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

UNITED STATES OF AMERICA,	:	CRIMINAL NO. 4:08-CR-1324 LLR
	:	
v.	:	**DEFENDANT RUBASHKIN'S**
	:	**BRIEF IN SUPPORT OF**
SHOLOM RUBASHKIN,	:	**COMBINED MOTION FOR JUDGMENT**
	:	**OF ACQUITTAL AND MOTION FOR**
Defendant.	:	**NEW TRIAL**
	:	

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I. INTRODUCTION

Trial in this matter resulted in guilty verdicts on 86 of the 91 counts. The jury determined Defendant Rubashkin was guilty of bank fraud, false statements to a bank, wire fraud, mail fraud, money laundering, and criminal violations of the Packers and Stockyards Act. Defendant Rubashkin incorporates by reference Defendant's Rule 29(a) motion, brief in support, and oral argument thereon. Federal Criminal Rule 29(a) provides for a judgment of acquittal if there is insufficient evidence to sustain a conviction. Federal Criminal Rule 29 (c) provides that a motion for judgment of acquittal may be made to the court after the discharge of the jury. FED.R.CRIM.P. 29.

II. BRIEF IN SUPPORT FOR JUDGMENT OF ACQUITTAL

In review of a motion for judgment of acquittal the evidence is to be viewed in the light most favorable to the prosecution and the prosecution is given the benefit of all inferences that may reasonably be drawn in its favor. *United States v. Ingram,* 501 F.3d 963 (8th Cir. 2007); *United States v. Huntsman,* 959 F 2d. 1429, 1436-1437 (8th Cir. 1992) (citing *United States v. Mundt,* 846 F.2d 1157, 1158 (8th Cir. 1988)). The motion should only be granted "where the evidence… is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged." *Mundt,* at 1158; *United States v. Pruett*, 501 F.3d 976 (8th Cir. Sept.6, 2007) ("We view the evidence in the light most favorable to the jury's verdict and draw all reasonable inferences in the government's favor, upholding the conviction as long as 'there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt.'").

Defendant Rubashkin is entitled to a judgment of acquittal on all counts because, as to each of those counts, "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P.

29(a). *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970) (government required to prove each element of the offense by evidence beyond reasonable doubt).

The testimony of the witnesses, combined with the other evidence and testimony in this case is not sufficient to prove guilt on each of the 86 Counts and "a reasonable fact finder must have entertained reasonable doubt about the government's proof of one of the essential elements" on the count of conviction. *See United States v. Jenkins,* 78 F 3d 1283, 1287 (8th Cir. 1996). This is true for a number of reasons, many of which were previously asserted in Defendant Rubashkin's Rule 29(a) motion, brief in support, and oral argument thereon, which followed the close of the Government's case. The reasons previously asserted in the same are now renewed and incorporated in the instant motion.

- **Insufficiency of the Evidence Relating to the Packers Act Counts**
    - Even in the light most favorable to the Government, the general testimony is insufficient to sustain a conviction that Defendant Rubashkin was responsible for the checks issued to cattle suppliers. No government witness testified the specific circumstances of the checks which are the subject of the Packers Act counts with in the indictment.
    - Defendant Rubashkin's mere signature on a check which was not timely mailed or executed is not in and of itself sufficient evidence to carry the burden beyond a reasonable doubt Defendant
    - With respect to Counts late cut checks, no evidence was presented to establish Defendant Rubashkin had any responsibility as to when the checks were cut.

Moreover, there is no evidence Defendant Rubashkin knew particular cattle were purchased necessitating that checks be cut.

- **Insufficiency of the Money Laundering Allegations**
  - **Definition of Proceeds.** The jury's finding that the monies obtained from the bank fraud and false statements did not involve profits is a fatal flaw necessitating overtuning each of the money laundering convictions.
  - The Government did not prove the alleged laundering involved "proceeds" as required for a conviction. Thus, under the Santos definition of "proceeds' there has been a failure to prove an essential element of each count of conviction.
  - The *Santos* definition of "proceeds" was not, but should have been, the law applied to this case.
  - Defendant Rubashkin continues to maintain the term "proceeds" means the net profits of any property, or any interest in property, that someone acquires or retains as a result of the commission of specified unlawful activity. Profits consist of what remains after expenses are paid. Regular expenses that are essential to the operation of a business are not proceeds. *United States v. Lee*, 558 F.3d 638, 643 (7th Cir. 2009) ("regular expenses that are essential to the operation of a business are not proceeds").
  - There is undisputed testimony that the monies obtained from FBBC and diverted accounts receivable went into Agriprocessors' accounts at Citizens State Bank to pay the ordinary expenses of the business.
  - Even in the light most favorable most favorable to the Government, it has not established the requisite showing on an indispensible element of the offense.

- **Merger of the Money Laundering Counts.** Similarly, the convictions on the money laundering counts were – according to the Government's evidence and argument – part and parcel of the underlying frauds and false statements. *See e.g.* Government's Exhibit 206A and 206B. Here, therefore, the money laundering merges with the underlying offenses. *See United States v. Santos*, 128 S.Ct. 2026-27 (2008). Justice Scalia articulates the inextricable merger issues as follows:

  > For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Absent the merger doctrine, "[a]nyone who pays for the costs of a crime with its proceeds – for example, the felon who uses the stolen money to pay for the rented getaway care-would violate the money-laundering statute. And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares. Generally, speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else would merge with money laundering.
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  > *Id.*

Government witnesses Toby Bensasson, Mitch Meltzer, and Special Agent Randy Van Gent all testified: (1) Agriprocessors did not profit from the frauds or false statements; (2) Agriprocessors paid for the costs of its false statements and fraud by monies obtained from sales or monies advanced by First Bank Business Capital (FBBC); and (3) any receipts of the frauds or false statements were paid back to FBBC. The Court then is presented then with the very scenarios Justice Scalia articulated in *Santos*; the very scenarios which, according to *Santos*, must be eliminated as a matter of law – under the law of merger. This problem is compounded by the irony that the punishment for an underlying offense – here, obtaining monies which according to a civil contract there was insufficient collateral – "radically increase[s] the sentence for that crime." *Id.* at 2027. This irony is made all the more tragic in light of the fact that the

Government's zeal to charge additional counts of the specified unlawful activities was only made available because Agriprocessors was paying back the monies which the Government claimed FBBC was defrauded – with interest.

- **Multiplicity Challenge**
    - Defendant Rubashkin is not barred from raising multiplicity challenges simply because he did not raise the issue prior to trial. Waiver of this claim does not occur if "neither the nature of [defendant's] conduct nor the fact that counts [1-38] charge the same conduct was evident from the face of the indictment. *United States v. Coiro*, 922 F.2d 1008, 1013 (2nd Cir. 1008).
    - Notwithstanding the general rule set forth in Fed.R.Crim.12(b)(3), "good cause" exists to raise the issue at the close of the government's evidence pursuant to Rule 12(e).
    - The multiplicity challenge is not readily apparent or obvious based upon the face of the indictment. The double jeopardy consequences of the allegations were established though the presentation of evidence at trial and taken in the light most favorable to the Government. Defendant's had no notice from the Indictment (or Toby & Mitch's 302 interviews) that the testimony would be that the "numbers were always false" and that on no apparent day from approximately 2002 to October 22, 2008 could Agriprocessors accurately and truthfully state their eligible accounts receivable values. Defendant had no notice that each succeeding "collateral certificate" which accompanied the Request for Advance form was dependent and integrally related to the prior days calculations which were necessarily false. On the contrary, the face of the indictment makes clear that the

government intended to prove that, for example Counts 1-14, that fraudulent adjustments were accomplished for each borrowing request.

- Furthermore, the question of multiple convictions for the same unit of conduct is a mixed question of fact and law. Here, under the facts of this case, could only be resolved by: (a) analyzing the evidence presented at trial; (b) comparing the evidence to the Government's argument on the evidence, and (c) analyzing the juries verdicts and answers to interrogatories.
- Good cause exists to raise the multiplicity issues at the close of the government's case and renewal thereof at the close of evidence.
- With regard to Counts 1-14, which allege bank fraud, the bank fraud statute is intend to penalize a criminal scheme.
- In this case, the evidence, in the light most favorable to the Government, established one unitary scheme.
- The scheme involved one loan and it is the one loan that gave rise to the Requests for Advances & Monthly Reports and daily faxing of the requests and monthly overnight deliveries of the monthly reports.
- That scheme was to obtain monies from FBBC by:
    - Falsely stating Agriprocessors was in compliance with all laws when Agriprocessors and its employees were harboring or conspiring to harbor undocumented aliens
    - Creating false accounts receivable collateral supporting the loan
    - Diverting collections from accounts receivable collateral for the loan.

- In finding Defendant Rubashkin guilty of Counts 1-9, the jury found the scheme involved all three of the above ways.
- For Counts 10-14, however, the jury only found proof of the false accounts receivable and diversion.
- It was multiplicitous to charge each act of bank fraud scheme as a separate crime in the indictment since the unit of the crime is the scheme and not each act in furtherance thereof.
- Each daily submission was premised upon a prior false calculation of the borrowing base. Additionally, each submission on a daily basis was premised upon the false representation that Agriprocessors was not employing illegal workers. The daily borrowing requests – from one loan – integrally related. Each daily borrowing request could not have succeeded without the preceding day's request being false as well. Each day's numbers already false before Defendant Rubashkin allegedly changed the numbers. Thus, each daily request is not a separate execution of the scheme.
- In conclusion, the conviction on more than one count of bank fraud violates Defendant Rubashkin's right against double-jeopardy for multiple convictions for the same act.

  In *Lemons,* we stated that "the bank fraud statute imposes punishment only for each execution of the scheme." *Id.* at 318. Thus, unlike the mail or wire fraud statutes, the bank fraud statute does not allow punishment for each *act* in execution of a scheme or artifice to defraud. *Id.* Although we so interpreted the bank fraud statute, we expressly declined to hold that "the execution of a scheme cannot result in the imposition of multiple liability.... *Id.* 941 F.2d at 318, n. 6. Our note specifically referred to *United States v. Farmigoni,* 934 F.2d 63 (5th Cir.1991), *cert. denied,* 502 U.S. 1090, 112 S.Ct. 1160, 117 L.Ed.2d 407 (1992). *Farmigoni,* in contrast to this case and *Lemons,* involved a scheme to defraud two different banks, giving rise to prosecution in each of the banks' home states.

> Although both indictments in *Farmigoni* arose from the same scheme, "neither require [d] proof of intent to defraud the other unnamed financial institution." *Id.* at 66. The instant scheme involves intent to defraud only one bank, Guaranty, albeit by procuring two loans. The two loans, however, were integrally related; one could not have succeeded without the other. Indeed, the sale of the Phoenix property was conceived for the sole purpose of facilitating the Florida sale.
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> Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we stated in *Lemons,* the execution of each step or transaction in furtherance of the scheme. Because the Defendants' indictments sought to punish them for execution of the multiple steps involved in the scheme, the counts are multiplicitous. Therefore, we remand the case with the instruction to the Government to choose the count it wishes to leave in effect. The district court then should vacate the convictions on the remaining count and resentence Heath and Cheng. *See United States v. Saks,* 964 F.2d 1514, 1526 (5th Cir.1992); *United States v. Moody,* 923 F.2d 341, 347-48 (5th Cir.), *cert. denied,* 502 U.S. 821, 112 S.Ct. 80, 116 L.Ed.2d 54 (1991).
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> *United States v. Heath*, 970 F.2d 1397, 1402 (5th Cir. 1992).

- Similarly, Counts 15-38 suffer from the identical multiplicity defect based on the evidence presented at trial.
- Counts 15-21 allege two ways to accomplish the scheme: (1) false statement or statements about Agriprocessors, Inc. knowingly harboring and conspiring to harbor illegal aliens and (2) false statement or statements about whether accounts receivable reported in collateral certificates submitted by Agriprocessors, Inc. were genuine. In finding Defendant Rubashkin guilty of Counts 15-21, the jury found him guilty of both ways on each count. So, for each of these counts, the evidence establishes a continuing execution of a unitary scheme.
- Counts 15-28 involve the submission of "request for advance of funds" forms. Each of these Counts allege the same false statements. (Counts 21 and 22 add the Packers Act component). Because taking the evidence in the light most favorable to the Government, harboring was continuous, accounts receivable were

continually false, then each request for advance contains the same false statement. The manner in which the accounts receivable were inflated is not reflected on the request for advance form (e.g. The Right Place), merely the eligible amounts of accounts receivable is represented. These totals in the light most favorable to the Government were continuously false. *See* Trial Testimony of Toby Bensasson and Special Agent Randy Van Gent.

- The "math" for each of these Counts is the same false statement. The declaration of the "math" on the request for advance from is not a new false statement. It is the same false statement for double jeopardy. The revolving line of credit is only one loan.
- With respect to Counts 21 and 22, the additional way included false statements about Agriprocessors, Inc.'s compliance with the Packers and Stockyards Act. This fails to impact the analysis for double jeopardy purposes. The inclusion of the Packers Act way only relates to the timing of the Packers Act violations. It was always the Government's contention the scheme included the Packers Act violations.
- With respect to Counts 23-28, the identical unitary scheme was charged as Counts 15-20. Furthermore, for each of Counts 15-29, the false statements are the same and made in response to identical questions contained in the Request for Advances- "The representations and warranties of the Borrower in the Credit Agreement are true as if made on the date hereof." See e.g. Govt's Exhibit 2054 p. 5. *United States v. Stewart*, 420 F.3d 1007, 1013 (9th Cir. 2005)(under section 1001(a)(2),"where identical false statements, in either oral or written form, are

made in response to identical questions, the declarant may be convicted only once.")

- With respect to Count 29, the fraud scheme for this count is unitary with the other false statement counts because the allegation that Defendant Rubashkin made a false statement post-raid about Agriprocessors knowingly harboring illegal aliens is identical false statement he is accused of in the other counts. The fact that this statement was a verbal representation rather than a written statement in the request for the advance of funds does not remove the representation from the single unitary and identical falsity.
- With respect to Count 30-38, the underlying assertion is that the monthly reports contain false accounts receivable numbers. Any representations in the monthly receivable reports are identical to false statements made with respect to all the other false statement counts, except Count 29.
- With respect to Counts 30-38, which involve the monthly reports, even though these reports do provide FBBC with the detail of particular customer inflations, the representation as to the eligible total is still a single false statement. Simply put, it is a recurring false statement.
- To avoid multiple convictions for the same offense, judgment of acquittal must be granted as to all but one count of false statements to the bank.

- **Merger of the Wire Fraud with the Bank Fraud and Mail Fraud with False Statement Counts**
  - Counts in the With respect to Counts 39-52, those counts merge with the bank fraud counts. In order to execute the bank fraud, it was necessary to submit the

request for advance forms by wire. And each one of these counts involves at least two components of the identical falsities.

- The same defect exists for Counts 53-61, which charges mail fraud. They involve the identical monthly reports charged in Counts 30-38, which charge false statements. In order for the statements to be false and material to the bank, it was essential said statements be sent by mail. And, each mailing recites the identical form of false math. Last, each mailing transmits the identical falsity (i.e., inflated accounts receivable).
- Counts 53-61, therefore, must necessarily merge with Counts 30-38.

III. BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

Given the facts and circumstances in this case, even should the Court find that a Motion for Judgment of Acquittal be denied, "despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiency heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *United States v. Lincoln,* 630 F.2d 131, 1319 (8th Cir. 1980). Federal Criminal Rule 33 allows the Court to grant a new trial "in the interest of justice". FED.R.CRIM.P. 33.

Defendant Rubashkin seeks the alternative remedy of new trial on Counts 74-163 on the grounds that given the state of the evidence presented by the government, his convictions for bank fraud, false statements to a bank, wire fraud, mail fraud, money laundering, and criminal violations of the Packers and Stockyards Act preponderates sufficiency heavily against the verdict that a serious miscarriage of justice may have occurred.

Defendant Rubashkin seeks the alternative remedy of new trial on Counts 74-163 for the following reasons:

1) Exclusion of theory of defense evidence;

2) the Court's failure to give jury instructions on the legal import of no-match letters;

3) a prejudicial variance occurred with respect to the indictment and the proof because the indictment charges separate offenses of bank fraud, false statements to a bank, wire fraud, and mail fraud counts but the evidence showed merely one continuing offense under either statute;

4) the Court's failure to grant motions for mistrial.

Each of these reasons is discussed below.

1. Exclusion of Defense Witnesses.

Nota Feinstien and Stan Martin. The testimony of these witnesses was directly relevant to four things: (1) did Sholom Rubashkin give $4,500 to Brent Beebe to knowing assist in the harboring of illegal aliens; (2) his habit of giving monies to people at need even while at work at Agriprocessors; (3) that evidence bore on why Agriprocessors gave non-payroll payments to Defendant Rubashkin; and (4) why he would give money to Hosam Amara in June of 2008.

Testimony From Neil Westin. Evidence was received by the jury, through the testimony of Elizabeth Billmeyer, that Neil Westin was at the plant on the day of the raid that Neil Westin was at the plant on the day of the raid assisting her with review of employment applications. Earlier in Billmeyer's testimony she testified lawyers from Nyemaster were retained to deal with the no-match problem. What Westin witnessed with respect to the cards he touched and evaluated, are facts. These facts are not protected by the attorney-client privilege. These facts are not any different that had Westin witnessed his client get into a car accident on Agriprocessors business. Westin's acts on May 12, 2008 are not "communications". Moreover, things that he

saw and did were in plain view and in front third-parties, i.e. applicants for jobs and thus not confidential. What he did on that day is not privileged. *Upjohn v. United States*, 449 U.S. 383 (1981) ("The protection of the privilege extends only to the subject of *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing."); *Hanes v. Dormire*, 240 F.3d 694, 717 (8th Cir. 2001) ("We begin with the formulation of the essential elements of the privilege (1) where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; (8) unless the protection be waived."). Indeed, Westin did not have an attorney-client privilege to assert in this instance. The attorney-client privilege is no longer viable after a corporate entity ceases to function. *See, e.g. Attorney-Corporate Client Privilege* § 2.08 (proposing similar presumption); *Accord Lewis v. United States,* 2004 WL 3203121 (W.D.Tenn. Dec. 7, 2004) (attorney-client privilege does not extend beyond the death of a corporation); *In re JMP Newcor Int'l, Inc.,* 204 B.R. 963 (N.D.Ill.Bankr.1997) (attorney-client privilege of bankrupt entity ceased to exist upon confirmation of a reorganization plan).

It was Defendant's theory of defense that Defendant did not give $4,500 to Brent Beebe for the purposes of employees to obtain new, fake documents when Sholom Rubashkin knew a lawyer would examine those documents for their validity. Furthermore, Westin's testimony on what documents he thought were genuine is probative as to whether Defendant knew the documents were phony.

Testimony from Jim Smith and Abe Roth. Court erred in failing to permit each expert to testify as to matters within their professional knowledge that bore directly upon issues of

"materiality" of any falsehoods, the Brooklyn business model as it related to issues pertinent to the "1510" account and other accounting practices, and capabilities of management. Defendant was erroneously prevented from presenting circumstantial evidence of what the bank had to have known or otherwise turned a blind eye to.

2. Jury Instructions

Proceeds Definition. The Court erred in not giving the *Santos* definition of "proceeds". The proposed proceeds definition submitted by Defendant Rubashkin was directly from the *Lee* case. Moreover, Congresses subsequent amendment to the money laundering statute is proof *Santos* changed the definition of proceeds. Thus, the Court erred in failing to give the proper definition of net proceeds as required for a *Santos* era crime. The Court's more expansive proceeds instruction was an incorrect statement of the law.

FDIC Insurance. The fourth element of bank fraud should have been interpreted so as to require proof that Defendant Rubashkin knew FBBC or FB was FDIC insured. The statutory construction of the word "knowingly" analysis conduct by the Supreme Court in *Flores-Figueroa v. United States*, ___U.S. ___, 129 S.Ct. 1886 (2009) dictates the identical result in interpreting the bank fraud and false statement statutes.

Import of No-Match Letters. Calling Defendant Rubashkin's proposed no-match letter instruction theory of defense instructions is a misnomer. The "law of no-match" was part of this case and the Court refused to instruct the jury on the law. The instructions were intended to be accurate representations of legal issues that were applicable to this case and chronology of events in the California no-match litigation directly affected decisions at Agriprocessors. Elizabeth Billmeyer knew there was litigation which stayed her employer's ability to act upon the no-match letters and the "stay" figured into how Agriprocessors dealt with the no-match employees.

It was fundamental error to fail to tell the jury – at least at minimum – that mere receipt of the no-match letter was insufficient evidence Agriprocessors or Sholom Rubashkin knew the employees who were the subject of the no-match letters were undocumented workers.

Willful Failure to Comply with Order of Secretary of Agriculture. The Court's substitution of the word willful with "knowing" was erroneous and an incorrect interpretation of the statute. A knowing violation merely means Defendant Rubashkin knew about the order and that Agriprocessors was not complying with it on certain instances. Whereas "willfulness" denotes conscious intention in a specific instance to defy the order. A person does not willfully violate a no-contact order when the subject of the order accidentally runs into the person at the grocery store. The subject does however violate the order where the subject consciously follows the person to the grocery store or remains in that person's presence upon running into the person. The *Chandler* decision illustrates the Secretary of Agriculture has interpreted the statute to require "willful" violations. The statute requires more than strict liability.

3. Variance of Proof

A prejudicial variance occurred between Counts 1-61 and the Seventh Superseding Indictment. This variance affected the substantial rights of Defendant Rubashkin because it exposed him to double jeopardy as discussed previously for multiple convictions for the same act. See Generally, *United States v. Pizano,* 421 F.3d 707, 724 (8th Cir. 2005). The "numbers" were always false and part of a unitary act. The falsities of compliance with the law were unitary falsities merely repeated to execute the single scheme.

Second, it deprived him of his substantial right to a fair trial because he was forced to defend against duplicitous counts. Thus, he was forced to defend against dozens of unnecessary counts. Consequently, this prosecutorial decision created the illusion of increased criminal

culpability. As we have outlined previously, there was one loan, one scheme, continuous and unitary falsities in the "numbers" and "math" and written and oral statements, and one crime of bank fraud and one crime and false statement. Yet the indictment alleges separate and distinct executions of each the four groups making up Counts 1-61. If the wire fraud and mail fraud do not merge with the bank and false statement counts respectively, at minimum there should have been no more than one count of wire and mail fraud each. Taking the evidence in the light most favorable to the Government, the evidence established singular fraud and falsity. One **act** of execution cannot be charged as separate Counts and Defendant Rubashkin has been prejudiced by the vast variance in proof from Indictment to trial proof.

The indictment attempts to make these separate executions Each daily submission was premised upon a prior false calculation of the borrowing base. Additionally, each submission on a daily basis was premised upon the false representation that Agriprocessors was not employing illegal workers. The daily borrowing requests – from one loan – integrally related. Each daily borrowing request could not have succeeded without the preceding day's request being false as well. Each day's numbers already false before Defendant Rubashkin allegedly changed the numbers. Thus, each daily request is not a separate execution of the scheme.

4. Motion for Mistrial.

Defendant incorporates fully by reference the arguments made on succeeding occasions by Defense Counsel at trial.

IV. CONCLUSION

In sum, Defendant Rubashkin respectfully requests this Court grant his motion for judgment of acquittal as to 86 Counts of convictions, the multiplicity and merger remedies and

alternatively, grant him a new trial.

Respectfully submitted,

By /s/ *F. Montgomery Brown*
F. Montgomery Brown (AT001209)
1001 Office Park Road, Suite 108
West Des Moines, Iowa 50265
Telephone: (515) 225-0101
Fax: (515) 225-3737
E-mail: hskrfan@brownscott.com

By /s/ Adam D. Zenor
Guy R. Cook (AT0001623)
Adam D. Zenor (AT0009698)
2222 Grand Avenue, P.O. Box 10434
Des Moines, Iowa 50306
Telephone: (515) 245-4300
Fax: (515) 245-4452
E-Mail: gcook@grefesidney.com
E-Mail: azenor@grefesidney.com

ATTORNEYS FOR DEFENDANT
SHOLOM RUBASHKIN

PROOF OF SERVICE

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 **November 19, 2009**, by CM/ECF.

Charles J. Williams
cj.williams@usdoj.gov

Peter E. Deegan, Jr.
peter.deegan@usdoj.gov

James Clarity
jclarity@rconnect.com

Mark Brown
attybrown@aol.com

Rapheal Scheetz
Scheetzlaw@aol.com

By */s/ Adam D. Zenor*