office of Int'l Affairs, Criminal Div., Dept. of Justice, Senate Committee on Foreign Relations, Nov. 15, 2005, at 7 (DX C, attached).

11 The original version of the treaty set forth a list of specifically enumerated offenses for which extradition was available; among those offenses was the offense of "obtaining money . . . by false pretenses." Article II(14).

12 *See* U.S. Sec. and Exchange Comm'n, SEC Obtains Default Judgments Ordering Two Defendants to Pay $7.6 Million For Insider Trading, http://www.sec.gov/litigation/litreleases/lr18193.htm.

13 *See* Israel to Extradite Citizen to U.S., United Press Int'l Network, March 30, 2000.

14 *See* Randal Archibald, Israeli Court Allows Return of Man Indicted in Fraud, N.Y. Times, Aug. 7, 2001, available at http://query.nytimes.com/gst/fullpage.html?res= 9C02E1DA1E3CF934A3575BC0A9679C8B63.

15 *See United States v. Berger*, No. 97-Cr-00410-BSJ (S.D.N.Y. May 23, 2002) (Docket 167, Filed Judgment as to Defendant Chaim Berger).

16 At one time there had been a problem because, despite the extradition treaty, Israel enacted a 1978 law that conflicted with the treaty when it came to Israeli nationals. *Id.* at 6. That domestic Israeli law has, however, since been

United States publicly praised Israel for its pre-amendment extradition to the United States of an Israeli who was a suspected mob boss on drug charges.[17] Nonetheless, despite the history of successful extraditions, the Administration sought and obtained Senate ratification for a protocol amending the treaty in a way that would "significantly streamline[] the process of requesting extradition." *Id.* at 6. For example, the amended treaty now

- allows the use of hearsay, *id.*;[18]
- "streamline[s] the procedures for 'provisional arrest,'" *id.* at 7; *see* Article XI;
- expands the list of extraditable offenses, providing that any crime that constitutes an offense in both countries and is punishable by imprisonment of one year or more is extraditable. Article II.
- requires that only one offense need be extraditable; as long as there is one extraditable offense in the U.S.'s request, Israel can extradite on non-extraditable offenses as well. Article II, section 4.

Most importantly, the amended version of the treaty reiterates the principle that nationality is no defense to extradition. Article IV, section one, of the amended treaty provides: "the requested Party shall not refuse extradition solely on the basis of nationality."[19] Protocol between the Government of the State of Israel and the Government of the United States Amending the Convention on Extradition Signed at Washington, D.C., on Dec. 10, 1962, U.S.-Isr., July 6, 2005, *available at* http://purl.access.gpo.gov/GPO/LPS65673 (DX D, attached). Thus, Sholom Rubashkin's citizenship and nationality would be no bar to extradition, even were he to become an Israeli citizen under the

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amended to yield the "workable" framework. *Id.* at 6-7.

17 *See* U.S. Attorney General praises Israel for fight against terror, international crime, Associated Press, June 27, 2006, 6/27/06 APALERTCRIM 15:54:33.

18 *See* Article X *bis*, section 2 (providing that the information in the extradition request "shall be admissible as evidence in extradition proceedings even though they would be considered hearsay or otherwise would not conform to evidentiary rules applicable at trial").

19 That clause is introduced with the phrase, "except as provided in the Article . . . ." But none of the exceptions apply to Rubashkin.

Law of Return.[20] Any American, whether Jewish or not, would be extraditable in the same way from Israel.

Not surprisingly, extraditions after the new protocol from Israel have increased. The new extradition cases continue to include Israeli citizens extradited in fraud cases. For example, this past September, the United States Attorney's Office, Southern District of New York announced that Israel arrested nine Israelis in a lottery telemarketing fraud scheme. According to the government's press release, "[t]his case involves the largest number of Israeli citizens ever to be provisionally arrested by Israel in anticipation of extradition."[21]

Finally, extradition defendants—if they jumped bail to travel to Israel—are typically detained by the Israelis pending extradition. For example, Michael Akva, an Israeli citizen extradited in 2002 for securities fraud and insider trading, *see supra* at 14, who had jumped bail in the United States, was detained by the Israelis until extradited to the United States.[22]

In sum, there exists an extradition treaty that has always been "workable." After the recent amendments it is now better than "workable"; it is an up-to-date, streamlined treaty, regularly invoked for all serious criminal matters, including fraud cases. It applies to everyone, Jews and non-Jews. It even applies to Israelis. This treaty will insure that Rubashkin—even if he were to become a citizen of Israel under the Law of Return—will be returned to the United States, tried in the United

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20 A limited exception applies to persons who were Israelis at the time of the offense. Such persons are still to be extradited from Israel to the United States, but only on the condition that they be returned to Israel to serve their sentences. *See* Marlow Statement at 6 -7; *see also* Israel's Extradition Law, 5714-1954, as amended, at section 1A. But that was part of the pre-existing procedure that the Justice Department found to be workable. *Id.* at 7. In any event, Sholom Rubashkin, is not and has never been an Israeli citizen, and certainly was not an Israeli citizen at the time of the alleged offenses, and is thus subject to all the extradition provisions of the treaty, and if extradited to the United States, would serve his sentence here.

21 *See* Israel-Based Defendants Indicted and Arrested in Loterry Telemarketing Fraud Targeting U.S. Citizens, http://www.usdoj.gov/usao/nys/pressreleases/September08/mayoetalarrestindictmentpr.pdf

States, and if convicted, that he will serve any sentence in the United States. Were he to flee to Israel, he would be detained pending extradition. Because of this treaty, the Law of Return is irrelevant. Any American, whether Jewish or non-Jewish, would be treated the same way if he or she were to flee to Israel.

Because of this effective treaty, the Law of Return does not create the opportunity for successful flight. And it therefore creates no motive to flee—any Jewish defendant who checks will see that he or she will be detained in Israel and then extradited back to the United States.

Finally, to accelerate the extradition procedure, some courts have required as a condition of bail that defendants with strong ties to Israel (including citizenship) execute irrevocable waivers of extradition. *See United States v. Simon*, 2006 U.S. Dist. LEXIS 52979 (D. Nev. July 27, 2006) (Israeli citizen released upon condition of executing extradition waiver); *United States v. Karni*, 298 F. Supp. 2d 129, 133 (D.D.C. 2004) (same); *United States v. Cohen*, No. 00-CR-00100 (S.D. Fla. May 5, 2000); *United States v. Cohen*, No. 02-MJ-02592 (S.D. Fla. May 3, 2002); *United States v. Freund*, No. 99-CR-00561 (S.D.N.Y. May 10, 1999). Sholom Rubashkin would execute such a waiver in this case.

C. THE GOVERNMENT HAS VIOLATED SHOLOM RUBASHKIN'S RIGHT TO EQUAL PROTECTION

Bail is subject to equal protection analysis. *See Hall v. Furlong*, 77 F.3d 261, 364 (10th Cir. 1996); *Pugh v. Rainwater*, 557 F.2d 1189, 1201 (5th Cir. 1977). Because Jews are a protected class, equal protection principles require that any rule treating Jews differently than non-Jews must be subjected to strict scrutiny. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 168 (3d

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22 *See* SEC Obtains Default Judgments Ordering Two Defendants to Pay $7.6 Million for Insider Trading, *supra*, n.12 (noting that Akva received "credit for time that he served while in custody in Israel awaiting extradition").

Cir. 2002) (government's selective application of ordinance to conduct motivated by Orthodox Jewish beliefs is sufficiently suggestive of discriminatory intent that it must be reviewed with strict scrutiny). Under strict scrutiny, the government has the burden of proving that its racial classification is a narrowly tailored measure that furthers compelling government interests. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). Because the government has not proven that there is any statistical correlation between the Law of Return and flight risk, *see United States v. Montero-Comargo,* 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (applying statistical population analysis to conclude that Hispanic appearance can play no role, even in conjunction with other factors, in determining whether an individual is an illegal alien), and especially in light of the streamlined extradition treaty, it cannot demonstrate a compelling interest in such a rule. More narrowly tailored measures – tight bail conditions and extradition when necessary – suffice.

IV. CONCLUSION

Sholom Rubashkin urges this Court to reconsider the Order of Detention and enter an order releasing him on bail, supervision by Pre-trial Release supervision, and upon on the additional conditions the defense proposes, or any others the Court deems reasonable.

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

CERTIFICATE OF SERVICE

I hereby certify that on 5th Day of December, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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