UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 10-2487, 10-3580

UNITED STATES OF AMERICA

Plaintiff- Appellee,

v.

SHOLOM RUBASHKIN

Defendant- Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
(HON. LINDA R. READE)

APPELLANT'S ADDENDUM

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ATTORNEYS FOR APPELLANT

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United States District Court

NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
V.

SHOLOM RUBASHKIN

JUDGMENT IN A CRIMINAL CASE

Case Number: **CR 08-1324-2-LRR**

USM Number: **10755-029**

Guy R. Cook
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) **73 through 143, 145 through 152, 156 through 161, and 163 of the Seventh Superseding Indictment filed on 07/16/2009** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1344	Bank Fraud	09/04/2007	73
18 U.S.C. § 1344	Bank Fraud	10/01/2007	74
18 U.S.C. § 1344	Bank Fraud	11/01/2007	75
18 U.S.C. § 1344	Bank Fraud	12/03/2007	76
18 U.S.C. § 1344	Bank Fraud	01/02/2008	77
18 U.S.C. § 1344	Bank Fraud	02/01/2008	78
18 U.S.C. § 1344	Bank Fraud	03/03/2008	79

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The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) **144, 153-155, and 162 of the Seventh Superseding Indictment**

☐ Counts _____ is/are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

June 22, 2010
Date of Imposition of Judgment

Signature of Judicial Officer

Linda R. Reade
Chief U.S. District Court Judge
Name and Title of Judicial Officer

June 22, 2010
Date

DEFENDANT: **SHOLOM RUBASHKIN**
CASE NUMBER: **CR 08-1324-2-LRR**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1344	Bank Fraud	04/01/2008	80
18 U.S.C. § 1344	Bank Fraud	05/01/2008	81
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18 U.S.C. § 1344	Bank Fraud	07/01/2008	83
18 U.S.C. § 1344	Bank Fraud	08/01/2008	84
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18 U.S.C. § 1344	Bank Fraud	10/07/2008	86
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18 U.S.C. § 1014	False Statements and Reports to a Bank	11/01/2007	89
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18 U.S.C. § 1014	False Statements and Reports to a Bank	01/02/2008	91
18 U.S.C. § 1014	False Statements and Reports to a Bank	02/01/2008	92
18 U.S.C. § 1014	False Statements and Reports to a Bank	03/03/2008	93
18 U.S.C. § 1014	False Statements and Reports to a Bank	04/01/2008	94
18 U.S.C. § 1014	False Statements and Reports to a Bank	05/01/2008	95
18 U.S.C. § 1014	False Statements and Reports to a Bank	06/02/2008	96
18 U.S.C. § 1014	False Statements and Reports to a Bank	07/01/2008	97
18 U.S.C. § 1014	False Statements and Reports to a Bank	08/01/2008	98
18 U.S.C. § 1014	False Statements and Reports to a Bank	09/02/2008	99
18 U.S.C. § 1014	False Statements and Reports to a Bank	10/07/2008	100
18 U.S.C. § 1014	False Statements and Reports to a Bank	May 2008	101
18 U.S.C. § 1014	False Statements and Reports to a Bank	02/29/2008	102
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18 U.S.C. § 1014	False Statements and Reports to a Bank	07/02/2008	106
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18 U.S.C. § 1343	Wire Fraud	11/01/2007	113
18 U.S.C. § 1343	Wire Fraud	12/03/2007	114
18 U.S.C. § 1343	Wire Fraud	01/02/2008	115
18 U.S.C. § 1343	Wire Fraud	02/01/2008	116
18 U.S.C. § 1343	Wire Fraud	03/03/2008	117
18 U.S.C. § 1343	Wire Fraud	04/01/2008	118
18 U.S.C. § 1343	Wire Fraud	05/01/2008	119
18 U.S.C. § 1343	Wire Fraud	06/02/2008	120
18 U.S.C. § 1343	Wire Fraud	07/01/2008	121
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ADDITIONAL COUNTS OF CONVICTION

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DEFENDANT: **SHOLOM RUBASHKIN**
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ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
7 U.S.C. §§ 193 and 195	Willful Violation of Order of Secretary of Agriculture and Aiding and Abetting	04/09/2008	161
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DEFENDANT: **SHOLOM RUBASHKIN**
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **324 months. This term of imprisonment consists of a 324-month term imposed on each of Counts 73 through 110, a 240-month term imposed on each of Counts 111 through 143, and a 60-month term imposed on each of Counts 145 through 152, 156 through 161, and 163 of the Seventh Superseding Indictment, with all terms of imprisonment to run concurrently with each other.**

■ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a Bureau of Prisons facility that can best accommodate his religious preferences and is as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.
That the defendant participate in a Bureau of Prisons' Vocational Training Program specializing in an area

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **SHOLOM RUBASHKIN**
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **5 years. This term of supervised release consists of a 5-year term imposed on each of Counts 73 through 110 and a 3-year term imposed on each of Counts 111 through 143, 145 through 152, 156 through 161, and 163 of the Seventh Superseding Indictment, with these terms of supervised release to be served concurrently with each other.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ■ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- □ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- □ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **SHOLOM RUBASHKIN**
CASE NUMBER: **CR 08-1324-2-LRR**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1) **The defendant must pay any financial penalty that is imposed by this judgment.**

2) **The defendant must provide the U.S. Probation Office with access to any requested financial information.**

3) **The defendant must not incur new credit charges or open additional lines of credit without the approval of the U.S. Probation Office unless the defendant is in compliance with the installment payment schedule.**

4) **The defendant must not accept or maintain any employment in which the defendant would have access to money or assume a fiduciary position. Further, the defendant must allow the defendant's probation officer to notify the defendant's employer of the defendant's current criminal status.**

5) **The defendant must participate in a mental health evaluation and/or treatment program. The defendant must take all medications prescribed to the defendant by a licensed psychiatrist or physician.**

Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant _____ Date _____

U.S. Probation Officer/Designated Witness _____ Date _____

DEFENDANT: **SHOLOM RUBASHKIN**
CASE NUMBER: **CR 08-1324-2-LRR**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 8,600 (paid)**	**$ 0**	**$ 26,852,152.51**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

■ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
First Bank Business Capital, Incorporated 11901 Olive Boulevard Suite 160 St. Louis, MO 63141		**$18,525,362.88**	**2**
MB Financial Bank 6111 North River Road No. 800 Rosemont, IL 60018-5111		**$8,322,989.12**	**2**
Waverly Sales Company, Incorporated 2212 Fifth Avenue NW P.O. Box 355 Waverly, Iowa 50677-0355		**$3,800.51**	**1**
TOTALS	**$ _____**	**$ 26,852,152.51**	

☐ Restitution amount ordered pursuant to plea agreement $ _____

■ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **SHOLOM RUBASHKIN**
CASE NUMBER: **CR 08-1324-2-LRR**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ■ Lump sum payment of $ **26,852,152.51** due immediately, balance due

☐ not later than _____, or
■ in accordance with ☐ C, ☐ D, ☐ E, or ■ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ■ Special instructions regarding the payment of criminal monetary penalties:

While incarcerated, the defendant shall make monthly payments in accordance with the Bureau of Prison's Financial Responsibility Program. The amount of the monthly payments shall not exceed 50% of the funds available to the defendant through institution or non-institution (community) resources and shall be at least $25 per quarter. If the defendant still owes any portion of the financial obligation(s) at the time of release from imprisonment, the defendant shall pay it as a condition of supervision and the U.S. Probation Officer shall pursue collection of the amount due, and shall request the Court to establish a payment schedule if appropriate. The defendant shall also notify the United States Attorney within 30 days of any change of mailing or residence address that occurs while any portion of the financial obligation(s) remains unpaid.

Nothing about the monthly payment prevents the prosecutor from collecting under all other able means under the statute.

The $ 8,600 special assessment was paid on 06/17/2010, receipt # IAN110004465.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

■ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant's restitution obligation to FBBC and MBFB shall be joint and several with the restitution amounts of any other defendant ordered to make restitution in Northern District of Iowa Docket Nos. CR 09-1013-1-LRR and CR 09-1019-1-LRR.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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

UNITED STATES OF AMERICA, Plaintiff, vs. AGRIPROCESSORS, INC., *et al.*, Defendants.	No. 08-CR-1324-LRR **ORDER**

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I. INTRODUCTION

The matter before the court is Defendant Sholom Rubashkin's "Amended Motion to Sever Counts 1-74 and Forfeiture Allegation from Counts 75-142" ("Amended Third Motion to Sever") (docket no. 497).

II. RELEVANT PRIOR PROCEEDINGS

A. Sixth Superseding Indictment

On May 14, 2009, a grand jury returned the Sixth Superseding Indictment (docket no. 464) against Defendants Agriprocessors, Inc. ("Agriprocessors"), Sholom Rubashkin, Brent Beebe, Hosam Amara and Zeev Levi. The Sixth Superseding Indictment contains 142 counts and a forfeiture allegation.

Count 1 charges all Defendants with Conspiracy to Harbor Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). The conduct alleged in Count 1 "[b]eg[an] on an unknown date and continu[ed] to at least May 2008." Sixth Superseding Indictment (docket no. 464-1), at 9.

Counts 2 through 34 charge Defendants Agriprocessors and Rubashkin with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(ii), 1324(a)(1)(B)(i).[1] The 33 undocumented aliens allegedly harbored are: Sarahi Acevedo-Murillo (Count 2); Luis Miguel Becera-Guajardo (Count 3); Alejandro Bustamante-Ramirez (Count 4); Fidelio Calicio-Sajche (Count 5); Eliazar Cana-Melendres (Count 6); Salvador Caquach-Hernandez (Count 7); Jose Alfredo Casteneda-Guillen (Count 8); Noe Castillo-Ordonez (Count 9); Miguel Gabriel Chavez-Figueroa (Count 10); Elvira Esparza-Ramos (Count 11); Ciro Garcia-Hernandez (Count 12); Inocencio Hernandez-Sifuentes (Count 13); Carlos Ixen-Choc (Count 14); Edwin Samuel Junech-Pastor (Count 15); Gilmar Alexander Lopez-Garcia (Count 16); Joel Lopez-Perez (Count 17); Elder Robinson Lopez-Lux (Count 18); Alfredo Lopez-Martinez (Count 19); Osbaldo Lopez-Becerra (Count 20); Cruz-Adelso Lopez-Marroquin (Count 21); Vincente Machic-Tasej (Count 22); Uriel Migdael Melendrez-Guzman (Count 23); Victor Moncada-Nava (Count 24); Norberto Nava-Davila (Count 25); Raul Nunez-Moncada (Count 26); Jonas Ordonez-Alquijay (Count 27); Rony Otoniel Ordonez-Capir (Count 28); Wilfredo Rodriguez-Meza (Count 29); Daniel Sagche-Chajon (Count 30); Mariano Tajtaj-Lopez (Count 31); Leandro Tajtaj-Lopez (Count 32); Antolin Trinidad-Candido (Count 33); and Svitlana Yudina (Count 34). The conduct alleged in Counts 2 through 34 "[b]eg[an] on an unknown date and continu[ed] to at least May 2008." Sixth Superseding Indictment

[1] The Sixth Superseding Indictment repeatedly refers to this subparagraph erroneously as "1324(a)(1)(B)(I)."

(docket no. 464-1), at 12.

Counts 35 though 51 charge Defendants Agriprocessors, Rubashkin and Amara with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i). The 17 undocumented aliens allegedly harbored are: Enmer Orlando Azurdia-Jerez (Count 35); Elman Freddy Gomez-Granados (Count 36); Ignacio Guerrero-Espinoza (Count 37); Natael Hidalgo-Perez (Count 38); Yadira Hidalgo-Perez (Count 39); Rudy Israel Junech-Santos (Count 40); Walter Anibal Lopez-Lopez (Count 41); Wilfredo Lopez-Lopez (Count 42); Byron Humberto Lopez-Lux (Count 43); Juan Lopez-Taj (Count 44); Julio Lux-Chamoro (Count 45); Alfredo Marroquin-Argueta (Count 46); Luis Enrique Moncada-Quiroz (Count 47); Ruben Nunez-Munoz (Count 48); Marvin Perez-Gomez (Count 49); Luis Enrique Sagche-Fuentes (Count 50); and Rosita Trejo-Pinales (Count 51). The conduct alleged in Counts 35 through 51 "[b]eg[an] on an unknown date and continu[ed] to at least May 2008." Sixth Superseding Indictment (docket no. 464-1), at 15.

Counts 52 through 58 charge Defendants Agriprocessors, Rubashkin, Amara and Levi with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i). The 7 undocumented aliens allegedly harbored are: Crispin Camarillo-Valencia (Count 52); Maria Patricia Hernandez-Loera (Count 53); Jesus Loera-Gallegos (Count 54); Leonides Ordonez-Lopez (Count 55); Bulmaro Paredes-Morado (Count 56); Silvia Ruiz-Choy (Count 57); and Antonio Vasquez-Saragosa (Count 58). The conduct alleged in Counts 52 through 58 "[b]eg[an] on an unknown date and continu[ed] to at least May 2008." Sixth Superseding Indictment (docket no. 464-1), at 16.

Counts 59 through 72 charge Defendants Agriprocessors, Rubashkin and Beebe with

Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i). The 14 undocumented aliens allegedly harbored are: Alejandro Bustamante-Ramirez (Count 59); Ana Patricia Calel-Lopez (Count 60); Ana Camarillo-Valencia (Count 61); Olena Chehovska (Count 62); Otto Ramiro Garcia-Barillas (Count 63); Ricardo Gomez-Lopez (Count 64); Fernando Gutierrez-Almaraz (Count 65); Monica Hernandez-Vidals (Count 66); Dibrey Lopez-Lopez (Count 67); Reynaldo Lopez-Nunez (Count 68); Josue Muj-Ixen (Count 69); Horacio Quiroz-Hernandez (Count 70); Noel Torres-Espinoza (Count 71); and Maria De La Cruz Valdez-Macias (Count 72). The conduct alleged in Counts 59 through 72 "[b]eg[an] on an unknown date and continu[ed] to at least May 2008." Sixth Superseding Indictment (docket no. 464-1), at 18.

Count 73 charges all Defendants with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. Count 73 alleges 34 overt acts. The conduct alleged in Count 73 occurred "[i]n about April and May 2008." Sixth Superseding Indictment (docket no. 464-1), at 19.

Count 74 charges all Defendants with Aiding and Abetting Document Fraud, in violation of in violation of 18 U.S.C. §§ 1546(a) and 2. The conduct alleged in Count 74 occurred "[i]n about April and May 2008." Sixth Superseding Indictment (docket no. 464-1), at 25.

Counts 75 through 88 charge Defendants Agriprocessors and Rubashkin with Bank Fraud, in violation of 18 U.S.C. § 1344.[2] There are allegedly three components to the "scheme to defraud": (1) "[c]oncealment and [f]alse [s]tatements [r]egarding [c]ompliance with the [l]aw"; (2) "[f]raudulent [d]iversion of [b]ank [c]ollateral ([a]ccounts [r]eceivable) and [c]oncealment"; and (3) "[f]raudulent [c]reation of [f]alse [a]ccounts [r]eceivable and

[2] Counts 75 through 88 erroneously purport to reallege "the Overt Acts alleged in Count 3." Sixth Superseding Indictment (docket no. 464-1), at 26.

[c]oncealment." Sixth Superseding Indictment (docket no. 464-1), at 26, 28 & 31. The conduct alleged in Counts 75 through 88 "[b]eg[an] on a date unknown to the grand jury and continu[ed] through about October 2008." *Id.* at 26. More specifically, the grand jury alleges that a bank advanced money to Agriprocessors on the following 14 dates and in the following 14 amounts as a result of fraud: $2,900,000 on September 4, 2007 (Count 75); $525,000 on October 1, 2007 (Count 76); $825,000 on November 1, 2007 (Count 77); $1,210,000 on December 3, 2007 (Count 78); $1,550,000 on January 2, 2008 (Count 79); $640,000 on February 1, 2008 (Count 80); $1,064,000 on March 3, 2008 (Count 81); $1,579,000 on April 1, 2008 (Count 82); $1,343,000 on May 1, 2008 (Count 83); $1,035,000 on June 2, 2008 (Count 84); $1,125,000 on July 1, 2008 (Count 85); $475,000 on August 1, 2008 (Count 86); $615,000 on September 2, 2008 (Count 87); and $1,100,000 on October 7, 2008 (Count 88).

Counts 89 through 102 charge Defendants Agriprocessors and Rubashkin with False Statements and Reports to a Bank, in violation of 18 U.S.C. § 1014.[3] The conduct alleged in Counts 89 through 102 occurred "[o]n or about" the following dates: September 4, 2007 (Count 89); October 1, 2007 (Count 90); November 1, 2007 (Count 91); December 3, 2007 (Count 92); January 2, 2008 (Count 93); February 1, 2008 (Count 94); March 3, 2008 (Count 95); April 1, 2008 (Count 96); May 1, 2008 (Count 97); June 2, 2008 (Count 98); July 1, 2008 (Count 99); August 1, 2008 (Count 100); September 2, 2008 (Count 101); and October 7, 2008 (Count 102). Sixth Superseding Indictment (docket no. 464-1), at 34.

Count 103 charges Defendants Agriprocessors and Rubashkin with False Statements

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[3] Counts 89 through 102 erroneously purport to reallege "the Overt Acts alleged in Count 3, and the Scheme to Defraud allegations from Counts 12 through 25." Sixth Superseding Indictment (docket no. 464-1), at 34.

and Reports to a Bank, in violation of 18 U.S.C. § 1014.[4] The conduct alleged in Count 103 occurred "[i]n about the middle of May 2008, and shortly after the May 12, 2008, ICE worksite enforcement action." Sixth Superseding Indictment (docket no. 464-1), at 36.

Counts 104 through 112 charge Defendants Agriprocessors and Rubashkin with False Statements and Reports to a Bank, in violation of 18 U.S.C. § 1014.[5] The conduct allged in Counts 104 through 112 occurred on 9 separate dates "by the customers, for the time periods, and in the amounts identified" in a nine-page table set forth within the Sixth Superseding Indictment. *See* Sixth Superseding Indictment (docket no. 464-1), at 37 (prefatory remarks), 38-46 (table). Specifically:

Count 104 charges that, on or about February 29, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of January 25, 2008, C.G.M. owed Agriprocessors $1,217,961.02; T.C.H. owed Agriprocessors $617,301.95; V.H. owed Agriprocessors $704,042.14; C.M.P. owed Agriprocessors $944,230.68; T.C.P. owed Agriprocessors $873,458.21; D.W. owed Agriprocessors $1,142,424.00; and G.W.K. owed Agriprocessors $475,543.90.

Count 105 charges that, on or about March 27, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of February 29, 2008, C.G.M. owed Agriprocessors $1,140,107.48; T.C.H. owed Agriprocessors $941,763.00; V.H. owed Agriprocessors $951,679.19; C.M.P. owed Agriprocessors $1,005,032.64; T.C.P. owed Agriprocessors $1,039,590.07; D.W. owed Agriprocessors $1,076,736.42; and G.W.K. owed Agriprocessors $428,263.74.

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[4] Count 103 erroneously purports to reallege "the Overt Acts alleged in Count 3, and the Scheme to Defraud allegations from Counts 12 through 25." Sixth Superseding Indictment (docket no. 464-1), at 36.

[5] Counts 104 through 112 erroneously purport to reallege "the Overt Acts alleged in Count 3, and the Scheme to Defraud allegations from Counts 12 through 25." Sixth Superseding Indictment (docket no. 464-1), at 37.

Count 106 charges that, on or about April 18, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of March 28, 2008, C.G.M. owed Agriprocessors $1,145,873.54; T.C.H. owed Agriprocessors $521,013.00; V.H. owed Agriprocessors $627,244.00; C.M.P. owed Agriprocessors $1,009,409.75; T.C.P. owed Agriprocessors $1,084,594.56; D.W. owed Agriprocessors $1,011.268.88; and G.W.K. owed Agriprocessors $427,219.45.

Count 107 charges that, on or about May 20, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of April 25, 2008, C.G.M. owed Agriprocessors $1,301,853.77; T.C.H. owed Agriprocessors $983,317.75; V.H. owed Agriprocessors $854,911.31; C.M.P. owed Agriprocessors $707,597.62; T.C.P. owed Agriprocessors $876,468.13; D.W. owed Agriprocessors $1,182,945.24; and G.W.K. owed Agriprocessors $200,313.84.

Count 108 charges that, on or about July 2, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of May 30, 2008, C.G.M. owed Agriprocessors $1,308,367.19; T.C.H. owed Agriprocessors $1,172,194.63; V.H. owed Agriprocessors $924,838.05; C.M.P. owed Agriprocessors $282,361.24; T.C.P. owed Agriprocessors $1,085,911.24; D.W. owed Agriprocessors $1,242,818.93; and G.W.K. owed Agriprocessors $180,158.93.

Count 109 charges that, "on or about July or August, 2008," Sixth Superseding Indictment (docket no. 464-1), at 43, Defendants Agriprocessors and Rubashkin falsely overstated that, as of June 27, 2008, C.G.M. owed Agriprocessors $1,380,244.72; T.C.H. owed Agriprocessors $1,076,961.12; V.H. owed Agriprocessors $799,429.18; C.M.P. owed Agriprocessors $646,608.20; T.C.P. owed Agriprocessors $1,765,746.75; D.W. owed Agriprocessors $1,171,658.12; and G.W.K. owed Agriprocessors $420,334.92.

Count 110 charges that, on or about September 3, 2008, Defendants Agriprocessors and Rubashkin falsely overstated that, as of July 25, 2008, C.G.M. owed Agriprocessors

$1,162,035.79; T.C.H. owed Agriprocessors $787,025.60; V.H. owed Agriprocessors $893,308.26; C.M.P. owed Agriprocessors $1,854,451.91; T.C.P. owed Agriprocessors $2,072,638.81; D.W. owed Agriprocessors $943,772.77; and G.W.K. owed Agriprocessors $831,111.23.

Count 111 charges that, "on or about September or October, 2008," Sixth Superseding Indictment (docket no. 464-1), at 45, Defendants Agriprocessors and Rubashkin falsely overstated that, as of August 29, 2008, C.G.M. owed Agriprocessors $1,280,596.73; T.C.H. owed Agriprocessors $1,113,035.19; V.H. owed Agriprocessors $1,176,335.70; C.M.P. owed Agriprocessors $2,346,163.56; T.C.P. owed Agriprocessors $1,916,348.03; D.W. owed Agriprocessors $836,341.60; and G.W.K. owed Agriprocessors $1,029,422.24.

Count 112 charges that, "on or about October 2008," Sixth Superseding Indictment (docket no. 464-1), at 46, Defendants Agriprocessors and Rubashkin falsely overstated that, as of September 26, 2008, C.G.M. owed Agriprocessors $1,502,701.61; T.C.H. owed Agriprocessors $993,038.79; V.H. owed Agriprocessors $912,136.38; C.M.P. owed Agriprocessors $1,474,421.37; T.C.P. owed Agriprocessors $1,467,883.58; D.W. owed Agriprocessors $1,394,769.50; and G.W.K. owed Agriprocessors $752,464.06.

Counts 113 through 122 charge Defendants Agriprocessors and Rubashkin with Money Laundering and Aiding and Abetting Money Laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) and 2.[6]

> Beginning on a date unknown to the grand jury, and continuing through about October 2008 . . . [D]efendants [Agriprocessors] and [Rubashkin] did knowingly conduct and aid and abet others in conducting financial transactions which involved the proceeds of a specified unlawful activity (bank

[6] Counts 113 through 122 erroneously purport to reallege "the Overt Acts alleged in Count 3, and the Scheme to Defraud allegations from Counts 12 through 25." Sixth Superseding Indictment (docket no. 464-1), at 46.

> fraud in violation of Title 18, United States Code, Section 1344; making false statements and reports to a bank in violation of Title 18, United States Code, Section 1014; and harboring undocumented aliens and conspiracy to harbor in violation of Title 8, United States Code, Section 1324(a) *et seq*.) with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity.

Sixth Superseding Indictment (docket no. 464-1), at 47. More specifically:

Count 113 charges that, on August 9, 2007, Defendants Agriprocessors and Rubashkin caused check numbers 2371 and 2372 from "Kosher Community," in the amounts of $42,240.86 and $48,685.03, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 114 charges that, on September 19, 2007, Defendants Agriprocessors and Rubashkin caused check numbers 3274 and 3299 from "Torah Education," in the amounts of $38,464.92 and $18,768.46, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 115 charges that, on October 17, 2007, Defendants Agriprocessors and Rubashkin caused check numbers 2506 and 2507 from "Kosher Community," in the amounts of $41,066.57 and $42,525.56, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 116 charges that, on November 14, 2007, Defendants Agriprocessors and Rubashkin caused check numbers 3344 and 3349 from "Torah Education," in the amounts of $32,300.86 and $35,362.44, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 117 charges that, on December 11, 2007, Defendants Agriprocessors and

Rubashkin caused check numbers 2744, 2745 and 2746 from "Kosher Community," in the amounts of $42,899.56, $43,888.99 and $38,848.92, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 118 charges that, on January 15, 2008, Defendants Agriprocessors and Rubashkin caused check numbers 3378 and 3379 from "Torah Education," in the amounts of $34,897.55 and $32,586.58, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 119 charges that, on February 26, 2008, Defendants Agriprocessors and Rubashkin caused check numbers 3069, 3070, 3071 and 3072 from "Kosher Community," in the amounts of $78,890.14, $88,593.45, $79,222.48 and $88,259.26, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 120 charges that, on March 18, 2008, Defendants Agriprocessors and Rubashkin caused check numbers 3365 and 3366 from "Torah Education," in the amounts of $48,660.88 and $38,982.46, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 121 charges that, on April 15, 2008, Defendants Agriprocessors and Rubashkin caused check numbers 3632, 3668 and 3692 from "Torah Education," in the amounts of $78,888.56, $78,458.55 and $98,458.48, respectively, to be deposited at the Decorah Bank and Trust Company.

Count 122 charges that, on May 13, 2008, Defendants Agriprocessors and Rubashkin caused check numbers 3435, 3436, 3437 and 3438 from "Torah Education," in the amounts of $88,958.26, $59,158.25, $97,859.28 and $60,259.36, respectively, to be deposited at the Decorah Bank and Trust Company.

Counts 123 through 142 charge Defendants Rubashkin and Agriprocessors with Willful Violations of an Order of the Secretary of Agriculture and Aiding and Abetting Willful Violations of an Order of the Secretary of Agriculture, in violation of 7 U.S.C.

§ 195 and 18 U.S.C. § 2. The grand jury alleges that, on March 7, 2002, the United States Secretary of Agriculture ordered Defendant Agriprocessors "and its agents and employees to cease and desist from" failing to pay in a timely manner for livestock purchases and "failing to deposit checks issued in payment for livestock in the mail before the close of the next business day after the purchase of such livestock as required by law." Sixth Superseding Indictment (docket no. 464-1), at 49. The grand jury alleges Defendants Agriprocessors and Rubashkin willfully violated the Secretary's order and aided and abetted violations of the order as follows:

Count 123 charges that Defendants Agriprocessors and Rubashkin deposited a check in the amount of $38,207.54 in the mail to "Waukon Iowa Cattle Supplier" on February 8, 2008 when livestock was purchased on February 4, 2008, and payment was due on February 5, 2008.

Count 124 charges that Defendants Agriprocessors and Rubashkin dated a check "February 15, 2008," in the amount of $96,497.88 to "Chicago Cattle Supplier" when livestock was purchased on February 11, 2008, and payment was due on February 12, 2008.

Count 125 charges that Defendants Agriprocessors and Rubashkin dated a check "February 25, 2008," in the amount of $47,219.00 to "Marshalltown Iowa Cattle Supplier" when livestock was purchased on February 13, 2008, and payment was due on February 14, 2008.

Count 126 charges that Defendants Agriprocessors and Rubashkin dated a check "February 25, 2008," in the amount of $91,698.55 to "Minnesota Cattle Supplier" when livestock was purchased on February 14, 2008, and payment was due on February 15, 2008.

Count 127 charges that Defendants Agriprocessors and Rubashkin deposited a check in the amount of $99,435.10 in the mail to "Waukon Iowa Cattle Supplier" on February

19, 2008 when livestock was purchased on February 14, 2008, and payment was due on February 15, 2008.

Count 128 charges that Defendants Agriprocessors and Rubashkin dated a check "February 19, 2008," in the amount of $90,076.74 to "Walnut Illinois Cattle Supplier" when livestock was purchased on February 14, 2008, and payment was due on February 15, 2008.

Count 129 charges that Defendants Agriprocessors and Rubashkin deposited a check in the amount of $71,465,27 in the mail to "Waukon Iowa Cattle Supplier" on February 26, 2008 when livestock was purchased on February 21, 2008, and payment was due on February 22, 2008.

Count 130 charges Defendants Agriprocessors and Rubashkin deposited a check in the amount of $76,937.72 in the mail to "Waukon Iowa Cattle Supplier" on March 4, 2008 when livestock was purchased on February 27, 2008, and payment was due on February 28, 2008.

Count 131 charges Defendants Agriprocessors and Rubashkin deposited a check in the amount of $88,698.48 in the mail to "Waukon Iowa Cattle Supplier" on March 4, 2008 when livestock was purchased on February 28, 2008, and payment was due on February 29, 2008.

Count 132 charges Defendants Agriprocessors and Rubashkin dated a check "March 7, 2008," in the amount of $47,938.32 to "Aplington Iowa Cattle Supplier" when livestock was purchased on March 4, 2008, and payment was due on March 5, 2008.

Count 133 charges Defendants Agriprocessors and Rubashkin dated a check "March 7, 2008," in the amount of $49,627.02 to "Ledyard Iowa Cattle Supplier" when livestock was purchased on March 4, 2008, and payment was due on March 5, 2008.

Count 134 charges Defendants Agriprocessors and Rubashkin dated a check "March 7, 2008," in the amount of $14,113.50 to "Ames Iowa Cattle Supplier" when livestock

was purchased on March 4, 2008, and payment was due on March 5, 2008.

Count 135 charges Defendants Agriprocessors and Rubashkin dated a check "March 7, 2008," in the amount of $189,987.73 to "Waverly Iowa Cattle Supplier" when livestock was purchased on March 4, 2008, and payment was due on March 5, 2008.

Count 136 charges Defendants Agriprocessors and Rubashkin hand delivered a check in the amount of $93,680.45 on March 25, 2008 to "Waukon Iowa Cattle Supplier" when livestock was purchased on March 20, 2008, and payment was due on March 21, 2008.

Count 137 charges Defendants Agriprocessors and Rubashkin hand delivered a check in the amount of $149,214.77 on April 2, 2008 to "Waukon Iowa Cattle Supplier" when livestock was purchased on March 27, 2008, and payment was due on March 28, 2008.

Count 138 charges Defendants Agriprocessors and Rubashkin dated a check "April 2, 2008," in the amount of $7,371.60 to "Aplington Iowa Cattle Supplier" when livestock was purchased on March 28, 2008, and payment was due on March 29, 2008.

Count 139 charges Defendants Agriprocessors and Rubashkin hand delivered a check in the amount of $43,871.28 on April 5, 2008 to "Waukon Iowa Cattle Supplier" when livestock was purchased on March 31, 2008, and payment was due on April 1, 2008.

Count 140 charges Defendants Agriprocessors and Rubashkin hand delivered a check in the amount of $77,170.06 on April 9, 2008 to "Waukon Iowa Cattle Supplier" when livestock was purchased on April 3, 2008, and payment was due on April 4, 2008.

Count 141 charges Defendants Agriprocessors and Rubashkin hand delivered a check in the amount of $112,657.10 on April 11, 2008 to "Waverly Iowa Cattle Supplier" when livestock was purchased on April 8, 2008, and payment was due on April 9, 2008.

Count 142 charges Defendants Agriprocessors and Rubashkin express mailed a

check via UPS in the amount of $48,727.51 on April 21, 2008 to "Waverly Iowa Cattle Supplier" when livestock was purchased on April 15, 2008, and payment was due on April 16, 2008.

Finally, the Sixth Superseding Indictment contains a forfeiture allegation. Pursuant to 8 U.S.C. § 1324(b), 18 U.S.C. § 982(a)(6)(A) and 28 U.S.C. § 2461(c), the government seeks from all Defendants "the proceeds and gross proceeds of [the Defendants' alleged criminal law violations as set forth in Counts 1 through 72], any property traceable to such proceeds, and any property, real or personal, that was used to facilitate, or was intended to facilitate, the commission of the offenses of which [D]efendants are convicted . . . ." Sixth Superseding Indictment (docket no. 464-1), at 51. In particular, the government seeks forfeiture of Defendant Agriprocessors' corporate name, trademarks and corporate stock. Defendant Agriprocessors' trademarks include "Iowa Best Beef," "Shor Habor," "Aaron's Best" and "Rubashkin." *Id.* at 52.

B. Amended Third Motion

On January 30, 2009, Defendant Rubashkin filed a Motion to Sever Counts ("First Motion to Sever") (docket no. 213). Defendant sought to sever the then-pending Fourth Superseding Indictment (docket no. 177) into four parts. On February 4 and 17, 2009, respectively, Defendants Beebe and Agriprocessors filed Joinders (docket no. 277 & 333) to the First Motion to Sever. On February 24, 2009, the government filed a Resistance (docket no. 370) to the First Motion to Sever. On March 20, 2009, Defendant Beebe formally withdrew his Joinder. *See* Written Withdrawal of Joinder (docket no. 400), at 1.

On February 23, 2009, the court held a hearing on the First Motion to Sever. Assistant United States Attorneys Sean R. Berry and C.J. Williams represented the government. Attorneys Guy R. Cook and F. Montgomery Brown represented Defendant Rubashkin. Attorney James A. Clarity, III represented Defendant Agriprocessors.

Attorney Raphael M. Scheetz represented Defendant Beebe. Defendants Rubashkin and Beebe were personally present.

On March 31, 2009, before the court ruled on the First Motion to Sever, the grand jury returned the Fifth Superseding Indictment (docket no. 413). Because the Fifth Superseding Indictment was arguably substantially different than the Fourth Superseding Indictment, on April 1, 2009, the court denied the First Motion to Sever with leave to refile on or before April 10, 2009. Order (docket no. 419), at 1.

On April 10, 2009, Defendant Rubashkin filed a Motion to Sever ("Second Motion to Sever") (docket no. 433). Defendant sought to sever the Fifth Superseding Indictment into two parts. On April 20, 2009, the government filed a Resistance (docket no. 438). On April 27, 2009, Defendant Rubashkin filed a Reply (docket no. 448).

On May 14, 2009, before the court ruled on the Second Motion to Sever, the grand jury returned the Sixth Superseding Indictment (docket no. 464). On June 1, 2009, Defendant Rubashkin filed a Motion to Sever (docket no. 494) ("Third Motion to Sever"), in which he "incorporate[ed] the law and argument from his [Second Motion to Sever] and Reply to the [g]overnment's Resistance to the same." Third Motion to Sever (docket no. 494), at 4. On June 2, 2009, Defendant Rubashkin filed the Amended Third Motion to Sever. On June 3, 2009, Defendant Agriprocessors filed a Joinder (docket no. 498) to the Amended Third Motion to Sever.

On June 4, 2009, the court held a hearing on the Amended Third Motion to Sever. Assistant United States Attorneys C.J. Williams and Peter E. Deegan represented the government. Attorneys F. Montgomery Brown and Adam Zenor represented Defendant Rubashkin, who was personally present. Attorney Meghan Sloma appeared telephonically on behalf of Defendant Agriprocessors. Attorney Raphael Scheetz represented Defendant Beebe, who was personally present.

At the hearing on the Amended Third Motion to Sever, Attorney Scheetz indicated

that Defendant Beebe took no position on the Amended Third Motion to Sever. Attorney Sloma indicated that Defendant Agriprocessors joined the Amended Third Motion to Sever. The government indicated it wished to stand on its Resistance (docket no. 438) to the Second Motion to Sever because, in its view, the Fifth Superseding Indictment and Sixth Superseding Indictment were materially similar. On June 11, 2009, Defendant Agriprocessors filed an Amended Joinder (docket no. 508) to the Amended Third Motion to Sever.

The court finds that the Amended Third Motion to Sever is fully submitted and ready for decision.

III. THE MERITS

A. Outline of the Parties' Arguments

Defendants Rubashkin and Agriprocessors seek to sever the Sixth Superseding Indictment into two parts, pursuant to Federal Rule of Criminal Procedure 8 and 14(a).[7] Specifically, Defendants Rubashkin and Agriprocessors ask the court to order separate trials (1) on Counts 1 through 74 ("the Immigration Counts") and (2) on Counts 75 through 142 ("the Financial Counts").

As a threshold matter, Defendants Rubashkin and Agriprocessors argue that the 142 counts are improperly joined under Federal Rule of Criminal Procedure 8. In the alternative, Defendants Rubashkin and Agriprocessors argue that joinder of all 142 counts into a single, unified proceeding would be unduly prejudicial under Federal Rule of Criminal Procedure 14. The government resists the Motion in all respects.

B. Analysis

The court assumes without deciding that Counts 1 through 142 are properly joined under Federal Rule of Criminal Procedure 8. Nonetheless the court finds that joinder of

[7] Defendants Rubashkin and Agriprocessors also argue severance is required under the Due Process Clause of the Fifth Amendment. The court need not reach this argument.

all 142 counts in a single, unified proceeding would "appear[] to prejudice" Defendants Rubashkin and Agriprocessors. Fed. R. Crim. P. 14(a). The court shall order separate trials on the Immigration Counts and the Financial Counts, pursuant to Federal Rule of Criminal Procedure 14(a). The court holds severance is necessary to preserve the rights of Defendants Rubashkin and Agriprocessors to a fair trial.

By its express terms, Federal Rule of Criminal Procedure 14 grants the court the discretion to "order separate trials of counts" when "the joinder of offenses . . . in an indictment . . . appears to prejudice a defendant . . . ." Fed. R. Crim. P. 14(a); *see, e.g.*, *United States v. Al-Esawi*, 560 F.3d 888, 891 (8th Cir. 2009) ("Rule 14 . . . provides that the district court may order separate trials of counts or grant a severance if it appears that a defendant . . . is prejudiced by a joinder of offenses."). A district court possesses broad discretion as to whether to grant or deny a motion to sever an indictment. *See, e.g., Al-Esawi*, 560 F.3d at 891 (reviewing for an abuse of discretion).

Rule 14 stands as a bulwark against artfully pled indictments that manage to pass muster under the looser requirements of Rule 8. *See United States v. Randazzo*, 80 F.3d 623, 627 (1st Cir. 2006) ("[Rule 14] provides a separate layer of protection where it is most needed."). It also serves as an important check against nearly unfettered prosecutorial discretion in the charging of a criminal case. *See id.* Rule 14 recognizes that, while joinder is "designed to promote economy and efficiency and to avoid a multiplicity of trials," joinder is only permissible if "these objectives can be achieved without substantial prejudice to the right of . . . defendants to a fair trial." *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (citation omitted); *see United States v. Starr*, 584 F.2d 235, 238 (8th Cir. 1978) ("[A] joint trial may not be had at the expense of a defendant's right to a fundamentally fair trial.").

Nonetheless, district courts rarely grant relief under Rule 14. There is a strong presumption in the law in favor of joinder and against severance. *See, e.g., United States*

v. Ruiz, 412 F.3d 871, 886 (8th Cir. 2005) ("The presumption against severing properly joined cases is strong . . . ."); *United States v. Darden*, 70 F.3d 1507, 1526 (8th Cir. 1995) (stating that Rules 8 and 14 should be construed in favor of joinder). It is settled that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Motions to sever are rarely successful in the Northern District of Iowa. *See, e.g., United States v. Lucas*, No. 06-CR-1047-LRR, 2007 WL 172009 (N.D. Iowa Jan. 17, 2007) (Reade, J.), *aff'd*, 521 F.3d 861 (8th Cir. 2008); *United States v. Cooper*, No. 06-CR-35-LRR, 2006 WL 2095217 (N.D. Iowa Jul. 26, 2006) (Reade, J.); *United States v. Hewett*, No. 99-CR-3012-MWB, 2000 WL 34031794 (N.D. Iowa Apr. 24, 2000) (Bennett, C.J.). The undersigned has great faith in the jury system and, in particular, the ability of Iowa jurors to do justice even when the indictment and jury instructions are long and complicated. *Cf. Hewett*, 2000 WL 34031794, at *12 ("It must be recalled that 'there is a presumption that the jury will be able to sort out the evidence applicable to each defendant and render its verdict accordingly.'" (quoting *United States v. Moreno*, 933 F.2d 362, 371) (6th Cir. 1988)).

In *this* particular case, however, the court finds that joinder of all 142 counts in a single proceeding would prevent a jury from making a reliable judgment about the guilt or innocence of Defendants Rubashkin and Agriprocessors. The court finds that this is one of those rare cases in which the presumption in favor of a single, unified proceeding is overcome. Put simply, it would be a monumental task for a single jury to keep all 5 defendants, 142 counts, 8 distinct crimes in this case straight.[8] The risk of prejudice to

[8] Indeed, it took the undersigned approximately twelve pages and no small amount of time to simply *summarize* the Sixth Superseding Indictment in Part II of the instant Order.

Defendants Rubashkin and Agriprocessors is simply too high.

In the court's view, severance is necessary because a single jury would be "unable to compartmentalize the evidence" as to all 5 defendants, 142 counts and 8 distinct crimes. *Cf. United States v. Agofsky*, 20 F.3d 866, 871 (8th Cir. 1994) (holding district court did not abuse its discretion in declining to grant motion to sever, where "[t]he trial involved only two defendants charged with three counts each"). The Sixth Superseding Indictment encompasses a wide array of distinct alleged conduct by different actors (including an untold number of coconspirators). The alleged conduct involves immigration-related offenses, financial crimes and violations of orders of the United States Secretary of Agriculture. The alleged financial crimes are obviously complex. However, even the immigration-related offenses, which in some other cases may be somewhat routine, are complicated in this case. For example, Count 73 alone alleges 34 overt acts. Moreover, the government alleges markedly different levels of culpability amongst the five defendants. One of the defendants is a corporation, an unusual occurrence and a complicating factor.

The present case is the archetypal case in which relief under Rule 14 is warranted. The Supreme Court has recognized that, "[w]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability, [the] risk of prejudice is heightened" and "a district court is more likely to determine that separate trials are necessary . . . ." *Zafiro*, 506 U.S. at 540. Further, "[i]t is obvious that[,] as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind." *United States v. Branker*, 395 F.2d 881, 887-88 (2d Cir. 1968) (cited with approval by *Peterson v. United States*, 405 F.2d 102, 105 n.4 (8th Cir. 1968)). "[T]rials involving large numbers of separate offenses are not the favorites of the law, and they carry the built-in hazards that confusion or abuse may

develop in such a degree during the course of trial as to necessitate . . . severance . . . in order to avoid undue prejudice." *Daly v. United States*, 342 F.2d 932, 933 (D.C. Cir. 1964) (per curiam).

The court is mindful that the factual allegations for many of the 142 counts overlap and granting the Amended Third Motion to Sever will likely result in two juries hearing some of the same evidence. For example, one of the government's multiple theories of bank fraud is that Defendants Agriprocessors and Rubashkin failed to notify their bank that Defendant Agriprocessors was engaged in illegal activity, *e.g.*, the large-scale employment of undocumented aliens. *See, e.g.*, Sixth Superseding Indictment (docket no. 464-1), at 27 ("Defendant RUBASHKIN and Defendant AGRIPROCESSORS falsely claimed defendant AGRIPROCESSORS was in compliance with the Packers Act and other laws and regulations even though, as defendant RUBASHKIN well knew, defendant RUBASHKIN had violated the Packers Act and was knowingly harboring undocumented aliens." (Emphasis in original.)). On the whole, however, the Immigration Counts and the Financial Counts are not similar and it appears the important evidence underlying the Immigration Counts and the Financial Counts revolve around quite different facts. *Cf. United States v. Randazzo*, 80 F.3d 623, 628 (1st Cir. 1996) (discussing Rule 8 and concluding: "Congress did not provide for joinder for unrelated transactions and dissimilar crimes merely because some evidence might be common to all of the counts. Indeed, looking to the *important* evidence, the shrimp and tax counts in this case seem to revolve around quite different facts." (Emphasis in original.)).

This brings the court to a second, distinct species of prejudice Defendant Agriprocessors and Rubashkin would suffer were the court to deny the Amended Third Motion to Sever: the possibility of prejudicial "spill over" of evidence amongst the separate counts. The Eighth Circuit Court of Appeals has recognized that

> [p]rejudice may result from a possibility that the jury might use evidence of one crime to infer guilt on the other or that the

> jury might cumulate the evidence to find guilt on all crimes when it would not have found guilt if the crimes were considered separately.

United States v. Davis, 103 F.3d 660, 676 (8th Cir. 1996) (citing *Closs v. Leapley*, 18 F.3d 574, 578 (8th Cir. 1994)). Here, it appears unlikely that all of the evidence underlying the Immigration Counts would be admissible to prove the Financial Counts and *vice versa*. *See, e.g.*, Fed. R. Evid. 403 (providing that even relevant evidence may be excluded if its probative value is substantially outweighed by dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence).[9] The danger of unfair evidentiary "spillage," therefore, is real and concrete. Further, the court does not believe this is a case in which limiting instructions would prove effective. It is the undersigned's professional judgment based upon decades of experience as a defense attorney, prosecutor and trial judge that, notwithstanding limiting instructions, there would remain a real and concrete danger that the jury might cumulate the evidence as to the various counts. *Davis*, 103 F.3d at 676. These dangers are heightened in the context of a complex case that involves many defendants, counts and distinct crimes. *See, e.g., United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) (discussing when limiting instructions work and when they do not). "It is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts than it is to compartmentalize evidence against separate defendants joined for trial." *United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir.), *amended and adhered to*, 798 F.2d 1250 (1986).

Accordingly, the court shall grant the Motion. The court shall sever the Immigration Counts and the forfeiture allegation from the Financial Counts. *Cf. United States v. Shellef*, 507 F.3d 82, 101 (2d Cir. 2007) (holding severance should have been

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[9] This is a preliminary assessment. It is made in an evidentiary vacuum. It should not be construed as a ruling on any evidentiary dispute that may arise at trial.

ordered where evidence of an improperly joined tax count would not have been admissible as other-acts evidence in a separate trial for money laundering and wire fraud); *United States v. Cambindo Valencia*, 609 F.2d 603, 629 (2d Cir. 1979) (reversing conviction in complex case because of "prejudicial spillover"); *United States v. Paul*, 150 F.R.D. 696, 697-700 (S.D. Fla. 1993) (granting motion to sever of "mega-trial" that involved 100 counts because the danger of prejudicial "spill-over" was too great), *aff'd*, 161 F.3d 20 (11th Cir. 1998) *and* 49 F. App'x 287 (11th Cir. 2002).[10]

IV. DISPOSITION

The Motion (docket no. 497) is **GRANTED**. The court severs the Sixth

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[10] Other courts have recognized the burdens so-called "mega-trials" place upon jurors, the parties, counsel and the courts. *See, e.g., United States v. Gallo*, 668 F. Supp. 736, *passim* (E.D.N.Y. 1987) (granting severance in a complex case involving 16 defendants and 22 counts, in which the government alleged a wide array of conduct, including racketeering, obstruction of justice and murder). Some courts have indicated a preference for granting severance motions as a matter of course to avoid megatrials, because the underlying justification for the preference in the law in favor of joinder and against severance—judicial economy—is arguably nonexistent in the context of a megatrial. One judge observed:

> If the court does decide to try the case as a whole, the judge must adjourn the remainder of his or her civil and criminal calendars for an indefinite and protracted period of time. The effect under the individual calendar system is ruinous. The already overburdened docket of the court reaches a breaking point, and the administration of justice in all of the court's cases is unconscionably delayed. The judge effectively presides over a one-case court. Where the judge decides to sever the trial, the court is left with much greater flexibility to administer both that and other cases. The calendar is more easily adjusted and controlled, conflicts are more readily reconciled, and some normalcy remains as to the rest of the court's docket.

Id. at 755 (emphasis omitted). Because the court finds that severance is appropriate under Rule 14, however, it need not decide whether to follow this line of cases.

Superseding Indictment (docket no. 464) into two parts for trial: (1) Counts 1 through 74 and (2) Counts 75 through to 142. In other words, the court shall hold two trials: a trial on the Immigration Counts (including the forfeiture allegation) and a trial on the Financial Counts. In due course the court shall schedule a telephonic status conference to discuss the order and scheduling of these two trials.

IT IS SO ORDERED.

DATED this 25th day of June, 2009.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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

UNITED STATES OF AMERICA, Plaintiff, vs. AGRIPROCESSORS, INC., SHOLOM RUBASHKIN, BRENT BEEBE, HOSAM AMARA and ZEEV LEVI, Defendants.	No. 08-CR-1324-LRR **ORDER**

On June 25, 2009, the court severed the Sixth Superseding Indictment (docket no. 464) into two parts: Counts 1 through 74 ("the Immigration Counts") and Counts 75 through 142 ("the Financial Counts"). *See* Order (docket no. 519), *passim*. In other words, the court ordered two trials in this matter: a trial on the Immigration Counts (including the forfeiture allegation) and a trial on the Financial Counts.

On July 6, 2009, the court held a scheduling conference. Assistant United States Attorneys Peter E. Deegan, Jr. and C.J. Williams represented the government. Attorneys Guy R. Cook and F. Montgomery Brown represented Defendant Sholom Rubashkin, who was personally present. Attorney James A. Clarity, III, represented Defendant Agriprocessors, Inc. Attorney Raphael M. Scheetz represented Defendant Brent Beebe, who was also personally present.

At the conference, the parties disagreed about the order of the two trials. The government and Defendant Beebe asked the court to schedule the trial on the Financial Counts first. Defendants Agriprocessors and Rubashkin asked the court to schedule the trial on the Immigration Counts first.

"The trial court has broad discretion to control the scheduling of events in matters

on its docket." *Jones v. Clinton*, 72 F.3d 1354, 1361 (8th Cir. 1996). "The sequence in which trials would be held is in the discretion of the court." *Byrd v. Wainwright*, 428 F.2d 1017, 1022 (5th Cir. 1970). After considering the parties' arguments, the court orders the trial on the Financial Counts first. The court shall hold trial on the Financial Counts first to give Defendant Beebe more time to prepare for trial without continuing the trial yet again. Defendant Beebe is charged in the Immigration Counts but not the Financial Counts, and the court can discern no unfair prejudice to Defendants Rubashkin or Agriprocessors to try the Financial Counts first. Indeed, until less than two weeks ago, Defendants Rubashkin and Agriprocessors were preparing for a unified trial on all counts in the Sixth Superseding Indictment.[1]

Accordingly, the court **ORDERS** that trial on the Financial Counts shall commence, as previously scheduled, on September 15, 2009. Trial on the Immigration Counts shall commence immediately after the trial on the Financial Counts concludes.

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[1] The court notes that Defendant Rubashkin previously represented to the court that he "may very well exercise his right to testify in defense" of the Immigration Counts but was "highly likely to decline to testify" as to the Financial Counts. Brief in Support of Motion to Sever (docket no. 433-2), at 12. There appears to be substantial factual overlap among the severed counts and, therefore, any statements by Defendant Rubashkin on the Immigration Counts might be admissible in the trial on the Financial Counts. Were the court to try the Immigration Counts first, the court might "effectively den[y] the motion for severance." *United States v. DiBernardo*, 880 F.2d 1216, 1228 (11th Cir. 1989). The court need not reach this issue, however, because the court holds that the combined interest in preserving Defendant Beebe's right to a fair trial and moving this case along in a timely manner outweighs the stated concerns of Defendants Agriprocessors and Rubashkin.

IT IS SO ORDERED.

DATED this 6th day of July, 2009.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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

UNITED STATES OF AMERICA, Plaintiff, vs. SHOLOM RUBASHKIN, Defendant.	No. 08-CR-1324-LRR **ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

The matters before the court are Defendant Sholom Rubashkin's "Motion for Judgment of Acquittal" ("First Motion") (docket no. 721) and "Combined Motion for Judgment of Acquittal and Motion for New Trial" ("Second Motion") (docket no. 747).

II. RELEVANT PROCEDURAL BACKGROUND

On July 16, 2009, a grand jury returned a 163-count Seventh Superseding Indictment (docket no. 544) against Defendant. Count 1 charged Defendant with Conspiracy to Harbor Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). Counts 2 through 70 charged Defendant with Harboring and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II) and 1324(a)(1)(B)(i). Count 71 charged Defendant with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. Count 72 charged Defendant with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. Counts 73 through 86 charged Defendant with Bank Fraud, in violation of 18 U.S.C. § 1344 ("Bank Fraud Counts"). Counts 87 through 110 charged Defendant with False Statements and Reports to a Bank, in violation of 18 U.S.C. § 1014 ("False Statement Counts"). Counts 111 through 124 charged Defendant with Wire Fraud, in violation of 18 U.S.C. § 1343 ("Wire Fraud Counts"). Counts 125 through 133 charged Defendant with Mail Fraud, in violation of 18 U.S.C. § 1341 ("Mail Fraud Counts"). Counts 134 through 143 charged Defendant with Money Laundering and Aiding and Abetting Money Laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 2 ("Money Laundering Counts"). Counts 144 through 163 charged Defendant with Willful Violation of an Order of the Secretary of Agriculture and Aiding and Abetting a Willful Violation of an Order of the Secretary of Agriculture, in violation of 7 U.S.C. § 195 and 18 U.S.C. § 2 ("Packers and

Stockyards Act Counts"). The Indictment also contains a forfeiture allegation on Counts 1 through 70.

On June 25, 2009, the court granted Defendant's Motion for Separate Trial (docket no. 519). The court ordered separate trials on Counts 1 through 74 ("Immigration Counts") and Counts 75 through 143 ("Financial Counts").[1] From October 13, 2009 to November 12, 2009, the court held a jury trial on the Financial Counts, which the court renumbered as Counts 1 through 91. The renumbered Counts are as follows: Counts 73 through 86 became Counts 1 through 14, Counts 87 through 110 became Counts 15 through 38, Counts 111 through 124 became Counts 39 through 52, Counts 125 through 133 became Counts 53 through 61, Counts 134 through 143 became Counts 62 through 71 and Counts 144 through 163 became Counts 72 through 91.[2] On November 2, 2009, at the close of the government's case, Defendant filed the First Motion. The court reserved ruling on the First Motion.

On November 12, 2009, the jury returned verdicts of guilty on Counts 1 through 71, 73 through 80, 84 through 89 and 91 (docket no. 736). The jury returned verdicts of not guilty on Counts 72, 81, 82, 83 and 90. Defendant orally renewed the First Motion after the court read the verdicts. The court again reserved ruling.

On November 16, 2009, the government filed a Resistance to the First Motion (docket no. 740). On November 24, 2009, Defendant filed a Reply (docket no. 752).

On November 19, 2009, Defendant filed the Second Motion. On December 2, 2009, the government filed a Resistance to the Second Motion (docket no. 759).

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[1] Counts 144 through 163 were charged after the court granted Defendant's Motion for Separate Trial. These counts were tried with the Financial Counts.

[2] The remainder of the instant Order refers to the Financial Counts in their renumbered version. A conversion chart is attached as Exhibit 1 for convenience.

On November 19, 2009, the government filed a "Motion for Leave to Dismiss without Prejudice" ("Motion to Dismiss") (docket no. 745), which asked the court to dismiss the Immigration Counts without prejudice. On that same date, the court entered an Order (docket no. 746) granting the Motion to Dismiss.

III. RELEVANT FACTUAL BACKGROUND

A. The Loan Agreement

1. Players

First Bank Business Capital ("FBBC") is a wholly-owned subsidiary of First Bank, a Missouri-based bank. FBBC is the lending group for First Bank and is primarily involved in commercial loans. FBBC and First Bank share officers and directors and have offices in the same building. First Bank fully funds FBBC. First Bank is insured by the Federal Deposit Insurance Corporation ("FDIC"). FBBC is regulated by the same entities as First Bank, including the Federal Reserve, the FDIC and the State of Missouri. FBBC loans appear in the same quality reports as First Bank.

Agriprocessors was an Iowa corporation based in Postville, Iowa. Agriprocessors owned and operated a kosher meatpacking plant in Postville. Defendant was a corporate officer of Agriprocessors, holding the position of Vice President.

2. Credit agreement

On September 23, 1999, FBBC and Agriprocessors entered into a lending relationship pursuant to a Credit and Security Agreement ("Credit Agreement"). The Credit Agreement was introduced at trial as Exhibit 2000. Pursuant to the Credit Agreement, FBBC agreed to lend Agriprocessors up to $35,000,000. Of the $35,000,000 revolving line of credit, FBBC kept $25,000,000 and sold $10,000,000 to another institution. FBBC and Agriprocessors also executed an "Exchange Revolving Note"

("Note") in the amount of $35,000,000 in connection with the Credit Agreement. Defendant executed the Note on behalf of Agriprocessors.[3]

3. Loan structure

The Credit Agreement used a "borrowing base" formula to calculate Agriprocessors' available credit at any one time. The borrowing base was determined by calculating the current value of Agriprocessors' collateral, including its accounts receivable. Under this formula, Agriprocessors could borrow up to 85% of its "eligible" accounts receivable at a particular time. Agriprocessors' accounts receivable were "eligible" if they remained unpaid and were no more than 60 days old.

Each time Agriprocessors wanted an advance of funds, it was required to provide FBBC with a "Notice of Borrowing." A Notice of Borrowing required Agriprocessors to certify that certain conditions were met. These conditions included that: (1) no default or event of default existed under the Credit Agreement; (2) the representations and warranties of the Credit Agreement remained true; (3) the amount requested would not exceed the borrowing base; and (4) all conditions in the credit agreement required to obtain an advance on the loan were satisfied. Agriprocessors was always cash-starved and made frequent requests for advances on the loan.

Pursuant to the Credit Agreement, Agriprocessors was required to deposit daily customer payments on accounts receivable into a designated account at Decorah Bank & Trust Company. All sale proceeds and collections from accounts receivable were to be held in trust for FBBC and were not to be commingled with Agriprocessors' other funds or property.

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[3] The court hereafter generally refers to FBBC's lending relationship with Agriprocessors, including both the Credit Agreement and Note, as the "loan" or the "loan agreement."

4. Other covenants

The Credit Agreement also required Agriprocessors to comply with certain covenants. One such covenant was an agreement to comply with the Packers & Stockyards Act of 1921. Compliance with the Packers Act required Agriprocessors to promptly pay for certain inventory and farm products.

Other covenants included representations to FBBC that: (1) all accounts receivable were genuine and not subject to a Packers Act Trust; (2) Agriprocessors was not in violation of any law that would adversely affect the collateral or Agriprocessors' business, operations or condition; and (3) no document or statement that Agriprocessors furnished to FBBC contained any untrue statement of material fact or omitted facts necessary to make the statements not misleading.

IV. MOTION FOR JUDGMENT OF ACQUITTAL

A. Legal Standard

Federal Rule of Criminal Procedure 29 provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Such a motion is permitted after trial, in which case the court may set aside the verdict and enter a judgment of acquittal. Fed. R. Crim. P. 29(c). "The court may reserve decision on the motion, proceed with trial[,]. . . submit the case to the jury, and decide the motion either before the jury returns or is discharged after it returns a verdict of guilty[.]" Fed. R. Crim. P. 29(b). It is well-settled that jury verdicts are not lightly overturned. *See, e.g., United States v. Peneaux*, 432 F.3d 882, 889 (8th Cir. 2005); *United States v. Stroh*, 176 F.3d 439, 440 (8th Cir. 1999). The court must view the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences. *United States v. Peters*, 462 F.3d 953, 957 (8th Cir. 2006). The court must uphold the jury's verdict so long as a reasonable-minded jury could have found Defendant guilty beyond a

reasonable doubt. *Id.* Moreover, the court "must uphold the jury's verdict even where the evidence 'rationally supports two conflicting hypotheses' of guilt and innocence." *Id.* (quoting *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004)). It is not the province of the court to evaluate the credibility of witnesses. *United States v. Hayes*, 391 F.3d 958, 961 (8th Cir. 2004). That task is for the jury. *Id.*

B. Analysis

Defendant moves for a judgment of acquittal on all counts of conviction. *See* First Motion at 1 (stating Defendant "moves this Court for a judgment of acquittal as to Renumbered Counts 1-91 (Counts 74-163) of the Seventh Superseding Indictment."). Accordingly, the court shall evaluate the sufficiency of the evidence and any other issues Defendant has raised regarding each count of conviction. First, the court shall address whether Defendant waived a multiplicity challenge. Then, the court will evaluate each count of conviction.

1. Waiver of multiplicity challenge

Defendant argues that certain counts charged in the Seventh Superseding Indictment are multiplicitous. Defendant also refers to this argument as "merger" with respect to certain counts. *See* Defendant's Brief in Support of the Second Motion ("Def. Second Brief") (docket no. 747-1), at 11 (arguing that the Wire Fraud Counts merge with the Bank Fraud Counts and that the Mail Fraud Counts merge with the False Statement Counts).

Defendant has waived this argument. *See* Fed. R. Crim. P. 12(b)(3)(B) (stating that "a motion alleging a defect in the indictment" must be raised before trial); *see also United States v. Prescott*, 42 F.3d 1165, 1167 (8th Cir. 1994) (holding that "defenses and objections based on defects in the indictment must be raised before trial" and that failure to do so constitutes a waiver of that claim); *United States v. Shephard*, 4 F.3d 647, 650 (8th Cir. 1993) (holding that a challenge to an indictment based on multiplicity must be raised before trial). Accordingly, the court denies the First and Second Motions to the

extent they seek a judgment of acquittal on the basis of multiplicity. Further, as discussed more fully below, even if the court considered the multiplicity challenges as timely, the court finds that all of Defendant's multiplicity arguments are without merit.

2. Counts of conviction

a. Bank Fraud Counts

Defendant moves for a judgment of acquittal on the Bank Fraud Counts. Defendant argues that there is insufficient evidence to support these convictions, that the government did not prove Defendant knew the defrauded bank was insured by the FDIC, that the charges are multiplicitous and that other miscellaneous issues warrant a judgment of acquittal.

i. Sufficiency of the evidence on Counts 1-14

The government alleged that Defendant committed bank fraud in at least one of three ways: (1) by participating in a scheme to defraud a financial institution; (2) by executing a scheme to defraud a financial institution; and/or (3) by aiding or abetting another in executing a scheme to defraud. The crime of bank fraud, as alleged in Counts 1 through 14, under the first alternative, participating in a scheme to defraud a financial institution, has three essential elements, which are:

> ***One***, the defendant knowingly participated in a scheme to defraud a financial institution or to obtain funds owned by or under the custody and control of a financial institution by means of material false or fraudulent representations, pretenses, or promises, in that the defendant knowingly participated in a scheme to fraudulently obtain advances of money from a financial institution under a revolving loan to Agriprocessors, Inc. as follows:
>
> Count 1: advance of $2,900,000 on September 4, 2007;
> Count 2: advance of $525,000 on October 1, 2007;
> Count 3: advance of $825,000 on November 1, 2007;
> Count 4: advance of $1,210,000 on December 3, 2007;
> Count 5: advance of $1,550,000 on January 2, 2008;

> Count 6: advance of $640,000 on February 1, 2008;
> Count 7: advance of $1,064,000 on March 3, 2008;
> Count 8: advance of $1,579,000 on April 1, 2008;
> Count 9: advance of $1,343,000 on May 1, 2008;
> Count 10: advance of $1,035,000 on June 2, 2008;
> Count 11: advance of $1,125,000 on July 1, 2008;
> Count 12: advance of $475,000 on August 1, 2008;
> Count 13: advance of $615,000 on September 2, 2008;
> Count 14: advance of $1,100,000 on October 7, 2008;
>
> ***Two***, the defendant did so with intent to defraud; and
>
> ***Three***, the financial institution was insured by the FDIC.

Final Jury Instruction No. 12 (docket no. 742); *see also* 8th Cir. Model Criminal Instr. 6.18.1344 (2007) (same); *Feingold v. United States*, 49 F.3d 437, 439 (8th Cir. 1995) (affirming the use of the Eighth Circuit Model Instruction on bank fraud).

Under the second alternative, executing a scheme to defraud a financial institution, the first element is as follows:

> ***One***, the defendant knowingly executed a scheme to defraud a financial institution or to obtain funds owned by or under the custody and control of a financial institution by means of material false or fraudulent representations, pretenses, or promises, in that the defendant fraudulently obtained or voluntarily and intentionally caused others to obtain advances of money from a financial institution under a revolving loan to Agriprocessors, Inc.

Final Jury Instruction No. 12 (docket no. 742); *see also* 8th Cir. Model Criminal Instr. 6.18.1344 (2007) (same); *Feingold*, 49 F.3d at 439 (affirming the use of the Eighth Circuit Model Instruction on bank fraud). Elements two and three remain the same as the first alternative.

Under the third alternative, aiding and abetting another in executing a scheme to defraud, the first element is as follows:

> ***One***, [Defendant must] have known bank fraud was being committed or going to be committed in that some person or persons were fraudulently obtaining or going to obtain advances of money from a financial institution under a revolving loan to Agriprocessors, Inc.

Final Jury Instruction No. 12 (docket no. 742); *see also* 8th Cir. Model Criminal Instr. 6.18.1344 (2007) (same); *Feingold*, 49 F.3d at 439 (affirming the use of the Eighth Circuit Model Instruction on bank fraud). Elements two and three remain the same as the first alternative. The government presented four theories of criminal liability for the Bank Fraud Counts: (1) Defendant falsely stated that Agriprocessors was in compliance with all laws when Agriprocessors and its employees were harboring or conspiring to harbor undocumented aliens; (2) Defendant created false accounts receivable collateral supporting the loan; (3) Defendant diverted collections from accounts receivable supporting the loan; and (4) Defendant falsely stated that Agriprocessors was in compliance with all laws when Agriprocessors and its employees were failing to comply with the Packers and Stockyards Act.[4] The court finds that sufficient evidence supports the jury's verdicts under all four theories.

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[4] With respect to the first theory, the jury unanimously found beyond a reasonable doubt that Defendant committed bank fraud by falsely stating that Agriprocessors was in compliance with all laws while Agriprocessors harbored undocumented aliens on Counts 1-9. Verdict and Interrogatory Forms (docket no. 736), at 1-18. With respect to the second theory, the jury unanimously found beyond a reasonable doubt that Defendant committed bank fraud by creating false accounts receivable on all the Bank Fraud Counts. Verdict and Interrogatory Forms at 1-28. With respect to the third theory, the jury unanimously found beyond a reasonable doubt that Defendant committed bank fraud by diverting accounts receivable on all the Bank Fraud Counts. *Id.* With respect to fourth theory, the jury unanimously found beyond a reasonable doubt that Defendant committed bank fraud by falsely stating that Agriprocessors was in compliance with all laws while Agriprocessors failed to comply with the Packers and Stockyards Act on Counts 7 and 8. *Id.* at 14-16.

With respect to the first theory of criminal liability, Senior Credit Officer of First Bank, Phil Lykens, testified that, pursuant to the loan agreement, Agriprocessors reaffirmed the loan agreement's warranties and representations upon every advance request. These warranties and representations included a warranty of compliance with all laws.

On May 12, 2008, Immigration and Customs Enforcement ("ICE") conducted an enforcement action at Agriprocessors. During the enforcement action, federal agents discovered evidence that Agriprocessors employed hundreds of illegal immigrants. Almost 400 undocumented workers were arrested, charged and convicted. In addition, Elizabeth Billmeyer, the former human resources manager for Agriprocessors, testified that Agriprocessors received "no-match" letters from the Social Security Administration for a number of Agriprocessors' employees. The "no-match" letters listed Social Security numbers that did not "match" the employee using the number at Agriprocessors. Billmeyer testified that she informed Defendant of the "no-match" problem, and he instructed her not to worry about it. Billmeyer created a list of more than 200 employees with questionable documentation. Additionally, Billmeyer testified that an Immigration and Customs Enforcement agent advised her to stop hiring workers that presented pink-colored Resident Alien Cards, because these cards were no longer valid. Billmeyer informed Defendant of this by an e-mail, admitted as exhibit 1108. Billmeyer later learned that employees had been hired by Agriprocessors and placed on a special payroll, called the "Hunt Payroll," without her knowledge.[5] Billmeyer testified that Laura Althouse, a lower-level payroll employee, told her that Defendant did not want Billmeyer to know that Agriprocessors had hired these employees.

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[5] At trial, the court heard evidence that the Hunt Payroll was originally used to pay employees that were able to work on the Jewish Sabbath.

Althouse testified that Defendant instructed her to hire applicants who presented pink-colored Resident Alien Cards. Defendant directed Althouse to add these employees to the Hunt Payroll. Defendant directed her to conduct this hiring after normal business hours so Billmeyer would not know about it.

With respect to the second theory of criminal liability, collateral certificates and advance requests submitted on the dates charged in the Indictment and requesting the amounts charged in the Indictment were admitted into evidence as exhibits 2052 through 2062. Yomtov "Toby" Bensasson, the former controller of Agriprocessors, testified that Defendant directed him to falsify documents to overstate Agriprocessors' accounts receivable. Those overstatements had the effect of artificially increasing Agriprocessors' collateral, which allowed it to borrow more funds from FBBC. Bensasson testified that Agriprocessors did not submit any accurate collateral certificates to FBBC after September 4, 2007.

Darlis Hendry, a former customer service representative at Agriprocessors, testified that her job duties included preparing and sending Agriprocessors' customers an invoice for product they ordered. She testified that Defendant directed her to create invoices showing that customers had purchased product that they had not, in fact, purchased. Hendry testified that Defendant, on numerous occasions, came to her office holding a piece of paper with a customer name and dollar amount written on it in Defendant's handwriting. Hendry would then create an invoice to reflect purchases consistent with the name and dollar amount written on the piece of paper. Hendry testified that she simply chose any product or combination of products to reach the desired dollar amount. Hendry testified that Defendant asked her to store these invoices separately from other invoices.

With respect to the third theory of criminal liability, April Hamilton, a former accounts receivable employee at Agriprocessors, testified that Defendant directed her to

divert customer payments from the Decorah Bank & Trust account to other accounts owned by Agriprocessors. Additionally, she testified that Defendant occasionally directed her to refrain from crediting a customer account after receiving payment from the customer.

In addition to his testimony on the creation of false collateral certificates, Bensasson testified that the diversion of customer payments into accounts other than the Decorah Bank & Trust account caused Agriprocessors' accounts receivable to appear higher than they actually were. This effectively inflated Agriprocessors' outstanding accounts receivable, which, in turn, gave Agriprocessors more collateral to borrow against.

With respect to the fourth theory of criminal liability, Adam Fast, a Senior Auditor for the United States Department of Agriculture's Packers and Stockyards Program, testified that Agriprocessors is a "packer" within the meaning of the Packers and Stockyards Act. As such, Agriprocessors was required to pay for livestock by the close of the next business day following the day the livestock is purchased. Although suppliers can waive the prompt payment requirement, to be effective, the waiver must be in writing and occur before the sale. Shella Chiu, a former accounts payable employee at Agriprocessors, testified about Agriprocessors' payments to cattle suppliers. Chiu testified that Defendant gave her directions about when to release checks to cattle suppliers. At trial, the court admitted Exhibit 3000 into evidence. Exhibit 3000 is a March 7, 2002 Order from an Administrative Law Judge finding that Agriprocessors violated the Packers and Stockyards Act ("Order"). The Order directed Agriprocessors and its agents and employees to cease and desist violating the Packers and Stockyards Act. The court also admitted into evidence Exhibit 3007, which is an affidavit of Defendant dated March 22, 2006, in which he states that he is aware of the Packers and Stockyards Act's requirements. The court admitted into evidence exhibit 3002, which is a summary of checks from Agriprocessors to various cattle suppliers. These checks are signed by

Defendant, with the exception of the checks relevant to Counts 72, 81, 82, 83 and 90. The postmark and/or receipt dates on the envelopes are several days after the dates Agriprocessors purchased the cattle. Representatives of several entities involved in cattle sales to Agriprocessors testified that payments for cattle purchased by Agriprocessors were untimely under the Packers and Stockyards Act in 2007 through 2008. No evidence was presented that they had waived their right to timely payments. Suppliers received no explanation from Agriprocessors for the late payment.

Finally, the government presented sufficient evidence to show that FBBC is an FDIC insured institution. Gary Pratte is an Executive Vice President and Senior Regional Credit Officer of First Bank. Pratte testified that FBBC is a wholly-owned subsidiary of First Bank. According to his testimony, FBBC is the lending group for First Bank and is primarily involved in commercial loans. Pratte testified that FBBC and First Bank share officers and directors, have offices in the same building and that First Bank fully funds FBBC. He testified that First Bank is insured by the FDIC. Pratte also testified that FBBC is regulated by the same entities as First Bank, including the Federal Reserve, the FDIC and the State of Missouri. In light of the foregoing, the court finds that sufficient evidence supports the jury's verdicts on the Bank Fraud Counts.

ii. Defendant's knowledge of FDIC insurance

Defendant argues that the court must grant the First and Second Motions to the extent they seek a judgment of acquittal on the Bank Fraud Counts, because "the [g]overnment has presented no evidence . . . that [Defendant] knew [First Bank] or FBBC was a[] FDIC insured institution." Defendant's Brief in Support of the First Motion ("Def. First Brief") (docket no. 721-2), at 13.

This argument is a red herring. "The status of the victim-institution is not a separate knowledge element of bank fraud under § 1344, but an objective fact that must be established in order for the statute to apply." *United States v. Brandon*, 17 F.3d 409,

425 (1st Cir. 1994). Defendant cites no authority that requires the government to prove that a defendant charged with bank fraud knew that the defrauded bank was FDIC insured. Rather, Defendant analogizes the bank fraud statute, 18 U.S.C. § 1344, to the aggravated identity theft statute, 18 U.S.C. § 1028A(c).

Aggravated Identity Theft occurs when a person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(c). In *Flores-Figueroa v. United States*, the Supreme Court held that the word "knowingly" modifies the phrase "of another person," and therefore requires that the government prove that a defendant charged with Aggravated Identity Theft knew that the means of identification belonged to another person. 129 S.Ct. 1886, 1894 (2009). Defendant argues that *Flores-Figueroa* compels the court to find that the bank fraud statute requires the government to prove that a defendant charged with bank fraud actually knew that the defrauded bank was FDIC insured.

The court finds that the aggravated identity theft statute and the bank fraud statute are distinguishable on this issue. In *Flores-Figueroa*, the Supreme Court reasoned that "knowingly" modifies the words after it, because "where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Flores-Figueroa*, 129 S.Ct. at 1890. When the court applies this same textual analysis to the bank fraud statute, Defendant's argument is unavailing. Unlike the aggravated identity theft statute, the object at issue here (FDIC insurance) is not in the same sentence as the transitive verb, "knowingly." 18 U.S.C. § 1344. The object modified by the transitive verb is "a financial institution," indicating that the government must prove that a defendant knew that the fraud was directed at a financial institution—not that a defendant knew that the financial institution was FDIC insured.

iii. Multiplicity challenge to Counts 1-14

Defendant argues that the Bank Fraud Counts charge Defendant multiple times for "one criminal scheme." Def. Second Brief at 7. The court finds that Defendant's multiplicity argument is without merit. *See United States v. George*, 986 F.2d 1176, 1179 (8th Cir. 1993) (stating that "the language of 18 U.S.C. § 1344, the bank fraud statute under which [the defendant] was charged, clearly states that each execution of the scheme to defraud may be charged as a separate act.").

In *George*, the defendant, a vice president of a leasing company, directed employees to alter invoices to increase the amount of collateral it could borrow against. *Id.* at 1178. The defendant brought a multiplicity challenge, arguing that the conduct constituted a single offense. *Id.* at 1179. The Eighth Circuit Court of Appeals disagreed and found that "[e]ach of the invoices was altered separately . . . and occurred on a separate date." *Id.* at 1179-80. In this case, as in *George*, each Bank Fraud Count constituted a separate act. Each count represents distinct acts, occurring on separate dates, of falsifying invoices, diverting funds and misrepresenting Agriprocessors' compliance with the laws and accounts receivable to FBBC. Accordingly, the court finds that the Bank Fraud Counts are not multiplicitous.

iv. Miscellaneous arguments

Defendant offers other arguments in support of his motion for judgment of acquittal on the Bank Fraud Counts, including: the assertion that breach of contract is not a crime, Defendant's harboring of undocumented immigrants was not material, Defendant had a right to invoke the Fifth Amendment privilege with respect to the harboring of undocumented immigrants and that FBBC suffered no loss.

The court agrees with Defendant that breach of contract is not a crime. However, this is not a breach of contract case. As discussed in greater detail above, the government

presented sufficient evidence to establish that Defendant committed every element of bank fraud.

With respect to Defendant's claim that the harboring was not material, the court notes that the jury, according to the interrogatory forms, found Defendant guilty of Bank Fraud under multiple theories. Jury Verdicts (docket no. 763), at 1-29. Therefore, even if the court accepts Defendant's argument, the jury's verdicts remain the same under alternate theories of criminal liability. In any event, the court finds that Agriprocessors' harboring of undocumented immigrants was material. Lykens's testimony established that he confronted Defendant after the enforcement action to ascertain whether Defendant knew that Agriprocessors had employed undocumented workers. According to Lykens, Defendant asserted that he did not know there were undocumented workers at Agriprocessors. Testimony and other evidence introduced through witnesses, including Billmeyer and Althouse, establish Defendant's statement was untrue, in breach of the loan agreement.

Next, Defendant asserts that he had a right to assert his Fifth Amendment privilege when asked about Agriprocessors' compliance with the law after the enforcement action. Defendant argues that his Fifth Amendment privilege somehow permitted him to lie to FBBC when Agriprocessors submitted the advance requests. Again, even if the court accepts this argument, the jury found Defendant guilty under multiple theories on every Bank Fraud Count. Additionally, the Fifth Amendment privilege does not give one the right to commit a crime. Defendant asks the court to adopt a very expansive view of the Fifth Amendment. The Supreme Court has rejected an interpretation of the Fifth Amendment that "assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched."

United States v. Apfelbaum, 445 U.S. 115, 130 (1980) (citing *United States v. Freed*, 401 U.S. 601, 606-07 (1971)).

Finally, Defendant argues that the court must grant the First Motion to the extent it asks for a judgment of acquittal on the Bank Fraud Counts, because FBBC suffered no loss. The Eighth Circuit Court of Appeals has "held that no actual loss or intent to cause a loss is required, so long as the defendant has 'defraud[ed]' a financial institution." *United States v. Staples* 435 F.3d 860, 867 (2006) (quoting *United States v. Whitehead*, 176 F.3d 1030, 1041 (8th Cir. 1999)). Accordingly, this argument is without merit.

v. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 1 through 14, the Bank Fraud Counts, and that Defendant's other arguments for judgment of acquittal on the Bank Fraud Counts are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on Counts 1 through 14.

b. False Statement Counts

Defendant moves for a judgment of acquittal on the False Statement Counts. Defendant argues that there is insufficient evidence to sustain the jury's verdicts and that the False Statement Counts are multiplicitous.

i. Sufficiency of the evidence on Counts 15-28

The crime of making a false statement or report to a financial institution, as charged in Counts 15 through 28, has three essential elements, which are:

> ***One***, the defendant knowingly made a false statement or report, or voluntarily and intentionally caused another to make a false statement or report, in the following certifications that Agriprocessors, Inc. submitted to FBBC which stated that there was no Event of Default as of the date of the certification and that Agriprocessors' loan agreement representations and warranties were true as of the date of the certifications:

Count 15: a certification submitted on September 4, 2007;
Count 16: a certification submitted on October 1, 2007;
Count 17: a certification submitted on November 1, 2007;
Count 18: a certification submitted on December 3, 2007;
Count 19: a certification submitted on January 2, 2008;
Count 20: a certification submitted on February 1, 2008;
Count 21: a certification submitted on March 3, 2008;
Count 22: a certification submitted on April 1, 2008;
Count 23: a certification submitted on May 1, 2008;
Count 24: a certification submitted on June 2, 2008
Count 25: a certification submitted on July 1, 2008;
Count 26: a certification submitted on August 1, 2008;
Count 27: a certification submitted on September 2, 2008;
Count 28: a certification submitted on October 7, 2008;

Two, the defendant made the false statement or caused another to make the false statement for the purpose of influencing the action of a financial institution upon requests for advances on a loan; and

Three, that the financial institution was insured by the FDIC at the time the statement was made.

Final Jury Instruction No. 13 (docket no. 742); *see also* 8th Cir. Model Jury Instr. 6.18.1014 (2007) (same); *United States v. Reeves*, 674 F.2d 739, 747 (8th Cir. 1982) (setting forth the elements of making a false statement or report to a bank).

At trial, the government introduced sufficient evidence to show that Defendant made false statements to a financial institution. Lykens testified that, pursuant to the loan agreement, Agriprocessors reaffirmed the loan agreement's warranties and representations upon every advance request. These warranties and representations included a warranty of compliance with all laws and a representation that the accounts receivable offered as collateral were legitimate and assignable.

The evidence presented at trial establishes that Defendant misrepresented Agriprocessors' compliance with the law as well as the amount of its accounts receivable. For instance, testimony and other evidence introduced from witnesses, including Billmeyer

and Althouse, establishes that Defendant misrepresented Agriprocessors' compliance with laws prohibiting the harboring of undocumented immigrants. Testimony and other evidence introduced through witnesses, including Chiu and Fast, establishes that Defendant misrepresented Agriprocessors' compliance with the Packers and Stockyards Act. Testimony and other evidence introduced from witnesses, including Hendry, Bensasson and Hamilton, establishes that Defendant overstated Agriprocessors' accounts receivable by directing the creation of false invoices and directing the diversion of customer payments from the Decorah Bank & Trust account. Pratte's testimony established that FBBC is a wholly-owned subsidiary of First Bank, which is FDIC-insured. The court finds that this evidence is sufficient to sustain the jury's verdicts on False Statement Counts 15 through 28.

ii. Sufficiency of the evidence on Count 29

The crime of making a false statement or report to a financial institution, as charged in Count 29 of the Indictment, has three essential elements, which are:

> ***One***, the defendant knowingly made a false statement, that is, that during the time period leading up to the arrests of approximately 389 undocumented alien workers at Agriprocessors, Inc. on May 12, 2008, the defendant had been unaware that such alien workers were undocumented;
>
> ***Two***, the defendant made the false statement for the purpose of influencing the action of a financial institution upon requests for advances on a loan; and
>
> ***Three***, that the financial institution was insured by the FDIC at the time the statement was made.

Final Jury Instruction No. 13 (docket no. 742); *see also* 8th Cir. Model Jury Instr. 6.18.1014 (2007) (same); *Reeves*, 674 F.2d at 747 (setting forth the elements of making a false statement or report to a bank).

Lykens testified that Defendant told him Agriprocessors had complied with all laws when Lykens visited Agriprocessors after the enforcement action. Defendant made this statement to Lykens to authorize further advances pursuant to the loan agreement. Testimony from Billmeyer and Althouse establishes that, at the time Defendant made the statement to Lykens, Defendant knew that Agriprocessors was not in compliance with laws prohibiting the harboring of undocumented workers. The court finds that this evidence is sufficient to sustain the jury's verdict on False Statement Count 29.

iii. Sufficiency of the evidence on Counts 30-38

The crime of making a false statement or report to a financial institution, as charged in Counts 30 through 38 of the Indictment, has three elements, which are:

> ***One***, the defendant knowingly made or voluntarily and intentionally caused another to make a false statement or report, or willfully overvalued property and security or caused another to overvalue property or security, by submitting or causing to be submitted false monthly financial reports that overstated the accounts receivable collateral that supported a revolving loan to Agriprocessors, Inc. as follows:
>
> Count 30: submission of a false report on or about February 29, 2008, regarding accounts receivable as of January 25, 2008.
>
> Count 31: submission of a false report on or about March 27, 2008, regarding accounts receivable as of February 29, 2008;
>
> Count 32: submission of a false report on or about April 18, 2008, regarding accounts receivable as of March 28, 2008;
>
> Count 33: submission of a false report on or about May 20, 2008, regarding accounts receivable as of April 25, 2008;
>
> Count 34: submission of a false report on or about July 2, 2008, regarding accounts receivable as of May 30, 2008;

> Count 35: submission of a false report in or about July or August of 2008, regarding accounts receivable as of June 27, 2008;
>
> Count 36: submission of a false report on or about September 3, 2008, regarding accounts receivable as of July 25, 2008;
>
> Count 37: submission of a false report in or about September or October of 2008, regarding accounts receivable as of August 29, 2008;
>
> Count 38: submission of a false report in or about October of 2008, regarding accounts receivable as of September 26, 2008;
>
> ***Two***, the defendant made the false statement or caused another to make a false statement, or overvalued the property or security or caused another to overvalue the property or security, for the purpose of influencing the action of a financial institution upon requests for advances on a loan; and
>
> ***Three***, that the financial institution was insured by the FDIC at the time the statement was made.

Final Jury Instruction No. 13 (docket no. 742); *see also* 8th Cir. Model Jury Instr. 6.18.1014 (2007) (same); *Reeves*, 674 F.2d at 747 (setting forth the elements of making a false statement or report to a bank).

At trial, the government introduced sufficient evidence to show that Defendant knowingly and intentionally directed the creation of false invoices to overstate Agriprocessors' accounts receivable. Evidence from Agriprocessors' customers described below shows that a large number of invoices reflecting Agriprocessors' purported sales to these customers had not been received by the customers and the customers never received the product reflected in the invoices:

Albert Barel, the controller of City Glatt, based in Los Angeles, California, testified that City Glatt's purchases from Agriprocessors averaged $40,000 in value. City Glatt paid by check and occasionally wired payments to Citizens State Bank or Freedom Bank. City Glatt never owed Agriprocessors more than approximately $500,000. However, accounts receivable reports prepared by Agriprocessors indicate that City Glatt owed Agriprocessors $1,217,961.02 in February 2008, $1,140,107.48 in March 2008, $1,145,873.54 in April 2008, $1,301,853.77 in May 2008, $1,308,367.19 in July 2008, $1,380,244.72 in July or August 2008, $1,162,035.79 in September 2008, $1,280,596.73 in September or October 2008 and $1,502,701.61 in October 2008. Exhibit 2076C contains the invoices that purported to bill these amounts to City Glatt. Barel testified that City Glatt's records do not reflect that it received these invoices or paid for any product listed therein.

Charles Knudtson, controller of Twin City Hides, based in St. Paul, Minnesota, testified that Twin City Hides "pre-paid" Agriprocessors for the hides it purchased. In other words, according to Knudtson's testimony, Twin City Hides never owed Agriprocessors any money. However, accounts receivable reports prepared by Agriprocessors indicate that Twin City Hides owed Agriprocessors $617,301.95 in February 2008, $941,763 in March 2008, $521,013 in April 2008, $983,317.75 in May 2008, $1,172,194.63 in July 2008, $1,076,961.12 in July or August 2008, $787,025.60 in September 2008, $1,113,035.19 in September or October 2008 and $993,038.79 in October 2008. Exhibit 2049 contains the invoices that purported to bill these amounts to Twin City Hides. Knudtson testified that Twin City Hides' records do not reflect that it received these invoices.

Steven Haider and Gene Parks, both employees at Sanimax (formely Van Hoven), based in St. Paul, Minnesota, testified that Van Hoven purchased bi-products from Agirpropcessrs. Van Hoven had an "advance payment arrangement" with Agriprocessors. In other words, according to Parks and Haider , Van Hoven never owed Agriprocessors

any money. However, accounts receivable reports prepared by Agriprocessors indicate that Van Hoven owed Agriprocessors $704,042.14 in February 2008, $951,679.19 in March 2008, $627,244 in April 2008, $854,911.31 in May 2008, $924,838.05 in July 2008, $799,429.18 in July or August 2008, $893,308.26 in September 2008, $1,176,335,70 in September or October 2008 and $912,136.38 in October 2008. Parks testified that Agriprocessors never sent Van Hoven any invoices.

Douglas Berkhouse, the Chief Operating Officer of Colorado Meat Packers, based in Denver, Colorado, testified about Colorado Meat Packers's relationship with Agriprocessors. Accounts receivable reports prepared by Agriprocessors indicate that Colorado Meat Packers owed Agriprocessors $944,230.68 in February 2008, $1,005,032.64 in March 2008, $1,009,409.75 in April 2008, $707,597.62 in May 2008, $282,361.24 in July 2008, $646,608.20 in July or August 2008, $1,854,451.91 in September 2008, $2,346,163.56 in September or October 2008 and $1,474,421.37 in October 2008. Exhibit 2049 contains the invoices that purported to bill these amounts to Colorado Meat Packers. Berkhouse testified that Colorado Meat Packers never received these invoices or the product reflected in them. Berkhouse also testified that many of these invoices purported to bill Colorado Meat Packers for the front half of cows. According to Berkhouse, however, Colorado Meat Packers never purchased or received the front half of cows from Agriprocessors. The invoices reflected purported purchases from Agriprocessors' Postville, Iowa plant. However, Berkhouse testified that Colorado Meat Packers purchased their meat from Agriprocessors' plant in Gordon, Nebraska, not Postville, Iowa.

Steve Cohen, the president of Twin City Poultry, based in St. Paul, Minnesota, testified about Twin City Poultry's relationship with Agriprocessors. Accounts receivable reports prepared by Agriprocessors indicate that Twin City Poultry owed Agriprocessors $873,458.21 in February 2008, $1,039,590.07 in March 2008, $1,084,594.56 in April 2008, $876,468.13 in May 2008, $1,085,911.24 in July 2008, $1,765,746.75 in July or

August 2008, $2,072,638.81 in September 2008, $1,916,348.03 in September or October 2008 and $1,467,883.58 in October 2008. Exhibit 2080C contains the invoices that purported to bill these amounts to Twin City Poultry. Cohen testified that Twin City Poultry never received these invoices. According to Cohen, in the regular course of business, Twin City Poultry ordered approximately $150,000 to $200,000 of product per week and paid Agriprocessors within thirty days of receipt of an invoice.

Michael Engelman of Doheny Kosher, based in Los Angeles, California, testified that, throughout its relationship with Agriprocessors, Doheny Kosher never owed Agriprocessors more than $1,000,000. However, accounts receivable reports prepared by Agriprocessors indicate that Doheny Kosher owed Agriprocessors $1,142,424 in February 2008, $1,076,736.42 in March 2008, $1,011,268.88 in April 2008, $1,182,945.24 in May 2008, $1,242,818.93 in July 2008, $1,171,658.12 in July or August 2008, $943,772.77 in September 2008, $836,341.60 in September or October 2008 and $1,394,769.50 in October 2008. Exhibit 2081C contains the invoices that purported to bill these amounts to Doheny Kosher. Engelman testified that only one of these invoices was found in Doheny Kosher's records.

David Kagan, the owner of Western Kosher, based in Los Angeles, California, testified that, throughout its relationship with Agriprocessors, Western Kosher never owed Agriprocessors more than approximately $150,000 to $200,000. However, accounts receivable reports prepared by Agriprocessors indicate that Western Kosher owed Agriprocessors $475,543.90 in February 2008, $428,263.74 in March 2008, $427,219.45 in April 2008, $200,313.84 in May 2008, $180,153.93 in July 2008, $420,334.92 in July or August 2008, $831,111.23 in September 2008, $1,029,422.24 in September or October 2008 and $752,464.06 in October 2008. Exhibit 2082C contains the invoices that purported to bill these amounts to Western Kosher. Kagan testified that Western Kosher never received these invoices or the product reflected in them.

Eleazer Meyers, president of The Right Place, a clothing store based in New York, New York, testified about The Right Place's relationship with Agriprocessors. Accounts receivable reports prepared by Agriprocessors indicate that The Right Place owed Agriprocessors $234,298.68 in February 2008, $517,548.04 in March 2008, $371,550.63 in April 2008, $344,628.09 in May 2008, $386,996.34 in July 2008, $606,351.80 in July or August 2008, $639,344.41 in September 2008, $574,852.77 in September or October 2008 and $562,192.40 in October 2008 for meat purchases. However, Meyers testified that The Right Place was a clothing store, and thus never ordered meat from Agriprocessors. Meyers testified that he ordered meat from Agriprocessors for his personal consumption, but that it never totaled more than $10,000.

Aaron Tzivin, owner of House of Glatt, based in New York, New York testified about House of Glatt's relationship with Agriprocessors. Accounts receivable reports prepared by Agriprocessors indicate that House of Glatt owed Agriprocessors $283,264.45 in March 2008, $283,264.45 in April 2008, $426,514.13 in May 2008, $432,601.60 in July 2008, $556,347 in July or August 2008, $1,207,582.81 in September 2008, $661,021.77 in September or October 2008 and $1,055,313.15 in October 2008. Exhibit 2049 contains the invoices that purported to bill these amounts to House of Glatt. Tzivin testified that House of Glatt never received these invoices, and that the purchase amounts reflected in the invoices were larger than House of Glatt's regular invoices.

Additionally, Darlis Hendry testified that Defendant directed her to create invoices showing that customers had purchased product that they had not, in fact, purchased. Hendry testified that Defendant, on numerous occasions, came to her office holding a piece of paper with a customer name and dollar amount written on it in Defendant's handwriting. Hendry would then create an invoice to reflect purchases consistent with the name and dollar amount written on the piece of paper. Hendry testified that she simply chose any product or combination of products to reach the desired dollar amount. Hendry testified that Defendant asked her to store these invoices separately from other invoices. Pratte's

testimony established that FBBC is a wholly-owned subsidiary of First Bank, which is FDIC insured. The court finds that this evidence is sufficient to sustain the convictions on False Statement Counts 30 through 38.

iv. Multiplicity challenge to Counts 15-38

In addition to arguing that insufficient evidence exists to sustain the jury's verdict on Counts 15 through 38, Defendant argues that "Counts 15-38 suffer from [a]. . . multiplicity defect based on the evidence presented at trial." Def. Second Brief at 9. Defendant argues that the False Statement Counts charge a "continuing execution of a unitary scheme." *Id.* The court finds that Defendant's multiplicity argument is without merit. False statements made in separate documents can constitute separate counts. *United States v. Glanton*, 707 F.2d 1238, 1240 (11th Cir. 1983). In *Glanton*, the defendant argued that the indictment charging him with three counts of making false statements to a bank was multiplicitous, because "his acts arose from a continuous course of conduct." *Id.* at 1241. The Eleventh Circuit Court of Appeals disagreed and held that the indictment was not multiplicitous, because "[e]ach count required the government to prove a different fact[.]" *Id.* In this case, each count of false statements to a financial institution required the government to prove a different fact or different facts, namely that Defendant fabricated different invoices for different customers.

v. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 15 through 38 and that Defendant's other arguments for judgment of acquittal are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on Counts 15 through 38.

c. Wire Fraud Counts

Defendant moves for a judgment of acquittal on Counts 39 through 52. Defendant argues that there is insufficient evidence to sustain the jury's verdict and that the Wire Fraud Counts merge with the Bank Fraud Counts.

i. Sufficiency of the evidence on Counts 39-52

The crime of wire fraud, as charged in Counts 39 through 52, has three essential elements, which are:

> ***One***, the defendant voluntarily and intentionally participated in a scheme to defraud with knowledge of its fraudulent nature or devised or participated in a scheme to obtain money or property by means of material false representations or promises which scheme is described as follows: fraudulently obtaining advances of money from FBBC under a revolving loan to Agriprocessors, Inc. by lying about Agriprocessors' compliance with the law, diverting collections from accounts receivable collateral supporting the loan and/or creating false accounts receivable collateral supporting the loan
>
> ***Two***, the defendant did so with the intent to defraud; and
>
> ***Three***, the defendant used, or caused to be used, interstate wire facilities in furtherance of, or in an attempt to carry out, some essential step in the scheme, specifically, the interstate submission by facsimile machine of the following advance requests:
>
> Count 39: advance of $2,900,000 on September 4, 2007;
> Count 40: advance of $525,000 on October 1, 2007;
> Count 41: advance of $825,000 on November 1, 2007;
> Count 42: advance of $1,210,000 on December 3, 2007;
> Count 43: advance of $1,550,000 on January 2, 2008;
> Count 44: advance of $640,000 on February 1, 2008;
> Count 45: advance of $1,064,000 on March 3, 2008;
> Count 46: advance of $1,579,000 on April 1, 2008;
> Count 47: advance of $1,343,000 on May 1, 2008;
> Count 48: advance of $1,035,000 on June 2, 2008;
> Count 49: advance of $1,125,000 on July 1, 2008;
> Count 50: advance of $475,000 on August 1, 2008;
> Count 51: advance of $615,000 on September 2, 2008;
> Count 52: advance of $1,100,000 on October 7, 2008.

Final Jury Instruction no. 17 (docket no. 742); *see also* 8th Cir. Model Instr. 6.18.1341 (2007) (same); *United States v. Frank*, 354 F.3d 910, 918 (8th Cir. 2004) (setting forth the elements of wire fraud).

At trial, the government introduced sufficient evidence to show that Defendant used a facsimile machine to send advance requests to FBBC in an attempt to fraudulently obtain advances on Agriprocessors' loan. Therese Jones, a Senior Client Services Technician for FBBC, testified that Agriprocessors submitted collateral certificates and advance requests to FBBC through a facsimile machine. Jones reviewed these submissions and forwarded them to Lykens, who ultimately decided whether to grant the advance request.

Exhibits 2052 through 2064 contain the collateral certificates referenced in Counts 39 through 52. Bensasson testified that Defendant directed him to falsify accounts receivable documents to overstate Agriprocessors' income. Those overstatements had the effect of artificially increasing Agriprocessors' collateral, which allowed it to borrow more funds from FBBC. Bensasson testified that Agriprocessors did not submit any accurate collateral certificates to FBBC after September 4, 2007. All collateral certificates submitted after that date were intentionally overstated. The court finds that this evidence is sufficient to sustain the convictions on the Wire Fraud Counts.

ii. Merger

Defendant also argues that the Wire Fraud Counts "merge with the [B]ank [F]raud counts." Def. Second Brief at 11. Defendant cites no authority for this proposition. When an indictment contains multiplicitous counts, merger of the multiplicitous counts is the proper remedy. *United States v. Platter*, 514 F.3d 782, 787 (8th Cir. 2008) (citing *United States v. Richardson*, 439 F.3d 421, 423 (8th Cir. 2006)). An indictment is multiplicitous when it charges a single offense as separate counts. *United States v. Worthon*, 315 F.3d 980, 983 (8th Cir. 2003). A multiplicitous indictment can lead to a violation of the double jeopardy clause of the Fifth Amendment by "subjecting the defendant to two punishments for the same crime. . . ." *United States v. Chipps*, 410 F.3d

438, 447 (8th Cir. 2005). "Offenses are considered separate, and therefore not multiplicitous, if each requires proof of a fact not common to the others." *DaMier v. United States*, 616 F.2d 366, 370 (8th Cir. 1980) (citing *Ianelli v. United States*, 420 U.S. 770, 785, n. 17 (1975)).

The court finds that the wire fraud statute requires proof of an additional fact or additional facts that the bank fraud statute does not require or contain. Specifically, 18 U.S.C. § 1344, the bank fraud statute, requires the government to prove that a defendant knowingly executed or attempted to execute a "scheme or artifice to defraud a financial institution." 18 U.S.C. § 1344. The wire fraud statute does not require that the government prove the existence of a scheme to defraud a financial institution. 18 U.S.C. § 1343. It does, however, require that the government prove a "scheme or artifice to defraud" through the use of "wire, radio, or television communication in interstate or foreign commerce. . . ." *Id.* In contrast, bank fraud does not require the use of a wire communication. 18 U.S.C. § 1344. Therefore, the court declines to merge the Wire Fraud Counts and the Bank Fraud Counts.

iii. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 39 through 52 and that Defendant's other arguments for judgment of acquittal are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a Motion for Judgment of Acquittal on Counts 39 through 52.

d. Mail Fraud Counts

Defendant moves for a judgment of acquittal on Counts 53 through 61. Defendant argues that there is insufficient evidence to sustain the jury's verdicts and that the Mail Fraud Counts merge with the False Statement Counts.

i. Sufficiency of the evidence on Counts 53-61

The crime of mail fraud, as charged in Counts 53 through 61, has three essential elements, which are:

> ***One***, the defendant voluntarily and intentionally participated in a scheme to defraud with knowledge of its fraudulent nature or devised or participated in a scheme to obtain money or property by means of material false representations or promises which scheme is described as follows: fraudulently obtaining advances of money from FBBC under a revolving loan to Agriprocessors, Inc. by lying about Agriprocessors' compliance with the law, diverting collections from accounts receivable collateral for the loan, and/or creating false accounts receivable collateral supporting the loan.
>
> ***Two***, the defendant did so with the intent to defraud; and
>
> ***Three***, the defendant used, or caused to be used, a commercial interstate carrier in furtherance of, or in an attempt to carry out, some essential step in the scheme, specifically, the use of a commercial interstate carrier to send the following false financial reports to FBBC which overstated the accounts receivable collateral supporting the loan:
>
> Count 53: submission of a false report on or about February 29, 2008, regarding accounts receivable as of January 25, 2008;
>
> Count 54: submission of a false report on or about March 27, 2008, regarding accounts receivable as of February 29, 2008;
>
> Count 55: submission of a false report on or about April 18, 2008, regarding accounts receivable as of March 28, 2008;
>
> Count 56: submission of a false report on or about May 20, 2008, regarding accounts receivable as of April 25, 2008;
>
> Count 57: submission of a false report on or about July 2, 2008, regarding accounts receivable as of May 30, 2008;

> Count 58: submission of a false report in or about July or August of 2008, regarding accounts receivable as of June 27, 2008;
>
> Count 59: submission of a false report on or about September 3, 2008, regarding accounts receivable as of July 25, 2008;
>
> Count 60: submission of a false report in or about September or October of 2008, regarding accounts receivable as of August 29, 2008;
>
> Count 61: submission of a false report in or about October of 2008, regarding accounts receivable as of September 26, 2008

Final Jury Instruction no. 18 (docket no.742); *see also* 8th Cir. Model Instr. 6.18.1341 (2007) (same); *United States v. French*, 88 F.3d 686, 688 (8th Cir. 1996) (setting forth the elements of mail fraud).

At trial, the government introduced sufficient evidence to show that Defendant used the mail to send accounts receivable reports to FBBC in an attempt to fraudulently acquire advances on Agriprocessors' loan. Jones testified that she received financial records from Agriprocessors via the mail. Testimony from Hamilton, Hendry and Bensasson establishes that Defendant overstated Agriprocessors' accounts receivable by directing the creation of false invoices and directing the diversion of funds from the Decorah Bank & Trust account. The court finds that this evidence is sufficient to sustain convictions on the Mail Fraud Counts.[6]

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[6] The court notes that the jury, according to Interrogatory Forms 53 through 61, found that Defendant committed mail fraud only by creating false accounts receivable and by diverting collections from accounts receivable collateral for the loan. The court, therefore, does not address the sufficiency of the evidence for the compliance with all laws alternative.

ii. Merger

Defendant argues that the Mail Fraud Counts "must necessarily merge with Counts 30-38 [the False Statement Counts]." Def. Second Brief at 12. The court finds that the crimes of mail fraud and false statements to a bank each require proof of a fact or facts that the other does not. Specifically, the mail fraud statute requires the government to prove that Defendant used the Postal Service or "any private or commercial interstate carrier" in connection with a fraudulent "scheme or artifice." 18 U.S.C. § 1341. The crime of making false statements to a financial institution does not require the government to prove a defendant used the mail. 18 U.S.C. § 1014. It requires the government to prove that a defendant made a false statement to a bank through any medium. Therefore, the court declines to merge the Mail Fraud Counts and the False Statement Counts. *DaMier*, 616 F. 2d at 370.

iii. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 53 through 61 and that Defendant's other arguments for judgment of acquittal are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on Counts 53 through 61.

e. Money Laundering Counts

Defendant moves for a judgment of acquittal on Counts 62 through 71. Defendant argues that there is insufficient evidence to sustain the jury's verdicts and that the government failed to show that the money laundering transactions involved the profits of a specified illegal activity.

i. Sufficiency of the evidence on Counts 62-71

The government alleged that Defendant committed the crime of money laundering in one or both of the following ways: (1)by conducting an illegal financial transaction and/or (2) by aiding or abetting another in conducting an illegal financial transaction.

The crime of Conducting an Illegal Financial Transaction, as charged under the first alternative in Counts 62 through 71, has four essential elements, which are:

> ***One***, on or about the dates alleged with regard to each specific count stated below, the defendant conducted a financial transaction which in any way or degree affected interstate or foreign commerce, that is, the deposit of the following checks from third-party entities into a depository account at Decorah Bank and Trust Company:
>
> Count 62: the deposit on August 9, 2007 of check numbers 2371 ($42,240.86) and 2372 ($48,685.03) from Kosher Community Grocery;
>
> Count 63: the deposit on September 19, 2007 of check numbers 3274 ($38,464.92) and 3299 ($18,768.46) from Torah Education of Northeast Iowa;
>
> Count 64: the deposit on October 17, 2007 of check numbers 2506 ($41,066.57) and 2507 ($42,525.56) from Kosher Community Grocery;
>
> Count 65: the deposit on November 14, 2007 of check numbers 3344 ($32,300.86) and 3349 ($35,362.44) from Torah Education of Northeast Iowa
>
> Count 66: the deposit on December 11, 2007 of check numbers 2744 ($42,899.56), 2745 ($43,888.99) and 2746 ($38,848.92) from Kosher Community Grocery;
>
> Count 67: the deposit on January 15, 2008 of check numbers 3378 ($34,897.55) and 3379 ($32,586.58) from Torah Education of Northeast Iowa;
>
> Count 68: the deposit on February 26, 2008 of check numbers 3069 ($78,890.14), 3070 ($88,593.45), 3071 ($79,222.48) and 3072 ($88,259.26) from Kosher Community Grocery;

> Count 69: the deposit on March 18, 2008 of check number 3365 ($48,660.88) and 3366 ($38,982.46) from Torah Education of Northeast Iowa;
>
> Count 70: the deposit on April 15, 2008 of check numbers 3632 ($78,888.56), 3668 ($78,458.55) and 3692 ($98,458.48) from Torah Education of Northeast Iowa;
>
> Count 71: the deposit on May 13, 2008 of check numbers 3435 ($88,958.26), 3436 ($59,158.25), 3437 ($97,859.28) and 3438 ($60,259.36) from Torah Education of Northeast Iowa
>
> ***Two***, the defendant conducted the financial transaction with money that involved the proceeds of specified unlawful activity, that is, bank fraud, making false statements and reports to a bank, wire fraud or mail fraud;
>
> ***Three***, at the time the defendant conducted the financial transaction, the defendant knew the money represented the proceeds of some form of unlawful activity; and
>
> ***Four***, the defendant conducted the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity.

Final Jury Instruction no. 20 (docket no. 742), *see also* 8th Cir. Model Instr. No. 6.18.1956A (same); *United States v. Awada*, 425 F.3d 552, 524 (8th Cir. 2005) (setting forth the elements of money laundering under 18 U.S.C. § 1956).

The second alternative charges Defendant with aiding and abetting an illegal financial transaction. In order to have aided and abetted the commission of an illegal financial transaction, Defendant must:

> ***One***, have known that the crime of conducting an illegal financial transaction was being committed or was going to be committed by depositing the following checks from third party

entities into a depository account at Decorah Bank and Trust Company:

Count 62: the deposit on August 9, 2007 of check numbers 2371 ($42,240.86) and 2372 ($48,685.03) from Kosher Community Grocery;

Count 63: the deposit on September 19, 2007 of check numbers 3274 ($38,464.92) and 3299 ($18,768.46) from Torah Education of Northeast Iowa;

Count 64: the deposit on October 17, 2007 of check numbers 2506 ($41,066.57) and 2507 ($42,525.56) from Kosher Community Grocery;

Count 65: the deposit on November 14, 2007 of check numbers 3344 ($32,300.86) and 3349 ($35,362.44) from Torah Education of Northeast Iowa

Count 66: the deposit on December 11, 2007 of check numbers 2744 ($42,899.56), 2745 ($43,888.99) and 2746 ($38,848.92) from Kosher Community Grocery;

Count 67: the deposit on January 15, 2008 of check numbers 3378 ($34,897.55) and 3379 ($32,586.58) from Torah Education of Northeast Iowa;

Count 68: the deposit on February 26, 2008 of check numbers 3069 ($78,890.14), 3070 ($88,593.45), 307 ($79,222.48) and 3072 ($88,259.26) from Kosher Community Grocery;

Count 69: the deposit on March 18, 2008 of check number 3365 ($48,660.88) and 3366 ($38,982.46) from Torah Education of Northeast Iowa;

Count 70: the deposit on April 15, 2008 of check numbers 3632 ($78,888.56), 3668 ($78,458.55) and 3692 ($98,458.48) from Torah Education of Northeast Iowa;

> Count 71: the deposit on May 13, 2008 of check numbers 3435 ($88,958.26), 3436 ($59,158.25), 3437 ($97,859.28) and 3438 ($60,259.36) from Torah Education of Northeast Iowa;
>
> ***Two***, have knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the crime of conducting an illegal financial transaction; and
>
> ***Three***, have acted knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity.

Final Jury Instruction no. 20 (docket no. 742), *see also* 8th Cir. Model Instr. No. 6.18.1956A (same); *Awada*, 425 F.3d at 524 (setting forth the elements of money laundering under 18 U.S.C. § 1956).

Bensasson testified that Defendant directed him and other Agriprocessors employees to divert customer payments into Agriprocessors' General Operating Account at Citizens State Bank instead of the Decorah Bank and Trust Account, contrary to the loan agreement. Then, Defendant deposited checks from the Citizens State Bank account into either the Torah Education account at Citizens State Bank or the Kosher Community Grocery account at Freedom Bank.

Hamilton testified about Defendant's pattern of behavior regarding checks that Agriprocessors received and wrote. Hamilton testified that Defendant provided her with customer payment checks, and he would either give her a check or ask her to write a check from "Agri New York" and deposit the whole amount into Agriprocessors' General Operating Account at Citizens State Bank, despite the fact that the customer payments were supposed to go to the Decorah Bank & Trust account. Defendant asked Hamilton to obtain checks from Torah Education or Kosher Community Grocery and make "win checks"

payable to Agriprocessors.[7] No documentation shows that Torah Education or Kosher Community Grocery made payments to Agriprocessors. According to her testimony, Defendant directed Hamilton to arrive at a round dollar amount, and Hamilton was responsible for creating checks for smaller, odd-numbered amounts to total that round amount. This process made the checks deposited into the Decorah Bank & Trust account appear to be customer payments. The court admitted checks written to Agriprocessors from Kosher Community Grocery and Torah Education into evidence. The court finds that this evidence is sufficient to sustain a conviction on the Money Laundering Counts.

ii. Profits/proceeds

Defendant argues that the court must grant the First and Second Motions to the extent they seek a judgment of acquittal on the Money Laundering Counts, because "[t]he financial transaction allegedly constituting 'laundering' must involve the 'profits,' not merely the 'receipts,' of a 'specified unlawful activity.'" Def. First Brief at 24 (citing *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008)).[8] A four-Justice plurality in *United States v. Santos* held that the term "proceeds" in 18 U.S.C. § 1956 (the statute criminalizing money laundering) always means profits derived from the illegal activity and not simply the gross receipts derived from the activity. *Santos*, 128 S.Ct. at 2025. Justice Stevens concurred in the judgment, but "rejected the always-the-one or always-the-other approaches offered by his colleagues." *United States v. Kratt*, 579 F.3d 558, 561 (6th Cir. 2009). According to Justice Stevens, the question of whether the government must prove

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[7] Win checks are computer-generated checks that do not require a signature.

[8] The interrogatory forms for the Money Laundering Counts asked the jury to select the unlawful activity involved in the commission of the Money Laundering Counts (docket no. 736), at 113-142. The jury selected bank fraud and making false statements or reports to a bank on every interrogatory form. The jury did not select wire fraud or mail fraud. Therefore, the court limits its analysis on the Money Laundering Counts to the unlawful activities of bank fraud and making false statements and reports to a bank.

that a defendant derived profits from the unlawful activity depends on the underlying predicate offense. *Id.*

The predicate offense in *Santos* was operating an illegal gambling business. *Santos*, 128 S.Ct. at 2032-33. In deciding whether that predicate offense required the government to prove profits, Justice Stevens considered what he called a "merger problem." *Id.* Justice Stevens agreed with the plurality that the government must prove profits when the underlying offense is operating an illegal gambling business: "Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business." *Id.* at 2033.

"Because no opinion in *Santos* attracted a majority of Justices, the 'position taken by those [Justices] who concurred in the judgment[] on the narrowest grounds' represents its holding." *Kratt*, 579 F.3d at 562 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Therefore, the court engages in Justice Stevens's analysis as applied to the predicate offenses of bank fraud and making false statements or reports to a bank. The "merger problem" that concerned Justice Stevens is not present in this case. "[A] § 1956 . . . conviction [does not] radically increase[] the statutory maximum sentence when the predicate offense is bank fraud or making false statements. Far from it: . . . Section 1956 . . . impose[s] [a] *lower* statutory maximum[] than bank fraud and false-statement offenses." *Id.* at 563 (citing 18 U.S.C. § 1956(a)(1)). "*Santos* thus does not require [the court] to apply a profits definition of proceeds to [bank fraud and making false statements and reports to a bank]." *Id.*

iii. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 62 through 71 and that Defendant's other arguments for judgment

of acquittal are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on Counts 62 through 71.

f. Packers and Stockyards Act Counts

Defendant moves for a judgment of acquittal on Counts 72 through 91. Defendant argues that there is insufficient evidence to sustain the jury's verdicts on Counts 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 87, 88, 89 and 91 and that Defendant's conviction under 7 U.S.C. § 195 violates the Fifth and Eighth Amendments to the United States Constitution.

i. Sufficiency of the Evidence on Counts 72-91[9]

The crime of Willful Violation of an Order of the Secretary of Agriculture, as charged in Counts 72 through 91, has four essential elements, which are:

> ***One***, the defendant was an officer, director, agent or employee of a packer;
>
> ***Two***, the Secretary of Agriculture issued an order to the packer to cease the forbidden practice of failing to pay livestock suppliers in a timely manner as required by law;
>
> ***Three***, the defendant knew of the Secretary of Agriculture's order; and
>
> ***Four***, on or about the dates alleged with regard to each specific count, the defendant knowingly failed to obey the Secretary of Agriculture's order by failing to pay, or by voluntarily and intentionally causing another to fail to pay, the following livestock suppliers in a timely manner as required by law:
>
> [. . .]

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[9] The court need not consider Counts 72, 81, 82, 83 and 90. The jury returned not guilty verdicts on those Counts.

Count 73: failing to timely provide a payment for livestock due on February 12, 2008 to a cattle supplier in Chicago, Illinois;

Count 74: failing to timely provide a payment for livestock due on February 14, 2008 to a cattle supplier in Marshalltown, Iowa;

Count 75: failing to timely provide a payment for livestock due on February 15, 2008 to a cattle supplier in Minnesota;

Count 76: failing to timely provide a payment for livestock due on February 15, 2008 to a cattle supplier in Waukon, Iowa;

Count 77: failing to timely provide a payment for livestock due on February 15, 2008 to a cattle supplier in Walnut, Illinois;

Count 78: failing to timely provide a payment for livestock due on February 22, 2008 to a cattle supplier in Waukon, Iowa;

Count 79: failing to timely provide a payment for livestock due on February 28, 2008 to a cattle supplier in Waukon, Iowa;

Count 80: failing to timely provide a payment for livestock due on February 29, 2008 to a cattle supplier in Waukon, Iowa;

[. . .]

Count 84: failing to timely provide a payment for livestock due on March 5, 2008 to a cattle supplier in Waverly, Iowa;

Count 85: failing to timely provide a payment for livestock due on March 21, 2008 to a cattle supplier in Waukon, Iowa;

> Count 86: failing to timely provide a payment for livestock due on March 28, 2008 to a cattle supplier in Waukon, Iowa;
>
> Count 87: failing to timely provide a payment for livestock due on March 29, 2008 to a cattle supplier in Aplington, Iowa;
>
> Count 88: failing to timely provide a payment for livestock due on April 1, 2008 to a cattle supplier in Waukon, Iowa;
>
> Count 89: failing to timely provide a payment for livestock due on April 4, 2008 to a cattle supplier in Waukon, Iowa;
>
> [. . .]
>
> Count 91: failing to timely provide a payment for livestock due on April 16, 2008 to a cattle supplier in Waverly, Iowa.

Final Jury Instruction no. 22 (docket no.742); 7 U.S.C. §§ 195, 191 and 2286.

The court finds that the government produced sufficient evidence for a reasonable jury to find that Defendant was an officer, director or employer of a "packer;" that he knew of the Order directing Agriprocessors to timely pay cattle suppliers; and that he failed to obey the Order. Chiu testified that Defendant gave her directions as to when to release checks to cattle suppliers. Fast's testimony established that Agriprocessors was a "packer." Exhibit 3000 contained the March 7, 2002 Order in which the Secretary of Agriculture directed Agriprocessors to cease and desist violating the Packers and Stockyards Act. Exhibit 3007 contains an affidavit dated March 22, 2006, in which Defendant acknowledges that he is aware of the requirements of the Packers and Stockyards Act. With respect to the specific late payments for which the jury convicted Defendant, the government introduced signed checks and postmarked envelopes as exhibits to establish the date of payment, as well as testimony of producers who supplied livestock to Agriprocessors. The court finds that this evidence is sufficient to sustain the jury's guilty verdicts on Counts 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 87, 88, 89 and 91.

ii. Fifth and Eighth Amendment challenges

Defendant "renew[s] his Sixth and Eighth Amendment challenges to 7 U.S.C. [§] 195." Def. First Brief at 28. Although Defendant refers to the Sixth Amendment, Defendant's prior arguments referenced the Fifth and Eighth Amendments.[10] The court assumes that Defendant renews his prior arguments under the Fifth and Eighth Amendments. The court relies on its previous Order (docket no. 575) with respect to the Fifth Amendment argument. In that Order, the court found that the charges under 7 U.S.C. § 195 do not violate the Fifth Amendment.

In the Order, the court reserved ruling on Defendant's Eighth Amendment argument, because the argument was not yet ripe. It is now appropriate for the court to address Defendant's Eighth Amendment argument, because he is "about to suffer [] punishment." *United States v. Williams*, 128 F.3d 1239, 1242 (8th Cir. 1997). In his brief, Defendant argued that criminal penalty under 7 U.S.C. § 195 violates the Eighth Amendment, because it "is defective insofar as it purports to punish the mere 'status' of individuals." Defendant's Brief on Motion to Dismiss Counts 60 through 79 (docket no. 439-1), at 8. Defendant relies on *Robinson v. State of California*, 370 U.S. 660, 667 (1962), for his assertion that 7 U.S.C. § 195 punishes him for his "status." In *Robinson*, the Supreme Court held that "a state law which imprisons [a narcotics addict] as a criminal, even though he has never touched any narcotic drug in the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." *Robinson*, 370 U.S. at 667.

Defendant argues that 7 U.S.C. § 195 allows punishment for simply having the status of "officer, director, agent, or employee of a packer or swine contractor." 7 U.S.C. § 195. The court disagrees. In *Powell v. State of Texas*, 392 U.S. 514, 532 (1968), a

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[10] The Sixth Amendment guarantees the accused a speedy trial, a trial by jury, a right to confront witnesses against him or her and the right to assistance of counsel. U.S. Const. amend VI.

defendant challenged his punishment under a state law prohibiting public intoxication. The defendant argued that, as in *Robinson*, the statute punished a status, namely, the defendant's alcoholism. *Powell*, 392 U.S. at 532. The Supreme Court disagreed and found that *Robinson* interpreted the Eighth Amendment as requiring an act before criminal punishment may be imposed: "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus." *Id.* at 533. In this case, Defendant is not subject to criminal penalty simply for being an employee of a packer. He is subject to criminal penalty because the evidence at trial showed that the Secretary of Agriculture issued an order to Agriprocessors to cease and desist violating the Packers and Stockyards Act, that Defendant knew about this order and that Defendant continued to violate the order. 7 U.S.C. §§ 195, 191 and 2286. Accordingly, the court finds that Defendant's conviction on the Packers and Stockyards Act Counts does not violate the Eighth Amendment.

iii. Summary

In light of the foregoing, the court finds that there is sufficient evidence to support the verdicts on Counts 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 87, 88, 89 and 91 and that Defendant's other arguments for judgment of acquittal are without merit. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on Counts 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 87, 88, 89 and 91.

C. Summary

In light of the foregoing, the court finds that a reasonable-minded jury could have found Defendant guilty on all counts of conviction beyond a reasonable doubt. Accordingly, the court shall deny the First and Second Motions to the extent they seek a judgment of acquittal on any count of conviction.

V. MOTION FOR NEW TRIAL

A. Legal Standard

Federal Rule of Criminal Procedure 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if justice so requires." Fed. R. Crim. P. 33(a). A district court is granted broad discretion in considering a motion for a new trial. *Peters*, 462 F.3d at 957. A district court may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002) (citation omitted). However, the court "should grant a new trial only if 'the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred.'" *Peters,* 462 F.3d at 957 (quoting *United States v. Rodriguez*, 812 F.2d 414, 417 (8th Cir. 1987)).

A district court enjoys more latitude in granting new trials under Rule 33 than in granting motions for judgment of acquittal under Rule 29; however, "[m]otions for new trials based on the weight of the evidence are generally disfavored." *Campos*, 306 F.3d at 579. District courts "must exercise the Rule 33 authority 'sparingly and with caution.'" *Id.* (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)); *see also* Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 553 (3d ed. 2004) (stating that granting a new trial under Rule 33 is an unusual remedy reserved for "exceptional cases in which the evidence preponderates heavily against the verdict").

The court's standard of review differs from the standard that is applied to a motion for judgment of acquittal.

> When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different from those raised by a motion for judgment of acquittal. The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial. The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and

> in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently 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.

Lincoln, 630 F.2d at 1319; *see also United States v. Johnson*, 474 F.3d 1044, 1051 (8th Cir. 2007).

B. Analysis

Defendant moves for a new trial on four grounds. The court considers each of these grounds, in turn.

1. Exclusion of defense witnesses

Defendant argues that the court's "exclusion of defense witnesses" requires the court to grant a new trial. Def. Second Brief at 13. Defendant argues that the testimony of Nota Feinstein, Stan Martin, Neil Westin, Jim Smith and Abe Roth was improperly excluded.

a. Nota Feinstein and Stan Martin

Defendant argues that the testimony of Nota Feinstein and Stan Martin was improperly excluded. These witnesses would have testified about Defendant's charitable donations and good works. As stated in the court's order on the government's motion in limine, "[t]his evidence is not relevant to the charges at issue and is not admissible character evidence. Even if this evidence were relevant, its probative value would be substantially outweighed by the considerations set forth in Federal Rule of Evidence 403." Order (docket no. 677), at 4. Accordingly, the court denies the Second Motion to the extent it seeks a new trial based upon the exclusion of Nota Feinstein and Stan Martin's testimony.

b. Neil Westin

Defendant argues that attorney Neil Westin improperly asserted the attorney-client privilege. Defendant claims that "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." Def. Second Brief at 14.

The court finds that only Agriprocessors' trustee in bankruptcy has the authority to waive Agriprocessors' attorney-client privilege. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985) (holding that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege. . ."). The trustee for Agriprocessors did not waive its attorney-client privilege. Therefore, the court finds that Neil Westin properly asserted the privilege.

Additionally, the court finds that the subject of Westin's testimony would have been largely identical to Billmeyer's testimony. Billmeyer testified that she met with Westin on the morning of the enforcement action. Defendant had the opportunity to cross-examine Billmeyer and ask her specific questions about this meeting. On this basis, the court finds that even if the testimony of Neil Westin was admissible, it was insufficiently probative under Federal Rule of Evidence 403. This testimony would have also been a "needless presentation of cumulative evidence." Fed. R. Evid. 403. Accordingly, the court denies the Second Motion to the extent it asks for a new trial based upon the exclusion of Neil Westin's testimony.

c. Jim Smith and Abe Roth

Defendant argues that "the [c]ourt erred in failing to permit each expert to testify as to matters within their professional knowledge that bore directly upon the issues of 'materiality' of any falsehoods. . . ." Def. Second Brief at 15. The court finds that the testimony of these witnesses would have suggested that the bank had a duty or obligation to discover the alleged fraud. For the reasons stated it its September 23, 2009 Order (docket no. 677), the court finds that this evidence is inadmissible. Defendant was

permitted to present evidence detailing FBBC's reactions to learning about Defendant's acts, however Smith and Roth's testimony would not have been related to this issue. Neither Jim Smith nor Abe Roth was in a position to testify as to what FBBC knew or when FBBC knew it. Accordingly, the court denies the Second Motion to the extent it asks for a new trial due to the exclusion of Jim Smith and Abe Roth's testimony.

2. Jury Instructions

Defendant argues that a number of the jury instructions contained one or more defects that warrant a new trial. The court addresses each of these alleged defects, in turn.

a. Instruction on money laundering

Defendant argues that "[t]he [c]ourt erred in not giving the *Santos* definition of 'proceeds.'" *Id.* The court addressed this issue in Section IV.B.2.e.ii, *supra*. Accordingly, the court denies the Second Motion to the extent it asks for a new trial due to a defective jury instruction on money laundering.

b. Instruction on FDIC insurance

Defendant argues that "the fourth element of bank fraud should have been interpreted so as to require proof that Defendant Rubashkin knew FBBC or [First Bank] was FDIC insured." *Id.* The court addressed this issue in Section IV.B.2.a.ii, *supra*. Accordingly, the court denies the Second Motion to the extent it asks for a new trial due to a defective jury instruction on bank fraud.

c. Instruction on the law of no-match letters

Defendant argues that the court must grant the Motion for a New Trial, because "[t]he court[] fail[ed] to give jury instructions on the legal import of no-match letters." *Id.* at 13. The court notes that the rules regarding "safe harbor" procedures for employers who receive a no-match letter are currently in flux. The United States District Court for the Northern District of California entered a preliminary injunction in *AFL-CIO v. Chertoff*, enjoining the Department of Homeland Security ("DHS") and the Social Security Administration from enforcing a final rule entitled "Safe-Harbor Procedures for Employers

who Receive a No-Match Letter." 552 F.Supp.2d 999, 1015 (N.D.Cal. 2007). The rule at issue in *Chertoff* describes three steps that a "reasonable employer may take" to prevent a DHS finding that the employer had "constructive knowledge that [an] employee was not authorized to work in the United States." Safe Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 2).

The first step calls on a reasonable employer to, within fourteen days, "check its records promptly after receiving a no-match letter, to determine whether the discrepancy results from a typographical . . . or clerical error in the employer's records . . . . If there is such an error, the employer [should] correct its records [and] inform the relevant agencies." *Id.* If the first step fails to resolve the issue, the second step calls on the reasonable employer to "promptly request the employee to confirm that the employer's records are correct. If they are not correct, the employer [should] take the actions needed to correct them." *Id.* The third step describes a "verification procedure that the employer may follow if the discrepancy is not resolved within 60 days of receipt of the no-match letter." *Id.* If the employer follows this procedure, DHS will not regard the employer as having constructive knowledge, even if the employee at issue is an undocumented immigrant. *Id.*

The court finds that an instruction regarding this procedure would be inappropriate. The rule is not yet finalized and is the subject of litigation. In addition, Defendant presented no specific evidence that he performed the steps set forth in the rule. Furthermore, the jury heard evidence that a no-match letter, in and of itself, is not sufficient to find that an employer knowingly harbored undocumented workers. The face of the admitted no-match letters includes this information. The court finds that the government presented the large number of no-match letters as one piece of a collection of evidence detailing Defendant's harboring of undocumented workers. Accordingly, the

court denies the Second Motion to the extent it seeks a new trial due to the court's failure to provide a jury instruction on the law of no-match letters.

d. Instruction on the Packers and Stockyards Act Counts

Defendant argues that "[t]he [c]ourt's substitution of the word willful with 'knowing' was erroneous and an incorrect interpretation of the statute." Def. Second Brief at 16. The court relies on its analysis on this issue previously set forth in its Order denying Defendant's Motion to Dismiss the Packers and Stockyards Act Counts (docket no. 575). In that Order, the court articulated its reasoning for a mens rea requirement of "knowingly" and not "willful:"

> [T]he court resorts to the "usual presumption that a defendant must know the facts that make his conduct illegal. [*Staples v. United States*, 511 U.S. 600, 619 (1994)]. A party "must have had knowledge of the facts, though not necessarily the law," that make an otherwise innocent act illegal. [*Morisette v. United States*, 342 U.S. 246, 271 (1952)]; *see also* [*United States v. Gypsum Co.*, 438 U.S. 422, 446 (1978)] (finding "knowledge of the anticipated consequences" as the proper mens rea for criminal violations stemming from business behavior).

Order (docket no. 575), at 29 n.12. Because the court finds that the jury was properly instructed as to the mens rea required for the Packers and Stockyards Act Counts, the court denies the Second Motion to the extent it asks for a new trial based on a defective jury instruction.

3. Variance of proof

Defendant argues that "[a] prejudicial variance occurred between Counts 1-61 of the Seventh Superseding Indictment. This variance affected the substantial rights of Defendant . . . because it exposed him to double jeopardy as discussed for multiple convictions for the same act." Def. Second Brief at 16. This argument is essentially the same as Defendant's previous multiplicity arguments. "Offenses are considered separate,

and therefore not multiplicitous, if each requires proof of a fact not common to the others." *DaMier v. United States*, 616 F. 2d 366, 370 (8th Cir. 1980) (citing *Ianelli v. United States*, 420 U.S. 770, 785, n. 17 (1975)). The court relies on its previous analysis on multiplicity in the instant Order, and finds that every count of conviction required proof of a fact or facts that the others did not require.

Although Defendant does not articulate the argument as such, the court understands "prejudicial variance" as a term used to describe an indictment that does not "fairly apprise[] the defendant of the charge he or she must meet at trial." *United States v. Begnaud*, 783 F.2d 144, 148 (8th Cir. 1986) (citing *Mathews v. United States*, 15 F.2d 139, 142-43 (8th Cir. 1926)). The court finds that the Indictment "fairly apprised [Defendant] of the charges" he met at trial. *Id.* Therefore, the court denies the Second Motion to the extent it asks for a new trial due to a "variance of proof."

4. Motions for Mistrial

For the reasons stated at trial, the court finds that granting a mistrial would have been inappropriate. The court finds that the government's evidence on the harboring of undocumented workers was sufficient but not greater than necessary to establish the elements of bank fraud and making false statements to a bank. Accordingly, the court denies the Second Motion to the extent it asks for a new trial due to the court's failure to grant Defendant's multiple Motions for Mistrial.

C. Summary

In conclusion, the court finds that none of the grounds discussed above warrant a new trial. Accordingly, the court shall deny the Second Motion to the extent it requests a new trial.

VI. CONCLUSION

In light of the foregoing, the First Motion (docket no. 721) and the Second Motion (docket no. 747) are **DENIED.**

IT IS SO ORDERED.

DATED this 1st day of March, 2010.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

COUNT CONVERSION CHART
UNITED STATES v. RUBASHKIN (PHASE I)
08-CR-1324-LRR

Phase I number	Indictment Number
1	73
2	74
3	75
4	76
5	77
6	78
7	79
8	80
9	81
10	82
11	83
12	84
13	85
14	86
15	87
16	88
17	89
18	90
19	91
20	92
21	93
22	94

Phase I number	Indictment number
23	95
24	96
25	97
26	98
27	99
28	100
29	101
30	102
31	103
32	104
33	105
34	106
35	107
36	108
37	109
38	110
39	111
40	112
41	113
42	114
43	115
44	116
45	117
46	118
47	119

Phase I number	Indictment number
48	120
49	121
50	122
51	123
52	124
53	125
54	126
55	127
56	128
57	129
58	130
59	131
60	132
61	133
62	134
63	135
64	136
65	137
66	138
67	139
68	140
69	141
70	142
71	143
72	144

Phase I number	**Indictment number**
73	145
74	146
75	147
76	148
77	149
78	150
79	151
80	152
81	153
82	154
83	155
84	156
85	157
86	158
87	159
88	160
89	161
90	162
91	163

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

UNITED STATES OF AMERICA, Plaintiff, vs. SHOLOM RUBASHKIN, Defendant.	No. 08-CR-1324-LRR **SENTENCING MEMORANDUM**

TABLE OF CONTENTS

I. INTRODUCTION

The matter before the court is the sentencing of Defendant Sholom Rubashkin.

II. RELEVANT PRIOR PROCEEDINGS

On July 16, 2009, a grand jury returned a 163-count Seventh Superseding Indictment (docket no. 544) against Defendant.[1] Count 1 charged Defendant with Conspiracy to Harbor Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). Counts 2 through 70 charged Defendant with Harboring and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II) and 1324(a)(1)(B)(i). Count 71 charged Defendant with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. Count 72 charged Defendant with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. Counts 73 through 86 charged Defendant with Bank Fraud, in violation of 18 U.S.C. § 1344 ("Bank Fraud Counts"). Counts 87 through 110 charged Defendant with False Statements and Reports

[1] The Seventh Superseding Indictment was preceded by a great deal of procedure, the bulk of which the court need not include in the instant Sentencing Memorandum. Among other matters litigated prior to the Seventh Superseding Indictment was Defendant's pretrial release. Initially, Defendant was on pretrial release. On November 20, 2008, however, United States Magistrate Judge Jon Stuart Scoles revoked Defendant's pretrial release based in part on evidence that suggested that Defendant had committed bank fraud while on release. Defendant asked the undersigned to review Judge Scoles's decision. On January 28, 2009, the undersigned found that there was probable cause to believe that Defendant committed bank fraud while on pretrial release. Order (docket no. 199), at 16. However, the undersigned permitted Defendant to remain on release because there were "'conditions of release that [would] assure that [Defendant would] not flee or pose a danger to the safety of any other person or the community.'" Order at 16 (quoting 18 U.S.C. § 3148).

to a Bank, in violation of 18 U.S.C. § 1014 ("False Statement Counts"). Counts 111 through 124 charged Defendant with Wire Fraud, in violation of 18 U.S.C. § 1343 ("Wire Fraud Counts"). Counts 125 through 133 charged Defendant with Mail Fraud, in violation of 18 U.S.C. § 1341 ("Mail Fraud Counts"). Counts 134 through 143 charged Defendant with Money Laundering and Aiding and Abetting Money Laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 2 ("Money Laundering Counts"). Counts 144 through 163 charged Defendant with Willful Violation of an Order of the Secretary of Agriculture and Aiding and Abetting a Willful Violation of an Order of the Secretary of Agriculture, in violation of 7 U.S.C. § 195 and 18 U.S.C. § 2 ("Packers and Stockyards Act Counts").

On June 25, 2009, the court granted Defendant's Motion for Separate Trial (docket no. 519). The court ordered separate trials on Counts 1 through 74 ("Immigration Counts") and Counts 75 through 143 ("Financial Counts").[2] From October 13, 2009 to November 12, 2009, the court held a jury trial on the Financial Counts, which the court renumbered as Counts 1 through 91. The renumbered Counts are as follows: Counts 73 through 86 became Counts 1 through 14, Counts 87 through 110 became Counts 15 through 38, Counts 111 through 124 became Counts 39 through 52, Counts 125 through 133 became Counts 53 through 61, Counts 134 through 143 became Counts 62 through 71 and Counts 144 through 163 became Counts 72 through 91.

From October 14, 2009 until November 12, 2009, the court held a jury trial on the Financial Counts. On November 12, 2009, the jury returned verdicts of guilty on Counts 1 through 71, 73 through 80, 84 through 89 and 91 (docket no. 736). The jury returned verdicts of not guilty on Counts 72, 81, 82, 83 and 90.

On November 19, 2009, the government filed a "Motion for Leave to Dismiss

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[2] Counts 144 through 163 were charged after the court granted Defendant's Motion for Separate Trial. These counts were tried with the Financial Counts.

without Prejudice" ("Motion to Dismiss") (docket no. 745), which asked the court to dismiss the Immigration Counts without prejudice. On that same date, the court entered an Order (docket no. 746) granting the Motion to Dismiss.

On February 22, 2010, the United States Probation Office ("USPO") released a draft of Defendant's Presentence Investigation Report ("PSIR"). Both parties lodged objections to the PSIR. On April 14, 2010, the USPO released a revised PSIR.

On April 9, 2010, the government filed its Sentencing Memorandum ("Gov't. Sent. Mem.") (docket no. 883). That same date, Defendant filed his Sentencing Memorandum (docket no. 879) and a "Motion for Downward Departure and/or Variance" (docket no. 880). On April 21, 2010, Defendant filed an "Amended Sentencing Memorandum" (docket no. 895) (Def. Sent. Mem.) and an "Amended Motion for Downward Departure and/or Variance" (docket no. 896).

On April 28, 2010, the court commenced Defendant's sentencing hearing ("Hearing"). Assistant United States Attorneys Peter E. Deegan, Jr. and C.J. Williams represented the government. Attorneys F. Montgomery Brown, Guy Cook, Alan Ellis and Adam Zenor represented Defendant, who was personally present. At the Hearing, the court received evidence, heard argument and listened to Defendant's allocution. The court advised the parties that it would take the sentencing issues under advisement, issue a written opinion and then reconvene the Hearing to impose sentence.

All contested issues in Defendant's sentencing are now fully submitted and ready for decision. On June 22, 2010 at 3:30 p.m., the court shall reconvene the Hearing and impose sentence.

III. SENTENCING FRAMEWORK

A "district court should begin [a sentencing proceeding] with a correct calculation of the [defendant's] advisory Sentencing Guidelines range." *United States v. Braggs*, 511 F.3d 808, 812 (8th Cir. 2008). A defendant's Guidelines range "is arrived at after

determining the appropriate Guidelines range and evaluating whether any traditional Guidelines departures are warranted." *United States v. Washington*, 515 F.3d 861, 865 (8th Cir. 2008).

"[A]fter giving both parties a chance to argue for the sentence they deem appropriate, the court should consider all of the factors listed in 18 U.S.C. § 3553(a) to determine whether they support the sentence requested by either party." *Braggs*, 511 F.3d at 812. "The district court may not assume that the Guidelines range is reasonable, but instead 'must make an individualized assessment based on the facts presented.'" *Id.* (quoting *Gall v. United States*, 128 S. Ct. 586, 597 (2007)); *see, e.g.*, *Nelson v. United States*, 129 S. Ct. 890, 892 (2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.").

The district court "has substantial latitude to determine how much weight to give the various factors under § 3553(a)." *United States v. Ruelas-Mendez*, 556 F.3d 655, 657 (8th Cir. 2009); *see also United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc) ("'[I]t will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.'" (quoting *United States v. Gardellini*, 545 F.3d 1089, 1090 (D.C. Cir. 2008)). "If the court determines that a sentence outside of the Guidelines is called for, it 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Braggs*, 511 F.3d at 812 (quoting *Gall*, 128 S. Ct. at 597). "The sentence chosen should be adequately explained so as 'to allow for meaningful appellate review and to promote the perception of fair sentencing.'" *Id.*

IV. EVIDENTIARY RULES

The court makes findings of fact by a preponderance of the evidence. *See, e.g.*, *United States v. Bah*, 439 F.3d 423, 426 n.1 (8th Cir. 2006) ("[J]udicial fact-finding using a preponderance of the evidence standard is permitted provided that the [Sentencing

Guidelines] are applied in an advisory manner."). The court considers a wide variety of evidence, including the undisputed portions of the PSIR, as well as the testimony and other evidence the parties introduced at the Trial and at the Hearing. The court does not "put on blinders" and only consider the evidence directly underlying Defendant's offenses of conviction. In calculating Defendant's Guidelines range, for example, the court applies the familiar doctrine of relevant conduct. *See* USSG §1B1.3 (2008). The Eighth Circuit Court of Appeals has repeatedly held that a district court may consider uncharged, dismissed and even acquitted conduct at sentencing. *See, e.g.*, *United States v. Whiting*, 522 F.3d 845, 850 (8th Cir. 2008). When relevant and "accompanied by sufficient indicia of reliability to support the conclusion that it [was] probably accurate," the court credits hearsay. *United States v. Sharpfish*, 408 F.3d 507, 511 (8th Cir. 2005). The sentencing judge is afforded great discretion in determining the credibility of witnesses and making findings of fact. *United States v. Bridges*, 569 F.3d 374, 378 (8th Cir. 2009).

V. FACTS

The court draws the following facts from the uncontested portions of the PSIR,[3] the trial, Defendant's detention hearings and the evidence presented at the Hearing:[4]

A. Defendant

Defendant is 50 years old. Defendant was born in Brooklyn, New York. At all times relevant to the offenses of conviction, Defendant resided in Postville, Iowa with his wife and children. Defendant is the former Vice President of Agriprocessors, Inc.

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[3] In other words, the court does not consider the objected-to portions of the PSIR that are unsupported by evidence presented at trial or the Hearing. For example, in this case, such portions of the PSIR not considered include, but are not limited to: Agriprocessors' treatment of workers, child labor violations, allegations of the mistreatment of animals, conduct related to unionization efforts and allegations of bribery.

[4] The court makes additional factual findings in conjunction with its conclusions of law.

Agriprocessors was an Iowa corporation based in Postville, Iowa that owned and operated a kosher meatpacking plant. Agriprocessors' founder and sole owner was Abraham Aaron Rubashkin, Defendant's father.

B. Loan Agreement

On September 23, 1999, First Bank Business Capital ("FBBC") and Agriprocessors entered into a lending relationship pursuant to a Credit and Security Agreement ("Credit Agreement"). FBBC is a wholly-owned subsidiary of First Bank, a Missouri-based bank. FBBC is the lending group for First Bank and is primarily involved in commercial loans.

Pursuant to the Credit Agreement, FBBC agreed to lend Agriprocessors up to $35,000,000. FBBC and Agriprocessors also executed an "Exchange Revolving Note" ("Note") in the amount of $35,000,000 in connection with the Credit Agreement. Defendant executed the Note on behalf of Agriprocessors.[5] Defendant executed a $1,000,000 guaranty on the Note. Aaron Rubashkin executed an unlimited guaranty on the Note.

The Credit Agreement used a "borrowing base" formula to calculate Agriprocessors' available credit at any one time. The borrowing base was determined by calculating the current value of Agriprocessors' collateral, including its accounts receivable. Under this formula, Agriprocessors could borrow up to 85% of its "eligible" accounts receivable at a particular time. Agriprocessors' accounts receivable were "eligible" if they remained unpaid and were no more than 60 days old.

Each time Agriprocessors wanted an advance of funds, it was required to provide FBBC with a "Notice of Borrowing." A Notice of Borrowing required Agriprocessors to certify that certain conditions were met. These conditions included that: (1) no default or

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[5] The court hereafter generally refers to FBBC's lending relationship with Agriprocessors, including both the Credit Agreement and Note, as the "loan" or the "loan agreement."

event of default existed under the Credit Agreement; (2) the representations and warranties of the Credit Agreement remained true; (3) the amount requested would not exceed the borrowing base; and (4) all conditions in the Credit Agreement required to obtain an advance on the loan were satisfied. *See* Tr. Ex. 2000 (docket no. 749-11), at pp. 12 & 21. Agriprocessors was always cash-starved and made frequent requests for advances on the loan. At trial, Senior Credit Officer of First Bank, Phil Lykens, testified that, pursuant to the loan agreement, Agriprocessors reaffirmed the loan agreement's warranties and representations each time it submitted an advance request. These warranties and representations included a warranty of compliance with all laws.

Pursuant to the Credit Agreement, Agriprocessors was required to deposit daily customer payments on accounts receivable into a designated account at Decorah Bank & Trust Company. All sale proceeds and collections from accounts receivable were to be held in trust for FBBC in the Decorah Bank & Trust account and were not to be commingled with Agriprocessors' other funds or property.

The Credit Agreement also required Agriprocessors to comply with certain covenants. One such covenant was an agreement to comply with the Packers & Stockyards Act of 1921 ("Packers Act"). Compliance with the Packers Act required Agriprocessors to promptly pay for livestock.

Other covenants included representations to FBBC that: (1) all accounts receivable were genuine and not subject to a Packers Act Trust; (2) Agriprocessors was not in violation of any law that would adversely affect the collateral or Agriprocessors' business, operations or condition; and (3) no document or statement that Agriprocessors furnished to FBBC contained any untrue statement of material fact or omitted facts necessary to make the statements not misleading.

C. Sale of Portion of Interest in Credit Agreement

On September 14, 2007, FBBC sold a $10,000,000 portion of its interest in the

Credit Agreement to MB Financial Bank ("MBFB"). Consequently, FBBC maintained an interest in $25,000,000 of principal on the Credit Agreement.

D. Harboring Undocumented Workers

Elizabeth Billmeyer, the former human resources manager for Agriprocessors, testified at trial that, beginning as early as May of 2002, Agriprocessors began receiving frequent "no-match" letters from the Social Security Administration for a number of Agriprocessors' employees. The "no-match" letters listed Social Security numbers that did not "match" the employee using the number at Agriprocessors. Billmeyer testified that she informed Defendant of the "no-match" problem, and he instructed her not to worry about it. Billmeyer created a list of more than 200 employees with questionable documentation. Additionally, Billmeyer testified that an Immigration and Customs Enforcement ("ICE") agent advised her to stop hiring workers that presented pink-colored Resident Alien Cards, because these cards were no longer valid. Billmeyer informed Defendant of this in an e-mail. In April and May of 2007, and in response to the no-match letters, Billmeyer notified a number of employees that they needed to fix the discrepancies with their social security numbers or be terminated. In response, a number of employees staged a walk-out during business hours. Defendant told these employees that their problems would be solved if they returned to work.

1. Hunt Payroll scheme

Defendant tried to conceal a number of Agriprocessors' undocumented workers by placing them on the Hunt Payroll. The Hunt Payroll was originally used to pay employees who were able to work on the Jewish Sabbath. At trial, Laura Althouse, a lower-level payroll employee, testified that Defendant instructed her to hire applicants who presented pink-colored Resident Alien Cards and add them to the Hunt Payroll. Defendant directed Althouse to conduct this hiring process after hours so Billmeyer would not discover it. Billmeyer testified that Althouse told her Defendant wanted to keep Billmeyer from

learning about the Hunt Payroll scheme because he did not want Billmeyer to know Agriprocessors was hiring these employees.

2. Facts leading up to enforcement action

Brent Beebe and Juan Carlos Guererro-Espinoza assisted certain Agriprocessors employees in obtaining fraudulent employment documents. Beebe was Agriprocessors' Beef Operations Manager. Guererro-Espinoza was Agriprocessors' Beef Shift Supervisor. On or about May 8, 2008, Althouse informed Guererro-Espinoza that some of his employees would be terminated because their employment documents were insufficient. Guererro-Espinoza met with a number of these employees. At this meeting, the employees created a plan to obtain new employment documents. According to the plan, the new employment documents would cost a total of $4,500.

On May 9, 2008, Guererro-Espinoza and Beebe spoke to Defendant about the cost for the new employment documents. Defendant agreed to loan $4,500 to the employees for new employment documents, provided that the money would be repaid. Guererro-Espinoza and Beebe promised they would reimburse Defendant for any amount that the beef kill employees failed to repay. Defendant gave Beebe $4,500, which Beebe gave to Guererro-Espinoza. Guererro-Espinoza gave part of the money to the beef kill employees in need of cash to pay for the new employment documents and kept the remainder. On May 11, 2008, two Agriprocessors employees returned from Minneapolis, Minnesota with new fake employment documents for a number of employees. Immediately thereafter, a group of employees reported to the Human Resources Department and completed new application paperwork using the names and information on the newly-acquired false alien cards. Guererro-Espinoza returned the remaining money to Beebe.

On May 12, 2008, ICE conducted an enforcement action at Agriprocessors. During the enforcement action, federal agents discovered evidence that Agriprocessors employed hundreds of illegal immigrants. Almost 400 undocumented workers were arrested,

charged and convicted of a variety of immigration-related criminal offenses.

E. Agriprocessors and Defendant Defraud FBBC

Defendant defrauded FBBC in various ways. The court describes the various theories of fraud, in turn.

1. Falsely represented that Agriprocessors was in compliance with all laws

First, in a large number of its advance requests, Agriprocessors misrepresented that it was in compliance with all laws when Defendant knew that Agriprocessors was harboring illegal immigrants in violation of federal law.

2. Falsified collateral certificates

Second, Defendant directed Agriprocessors' former controller, Yomtov "Toby" Bensasson, and his colleague, Mitchell Meltzer, to falsify documents to overstate Agriprocessors' accounts receivable. Those overstatements had the effect of artificially increasing Agriprocessors' collateral, which allowed it to borrow more funds from FBBC. At trial, Bensasson testified that Agriprocessors did not submit any accurate collateral certificates to FBBC after September 4, 2007. Defendant directed Darlis Hendry, a former customer service representative at Agriprocessors, to create invoices showing that customers had purchased products that they had not, in fact, purchased. On numerous occasions, Defendant came to Hendry's office holding a piece of paper with a customer name and dollar amount written on it in Defendant's handwriting. Hendry would then create a fake invoice to reflect purchases consistent with the customer name and dollar amount written on the piece of paper. Hendry simply chose any product or combination of products to reach the desired dollar amount. Defendant asked Hendry to store these fake invoices separately from other invoices.

Defendant also directed the creation of false bills of lading to accompany the fake invoices. Defendant directed that the signature of a truck driver, likely to be assigned the route indicated on the false bill of lading, be forged. After Defendant had created a false

sale through a fake invoice and bill of lading, Defendant directed other Agriprocessors employees to manipulate Agriprocessors' internal accounting system, APGEN, to reflect the false sale.

3. Diversion of customer payments

Third, Defendant directed April Hamilton, a former accounts receivable employee at Agriprocessors, to divert customer payments from the Decorah Bank & Trust account to other accounts owned by Agriprocessors. At trial, Hamilton testified that Defendant occasionally directed her to refrain from crediting a customer account after receiving payment from the customer. In addition to his testimony on the creation of false collateral certificates, Bensasson testified that the diversion of customer payments into accounts other than the Decorah Bank & Trust account caused Agriprocessors' accounts receivable to appear higher than they actually were. This effectively inflated Agriprocessors' outstanding accounts receivable, which, in turn, gave Agriprocessors more collateral to borrow against.

4. Illegal financial transactions

At trial, Bensasson testified that Defendant directed him and other Agriprocessors employees to divert customer payments into Agriprocessors' General Operating Account at Citizens State Bank instead of the Decorah Bank and Trust Account, contrary to the loan agreement. Then, Defendant deposited checks from the Citizens State Bank account into either the Torah Education ("TE") account at Citizens State Bank or the Kosher Community Grocery ("KCG") account at Freedom Bank.

Hamilton testified about Defendant's pattern of behavior regarding checks that Agriprocessors received and wrote. Hamilton testified that Defendant provided her with customer payment checks, and he would either give her a check or ask her to write a check from "Agri New York" and deposit the whole amount into Agriprocessors' General Operating Account at Citizens State Bank, despite the fact that the customer payments were

supposed to go to the Decorah Bank & Trust account. Defendant asked Hamilton to obtain checks from Torah Education or Kosher Community Grocery and make "win checks" payable to Agriprocessors.[6] No documentation shows that TE or KCG purchased goods from Agriprocessors. According to Hamilton's testimony, Defendant directed Hamilton to arrive at a round dollar amount, and Hamilton was responsible for creating checks for smaller, odd-numbered amounts to total that round amount. This process made the checks deposited into the Decorah Bank & Trust account appear to be customer payments.

5. Packers Act

At trial, Adam Fast, a Senior Auditor for the United States Department of Agriculture's Packers and Stockyards Program, testified that Agriprocessors was a "packer" within the meaning of the Packers Act. Packers are required to pay for livestock by the close of the next business day following the day of the livestock purchase. Suppliers can waive the prompt payment requirement. However, to be effective, the waiver must be in writing and occur before the sale. On March 7, 2002, an Administrative Law Judge entered an order ("Order") finding that Agriprocessors had violated the Packers Act. The Order directed Agriprocessors and its agents and employees to cease and desist violating the Packers Act. On March 22, 2006, Defendant executed an affidavit in which he avers that he is aware of the Packers Act's requirements.

Shella Chiu, a former accounts payable employee at Agriprocessors, testified that Defendant gave her directions about when to release checks to cattle suppliers. Chiu would prepare a check to pay a supplier the day she received the invoice and wait for direction from Defendant on when to mail it. She placed the checks to the cattle suppliers in envelopes and ran the envelopes through a date-stamp machine. She placed the stamped envelopes on Defendant's desk and he decided when to mail them.

Trial exhibit 3002 contains a summary of checks from Agriprocessors to various

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[6] Win checks are computer-generated checks that do not require a signature.

cattle suppliers. These checks are signed by Defendant, with the exception of the checks relevant to Counts 72, 81, 82, 83 and 90. The postmark and/or receipt dates on the envelopes are several days after the dates Agriprocessors purchased the cattle. Representatives of several entities involved in cattle sales to Agriprocessors testified that payments for cattle purchased by Agriprocessors were untimely under the Packers Act in 2007 through 2008. No evidence was presented that any seller waived its right to timely payments. Suppliers received no explanation from Agriprocessors for late payments.

At the Hearing, Casey Sturgill, a resident agent from the United States Department of Agriculture, Packers and Stockyards Program, testified about the impact certain livestock suppliers faced due to Defendant's violation of the Packers Act. Sturgill testified that one livestock supplier, Waverly Sales, Inc., suffered a loss of $3,800.51 in the time value of money it was owed by Agriprocessors. The government did not present any additional numeric estimation of actual loss suffered by the livestock suppliers.

F. FBBC Suffers Monetary Loss Due to Defendant's Fraud

As a result of Defendant's fraud, FBBC loaned funds to Agriprocessors well in excess of the 85% eligibility formula provided in the loan agreement. In or around October of 2008, FBBC learned about part of Defendant's fraud before it filed a civil action against Agriprocessors for money damages arising out of Agriprocessors' diversion of collateral. *See First Bank Bus. Capital, Inc. v. Agriprocessors, Inc.*, No. 08-CV-1035-LRR (docket no. 1) (setting forth claim against Agriprocessors). At the time FBBC filed the civil action, it believed that Agriprocessors had diverted at least $1.3 million in funds.

On November 4, 2008, Agriprocessors filed a Chapter 11 petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Iowa ("Bankruptcy Court"), case no. 08-2751 ("Bankruptcy Action"). On July 20, 2009, the Bankruptcy Court entered an Order (docket no. 873 in Bankruptcy Action) allowing SHF Industries, LLC ("SHF") to purchase all of Agriprocessors' assets for $8,500,000. On October 8,

2009, the Bankruptcy Action was converted from a Chapter 11 to a Chapter 7 proceeding. SHF changed the name of Agriprocessors to "Agri Star Meat & Poultry, LLC." On December 29, 2009, the Bankruptcy Court entered a Final Decree (docket no. 2071 in Bankruptcy Action).

At the Hearing, FBI Special Agent Randy Van Gent testified about a telephone conversation he had with Lykens and Brian Dickman several months prior to the Hearing.[7] Dickman is a special asset manager for FBBC. Dickman took responsibility for the loan during Lykens's absence from FBBC. Dickman stated that FBBC had calculated its actual loss on the loan to be $29,944,981. This amount reflected the principal balance due on the loan after offsetting it with proceeds from the loan collateral, including proceeds from the sale of accounts receivable, inventory and a certificate of deposit from Aaron Rubashkin. Of that amount, $20,650,966 was due and owing to FBBC and $9,294,015 was due and owing to MBFB. Although $2,600,000 in interest had accrued on the loan, this amount was not included in Dickman's calculation of the principal balance due and owing.

S/A Van Gent testified that, as of February 1, 2010, certain collateral had not yet been applied to the principal. This collateral included: (1) $254,888 in unapplied cash; (2) $186,674 in postdated checks on accounts receivable; (3) $200,000 from the sale of equipment from Agriprocessors' plant in Gordon, Nebraska; (4) $1,984,000 from potential tax refunds; and (5) $400,000 from the sale of Agriprocessors' trademarks. S/A Van Gent testified that, if these credits were applied to the outstanding principal, the outstanding principal amount would be $26,919,419. Of that amount, 69%, or $18,574,399.11, was attributable to FBBC, and 31%, or $8,345,019.89 was attributable to MBFB.

S/A Van Gent testified that he spoke to Lykens the day prior to the Hearing and received updated figures relevant to FBBC's losses. Lykens told S/A Van Gent that the

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[7] S/A Van Gent testified that Lykens left FBBC in December of 2009 and returned to FBBC in March of 2010.

updated outstanding principal balance was $29,501,340. This figure included the $254,888 in previously unapplied cash and $136,674 in postdated checks on accounts receivable (leaving a balance of $50,000 on postdated checks). S/A Van Gent also learned that FBBC had received $10,679 in additional accounts receivable payments and that Agriprocessors' claimed tax refund had increased by $388 to $1,984,388. Figures related to the trademarks and equipment at the Gordon, Nebraska plant remained unchanged. S/A Van Gent testified that FBBC's loss was further offset by a $60,000 restitution payment from Bensasson, of which 69%, or $41,400, was paid to FBBC. Van Gent testified that this reduced the total amount of loss by $52,467. After these deductions, S/A Van Gent testified that the total amount of outstanding principal was approximately $26,866,952, which does not account for the portion of Bensasson's restitution payment presumably paid to MBFB, which the court calculates to be $18,600. This would bring the amount of actual loss to $26,848,352. According to the court's calculations, of this amount, $18,525,362.88 is attributed to FBBC and $8,322,989.12 is attributed to MBFB. These amounts exclude any debtor-in-possession ("DIP") financing FBBC extended to Agriprocessors during the Bankruptcy Action.

Abraham Roth, an accountant and friend of Defendant, testified as an "expert witness" at the Hearing. Roth testified that, based on his calculations, the total amount of loss was $4.5 million.

G. Mordechai Korf Offers to Purchase FBBC's Position in Bankruptcy

In November of 2008, before the Bankruptcy Court appointed a trustee in the Bankruptcy, Mordechai Korf offered to purchase FBBC's position in the Bankruptcy Action for $21.5 million to $22 million, a significant discount from the amount Agriprocessors owed FBBC. Korf initially expressed his interest in purchasing Agriprocessors in or around October of 2008. Korf recalled that he had a difficult time arranging to meet with FBBC personnel to discuss the potential purchase. Eventually,

Korf met with Lykens and FBBC Chairman Dennis Herstein. Korf explained that he did not need any financing to complete this purchase. Korf also assumed that a substantial amount of accounts receivable collateral was unrecoverable. At the meeting, Lykens and Herstein stated that they believed FBBC had exposure in the amount of $27 to $29 million. Lykens and Herstein rejected Korf's offer without counteroffering and closed the negotiations. Korf did not participate in the subsequent auction of Agriprocessors.

VI. ISSUES

The instant Sentencing Memorandum addresses the following contested Guidelines issues: (1) the amount of loss, as calculated pursuant to USSG §2B1.1(b)(1); (2) the number of victims, as calculated pursuant to §2B1.1(b)(2)(A); (3) whether Defendant used sophisticated means to commit bank fraud, pursuant to §2B1.1(b)(9)(C); (4) whether the court should apply the sophisticated money laundering enhancement in §2S1.1(b)(3); (5) whether Defendant had a supervisory role in the offense, pursuant to §3B1.1; (6) whether Defendant abused a "position of trust" as defined by §3B1.3; and (7) whether the court should assess a two-level upward adjustment for obstruction of justice, pursuant to §3C1.1. The government bears the burden of proof on all of these issues. *See United States v. Flores*, 362 F.3d 1030, 1037 (8th Cir. 2001) (stating that the government bears the burden to prove sentencing enhancements). The parties also make a number of arguments related to departures, variances, Defendant's ability to pay a fine and restitution. These arguments are also addressed in the instant Sentencing Memorandum.

The parties also contest a number of factual findings set forth in the PSIR.[8] To the

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[8] In addition to various specific objections to the PSIR, Defendant lodges a categorical objection to the offense conduct discussed and described by the PSIR. The Eighth Circuit Court of Appeals "'require[s] that objections to the [PSIR] be made "with specificity and clarity" before a district court is precluded from relying on the factual statements contained in the [PSIR].'" *United States v. Davis*, 583 F.3d 1081, 1095 (8th Cir. 2009) (quoting *United States v. Razo-Guerra*, 534 F.3d 970, 975 (8th Cir. 2008)). (continued...)

extent these factual disputes are relevant to the Guidelines analysis set forth below, the court makes findings on these objections in conjunction with its conclusions of law. Because the remaining factual objections are not relevant to the court's analysis of the Guidelines issues discussed below, the court declines to address them in the instant Sentencing Memorandum.

VII. CHAPTER 2: SPECIFIC OFFENSE CHARACTERISTICS

The parties agree that, in order to calculate Defendant's pre-departure adjusted offense level, the court must analyze Defendant's offense conduct pursuant to two Guidelines provisions: (1) USSG §2B1.1 (Bank Fraud); (2) and §2S1.1 (Money Laundering). Because the Money Laundering provision requires a calculation of Defendant's offense level under the Bank Fraud provision as a prerequisite, the court begins its analysis by determining Defendant's offense level pursuant to the Bank Fraud provision. Then, the court turns to calculate Defendant's offense level under the Money Laundering provision.

A. Bank Fraud

The parties agree that, pursuant to the Bank Fraud Guidelines provision in USSG §2B1.1(a)(1), Defendant's base offense level is **7**. Defendant disputes the application of each specific offense characteristic advocated by the government: (1) a **22**-level increase for an amount of loss between $20 million and $50 million, pursuant to §2B1.1(b)(1)(L); (2) a **2**-level enhancement because the offense involved 10 or more victims, pursuant to §2B1.1(b)(2)(A)(i); and (3) a **2**-level enhancement because the offense involved sophisticated means, pursuant to §2B1.1(b)(9)(C). The court discusses each specific

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[8](...continued)
Specific objections are required because they "'put the [g]overnment on notice of the challenged facts' which the government will need to prove at the sentencing hearing." *Razo-Guerra*, 534 F.3d at 976. Therefore, the court overrules Defendant's categorical objection to the offense conduct statement.

offense characteristic, in turn.

1. Amount of Loss: §2B1.1(b)

The parties dispute the amount of loss. The government advocates for a loss calculation between $20 million and $50 million. This amount of loss would give rise to a **22**-level upward adjustment. *See* USSG §2B1.1(b)(1)(L) & (M) (stating that the offense level should be increased by **22** for a loss between $20,000,000 and $50,000,000). Defendant objects to this loss calculation. Defendant argues that this amount of loss was not reasonably foreseeable and resulted from an independent intervening cause. Defendant argues that the actual amount of loss is only $4,500,000, which merits an upward adjustment of **18**. *See* USSG §2B1.1(b)(J) & (K) (providing for upward adjustment of 18 when amount of loss is between $2,500,000 and $7,000,000).

"As a general rule, 'loss is the greater of actual loss or intended loss.'" *United States v. Waldner*, 580 F.3d 699, 705 (8th Cir. 2009) (quoting USSG §2B1.1, cmt. (n.3(A)). "'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense, while 'intended loss' (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur." *Id.* (citing USSG §2B1.1 cmt. (n.3(A)(i-ii)) (internal quotation marks omitted). The government argues that the actual loss calculation governs the instant sentencing. Defendant impliedly agrees; he argues that he did not intend or foresee that FBBC would suffer a loss in excess of $20 million. Accordingly, the court focuses only on actual loss in this portion of the analysis.

"Because the loss caused by fraud is often difficult to determine precisely, 'a district court is charged only with making a reasonable estimate of the loss.'" *Id.* (quoting *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009)). In calculating the amount of loss, the court considers various credits against the loss, such as the sale of pledged collateral:

> Credits Against Loss.—Loss shall be reduced by the following:

> (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
>
> (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

USSG §2B1.1 cmt. (n.3(E)).

a. Amount of loss: victim banks

With respect to the victim banks, the court finds that the actual amount of loss is $26,848,352. The court arrives at this figure by relying on the facts discussed in § V.F. According to the court's calculations, of this amount, $18,525,362.88 is attributed to FBBC and $8,322,989.12 is attributed to MBFB. In arriving at this conclusion, the court finds that, while Defendant was a Vice President of Agriprocessors, Defendant directed Agriprocessors employees to create fraudulent invoices, divert customer accounts receivables and misrepresent Agriprocessors' compliance with various laws. As a result of Defendant's fraud, FBBC loaned Agriprocessors funds that it believed were adequately secured by collateral. Had FBBC known about the various misrepresentations by which Defendant was defrauding it, it would not have continued to loan Agriprocessors funds. In making this finding, the court considers the trial evidence and S/A Van Gent's testimony at the Hearing. This amount reflects all possible deductions and offsets against collateral as of the date of the Hearing. This amount excludes interest accrued and owing on the

principal balance.[9]

At the Hearing, Defendant argued that the government could not prove that Agriprocessors had inflated the value of its accounts receivables between September of 1999 and April of 2006. Defendant argued that, somehow, the first $20 million was not subject to inflated invoices, making it "pristine and clean." The evidence presented at trial clearly demonstrates otherwise. Bensasson testified that he became aware that Agriprocessors was inflating its sales figures and accounts receivables in 1997 or 1998.

Defendant also contended that the loss figures were inaccurate because they did not properly account for the reported $11 million in frozen and fresh meat inventory in Agriprocessors' warehouses at the time Agriprocessors filed for bankruptcy that has since been sold or otherwise disposed of. However, at trial, Bensasson and Meltzer testified that part of the fraud at Agriprocessors included Defendant's manipulation of Agriprocessors' inventory. Additionally, at the Hearing, S/A Van Gent testified that, typically, when assets are liquidated in a bankruptcy, they are worth far less than their actual value. Accordingly, the court finds that the amount of inventory Agriprocessors claimed to have when it filed for bankruptcy does not affect the court's calculation of the victim banks' actual loss.

Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Action, Paula Roby, testified that there was no such condition attached to the sale of Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the

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[9] "Loss shall not include [. . .] [i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs." USSG §2B1.1 cmt. (n.3(D)(i)).

court declines to consider this theory in arriving at an actual loss calculation.

Below, the court considers the various other theories Defendant proffered at the Hearing in an effort to reduce the amount of actual loss. Defendant has insufficient evidence to support these theories. Additionally, many of these theories are fundamentally flawed in that they disregard the general effect a bankruptcy has on the value of assets of the estate. Accordingly, the court declines to consider them in arriving at the actual loss calculation.

i. Foreseeability

Defendant argues that a substantial amount of loss was not reasonably foreseeable. "'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.'" USSG §2B1.1 cmt. (n.3(A)(i)). "'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known was a potential result of the offense." *Id.* at cmt. (n.3(A)(iv)).

Defendant argues the amount of pecuniary loss was not foreseeable to him because:

> 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 [a] substantial recovery from the assets on which it held the first secured interest.

Def. Sent. Mem. at 32.

Defendant's argument fails to consider the impact of a massive fraudulent scheme on the value of a company. The court agrees that it is not reasonable for a defendant to assume that, "in the wake of the failure of a loan due to a massive fraud, every nickle of every real account receivable will be recovered." Gov't Sent. Mem. at 29. Given the fact that Defendant knew he was causing FBBC to loan against approximately $10 million in fake invoices and was diverting millions of dollars of FBBC's collateral, a reasonable

person would have foreseen a loss well in excess of $20 million. Accordingly, the court finds that the amount of FBBC and MBFB's loss was reasonably foreseeable to Defendant.

ii. Intervening cause

Defendant also argues that the amount of actual loss is well below $20 million due to intervening acts taken by FBBC that devalued the loan collateral. Specifically, Defendant argues that FBBC took an unreasonable position with respect to Korf's offer to purchase FBBC's position in the bankruptcy in November of 2008 and that its "greed" caused it to suffer more pecuniary loss than it would have suffered by Defendant's actions alone. Def. Sent. Mem. at 34. In support of this argument, Defendant cites *United States v. Rutkoske*, 506 F.3d 170, 178-79 (2d Cir. 2007) and *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). *Rutkoske* and *Olis* are securities fraud cases and are materially distinguishable from the instant case. In *Rutkoske*, the Second Circuit Court of Appeals recognized that, in securities fraud cases, "[m]any factors may cause a decline in share price between the time of the fraud and the revelation of the fraud." *Rutkoske*, 506 F.3d at 179. The Second Circuit Court of Appeals held that, in those cases, "'losses from causes other than the fraud must be excluded from the loss calculation.'" *Id.* (quoting *United States v. Ebbers*, 458 F.3d 110, 128 (2d Cir. 2006)). *Rutkoske* stressed the necessity to distinguish loss caused from fraud from loss caused by typical economic market factors. *Id.* *Olis* reached a similar conclusion. *Olis*, 429 F.3d at 546 (stating that "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines"). Both cases encouraged sentencing courts to apply the loss causation analysis employed in the civil arena pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b). *Id.*; *Rutkoske*, 506 F.3d at 179.

In the instant bank fraud action, "[t]he appropriate test is not whether market factors impacted the amount of loss, but whether the market factors and the resulting loss were

reasonably foreseeable." *Parish*, 565 F.3d at 535. Additionally, the victim banks are creditors of Agriprocessors—not shareholders. Therefore, the financial instrument at issue is the loan agreement—not a security. As a result, the amount of the victim banks' loss is based on the amount of money Agriprocessors owed them and failed to repay due to Defendant's fraud—not on any fluctuating market factors that affect the value of a security. Accordingly, the court conducts its loss analysis in a manner consistent with §2B1.1; that is, the court determines the amount of actual loss by calculating foreseeable pecuniary harm that resulted from the Defendant's offense conduct and offsetting it by certain credits designated in comment 3(E).

Even if the court assumes Defendant is correct and applies the rationale in *Rutkoske* and *Olis* by considering the impact of outside market factors on the amount the victim banks were able to recover from Agriprocessors, it makes no difference to the analysis. Korf's offer had no impact on the amount of money the victim banks recovered from Agriprocessors. Korf's offer was to buy out the bank's position with respect to Agriprocessors at a significant discount. Because Lykens and Herstein were unaware of the extent of Defendant's fraud at the time of the offer, they decided FBBC should not pursue the offer and chose to pursue Agriprocessors through the bankruptcy trustee. At the time of the offer, FBBC was only aware of approximately $1.4 million in diverted funds. The true scope of the fraud was not discovered until January of 2009, when the Trustee began having difficulty collecting on Agriprocessors' accounts receivables. In other words, FBBC's rejection of Korf's offer did not depreciate the value of Agriprocessors or otherwise cause any loss to the victim banks. Futher, if Korf was truly interested in pursing FBBC's position in the Bankruptcy Action, he could have participated in the auction to purchase Agriprocessors. In light of these facts, the court concludes that FBBC did not unreasonably decline Korf's offer and cause itself to incur substantial pecuniary losses.

iii. Defendant's calculation of actual loss of victim banks

Defendant also asks that the court calculate the victim banks' actual loss in the following manner: (1) by "reasonabl[y] estimat[ing]" the loss caused by Defendant to be "85% of the fraudulent invoices, or approximately $8.5 million"; and (2) by further reducing this loss "by the amount of interest earned on the fraudulent invoices," which Roth has calculated to be approximately $4 million. Def. Sent. Mem. at 35. According to Defendant, this brings the actual loss to "approximately $4.5 million[.]" *Id.*

The court agrees that Defendant "appears to want full credit for the face value of all actual accounts receivable which supported the loan—regardless of their actual value to the victim[] banks upon liquidation." Gov't Sent. Mem. at 28. Defendant's calculation ignores the actual liquidated value of Agriprocessors. When offsetting the amount of actual loss, the court takes into account "the *amount the victim has recovered* at the time of sentencing from disposition of the collateral"—not the amount outstanding on the accounts receivable. USSG §2B1.1 cmt. (n.3(E)).

Further, the court notes that, among other questionable accounting methods, Defendant's witness, Abe Roth arrived at the $4.5 million loss figure by assuming that the victim banks should have unilaterally engaged in an investigation of Agriprocessors' fraud—the same fraud that Defendant took great pains to conceal. In other words, Roth argues that the victim banks' vulnerability to Defendant's fraud makes them responsible for their own loss. This argument is based on conjecture and a definition of "loss" so far removed from common sense and the advisory Sentencing Guidelines that the court declines to afford it any further consideration. Accordingly, the court completely disregards Roth's testimony.

b. Losses suffered by cattle suppliers

Next, the court turns to consider the actual losses suffered by the cattle suppliers. The parties agree that Agriprocessors failed to pay more than twenty livestock suppliers

within the time mandated by the Packers Act. At trial, the government presented evidence that Defendant directed Agriprocessors employees to intentionally delay payment to these livestock suppliers. The trial evidence also showed that, although Agriprocessors failed to pay these suppliers on time, all of them eventually received payment for the livestock they sold to Agriprocessors.

Defendant argues that the livestock suppliers did not really suffer a loss because they were ultimately paid in full. The government argues that, as a result of Defendant's conduct, the livestock suppliers suffered an actual loss because "they all lost the time value of their money while they were waiting for payment." Gov't Sent. Mem. at 25. The government states that one livestock supplier, Waverly Sales, Inc., "quantified the amount of [its] loss to be $3,800.51." *Id.* However, the government did not provide any other quantifiable data from which the court can reasonably estimate actual loss for any other livestock supplier. The court acknowledges that Defendant likely caused the other livestock suppliers to lose the time value of money while they waited for their payment from Agriprocessors. However, without a basis for the court to approximate this loss, it is unable to make a finding on the amount of loss applicable to the other livestock suppliers. *See* USSG §2B1.1 cmt. (n.3(C)) (stating that the court needs to make at least a "reasonable estimate of the loss"). The court is unwilling to guess the amount of loss the other livestock suppliers suffered, particularly when the time value of money likely varied from one livestock supplier to another. The government has also failed to set forth the "average loss to each [livestock supplier]," which the court could have extrapolated to each supplier. USSG §2B1.1 cmt. (n.3(C)(iv)). Accordingly, the court is only able to find that one livestock supplier, Waverly Supplies, Inc., suffered an actual loss.

c. Application

In conclusion, the court finds that, after offsetting the amount of loss by the amounts recovered on the collateral, the government has satisfied its burden to show that

Defendant's conduct caused the victim banks to a suffer a combined loss of $26,848,352. The court also finds that Defendant's conduct caused Waverly Sales, Inc. to suffer an actual loss of $3,800.51. Because this combined amount falls between $20,000,000 and $50,000,000, the court shall increase Defendant's offense level by **22**. USSG §2B1.1(b)(1)(L). This brings Defendant's offense level to **29**.

2. Number of victims: USSG §2B1.1(b)(1)(A)(i)

The parties dispute whether the court should apply the upward adjustment in USSG §2B1.1(2)(A), which directs the court to apply a two-level upward adjustment if the offense involved 10 or more victims. A "victim" is "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense." USSG §2B1.1 cmt. (n.1).

As previously stated, the court found that the victim banks, FBBC and MBFB, both suffered millions of dollars in actual loss. The court also found that Waverly Sales, Inc. suffered a loss due to the lost time value of the money Agriprocessors owed it. The government argues that the other livestock suppliers are victims. The court recognizes that Defendant's conduct subjected the other livestock suppliers to a genuine financial strain. However, because the government failed to present sufficient evidence for the court to determine the amount of loss that these other livestock suppliers suffered, these other livestock suppliers are not "victims" as defined by §2B1.1 cmt. (n.1). When an individual or entity has not suffered any part of the actual loss determined under §2B1.1(b)(1)(L) or bodily injury, that individual or entity cannot be considered a "victim" for purposes of §2B1.1(b)(2)(A). *See United States v. Miller*, 588 F.3d 560, 567-68 (8th Cir. 2009) ("We have already determined that the district court did not clearly err in determining that the government failed to prove any actual loss in this case. It necessarily follows that there were no 'victims' within the meaning of USSG §2B1.1(b)(2)(A)(i).").

Because the court declines to consider any livestock provider other than Waverly

Sales, Inc. as a "victim," there are only three victims at issue in this case: FBBC, MBFB and Waverly Sales, Inc. Therefore, the court shall not apply the 2-level upward adjustment for 10 or more victims in USSG §2B1.1(b)(2)(A)(i).[10]

3. Sophisticated means: USSG §2B1.1(b)(9)(C)

The parties dispute whether the court should apply the upward adjustment in USSG §2B1.1(b)(8)(C), which directs the court to increase Defendant's offense level by **2** if the bank fraud involved "sophisticated means."[11] Defendant objects to the enhancement, arguing that "[t]he alleged commission of this offense was completed by submission of false borrowing base certificates to the lender. This is the most straightforward method by which a lendee may seek to obtain more monies from a[] lender under an asset-based loan." Objections to Draft Pre-Sentence Investigation Report (docket no. 86), at 26-27.

a. Analysis

"The enhancement for sophisticated means applies when the offense involves 'especially complex or [. . .] intricate offense conduct pertaining to the execution or

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[10] Defendant argues that this case only involved one victim, FBBC. Defendant contends that MBFB was not a victim because it was not in privity of contract with Agriprocessors. Defendant provides no legal support for this argument and the court shall disregard it. As previously stated, the basis for determining actual loss is whether Defendant caused a reasonably foreseeable pecuniary harm to an individual or entity. The court finds that it was reasonably foreseeable that Defendant's bank fraud would cause injury to MBFB. Defendant also argues that no livestock providers are victims because they were all repaid and suffered no loss. To the extent this argument relates to Waverly Sales, Inc., the court disagrees. The court finds that it was reasonably foreseeable that Defendant's intentional delay tactics with respect to its payments to Waverly Sales, Inc. would cause Waverly Sales, Inc. to suffer pecuniary harm in the amount of $3,800.51. In any event, Defendant's arguments related to these issues make no difference to the application of this enhancement because the court declines to apply the additional 2-level increase for 10 or more victims.

[11] The government incorrectly cites the sophisticated means enhancement at §2B1.1(b)(8)(C) instead of §2B1.1(b)(9)(C).

concealment of an offense." *United States v. Septon*, 557 F.3d 934, 937 (8th Cir. 2009) (citing USSG §2B1.1 cmt. 8(b)). "Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." USSG §2B1.1 cmt. 8(b). In addition to the examples enumerated by the Guidelines, courts have applied the enhancement when a defendant's scheme involved a "multi-layered plot," when a defendant "created and used numerous false documents," when a "defendant's scheme was not a single fraudulent act, but a complex series of fraudulent transactions" and when a defendant's scheme involved forged notary stamps. *United States v. Edelmann*, 458 F.3d 791, 816 (8th Cir. 2006) (internal quotation marks omitted).

The court finds that the USPO correctly scored the two-level upward adjustment for sophisticated bank fraud. Defendant mischaracterizes the manner in which he committed bank fraud. The offense conduct involved more than the simple "submission of false borrowing base certificates to the lender." Defendant's conduct constituted "a complex series of fraudulent transactions." *Id.* The sheer number of false documents created over a long period of time justifies the enhancement. *Id.* (upholding the sophisticated means enhancement when the defendant "created and used numerous false documents, including multiple years of federal tax returns, supporting federal tax documents, [. . .] bank statements[. . .] , Articles of Incorporation [. . .] profit and loss statements, and a series of bank letters"). Over a period of many years, Defendant created numerous false invoices, bills of lading and collateral certificates.

Many of these documents contained forgeries. For instance, Defendant created false bills of lading to accompany the false invoices. In an effort to make the bills of lading look as legitimate as possible, Defendant directed that an Agriprocessors employee forge the signature of a truck driver likely to be assigned the route indicated on the false bill of lading. In another effort to appear legitimate, Defendant went to great lengths to

manipulate records in Agriprocessors' computer-based accounting system (APGEN) to reflect the number of false sales created by falsifying invoices and bills of lading so that the fraud would not be detected during routine audits. Defendant falsified the invoices and other documents and manipulated the accounting system in order to hide Agriprocessors' actual financial situation from FBBC. Accordingly, the court finds that Defendant committed bank fraud using sophisticated means.

b. Application

In light of the foregoing, the court shall apply the **2**-level enhancement in §2B1.1(b)(9)(C). This brings Defendant's offense level to **31**.

4. Summary

In summary, the court finds that Defendant's base offense level for Bank Fraud under USSG §2B1.1 is **31**. The court now turns to determine Defendant's base offense level for Money Laundering under USSG §2S1.1.

B. Money Laundering[12]

Pursuant to the Money Laundering Guidelines provision in USSG §2S1.1(a)(2), Defendant's base offense level is **31**.[13] The parties agree that the court should apply a **2**-

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[12] Defendant objects to the court's reliance on §2S1.1. Defendant argues that, because the government failed to prove that the money laundering offense involved "profits," his sentence cannot be based on this Guidelines provision. For the reasons stated in the Order (docket no. 854) in which the court denied Defendant's Motion for Directed Verdict, Motion for Judgment of Acquittal and Motion for New Trial, the court overrules this objection. Defendant also objects to the calculation of the Money Laundering base offense level to the extent it incorporates the base offense level calculated pursuant to §2B1.1. For the same reasons the court overruled the objections with respect to the amount of actual loss and sophisticated means, the court incorporates that analysis in the instant section and overrules Defendant's objection.

[13] Section 2S1.1 provides:

(a) Base Offense Level:

(continued...)

level increase because he "was convicted under 18 U.S.C. § 1956." *Id.* at §2S1.1(b)(2)(B). This brings Defendant's base offense level to **33**. Defendant disputes that the court should apply a **2**-level enhancement pursuant to §2S1.1(b)(3), which provides for a **2**-level increase "if (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering[.]" *Id.* at §2S1.1(b)(2)(C). Accordingly, the court turns to consider the sophisticated laundering enhancement.

1. Sophisticated laundering: USSG §2S1.1(b)(3)

According to the commentary, sophisticated laundering is "complex or intricate offense conduct." USSG §2S1.1, cmt 5(A). It "typically" involves "fictitious entities," "shell corporations," "two or more levels (i.e., layering) of transactions" or "offshore financial accounts." *Id.*

a. Analysis

The parties agree that Defendant's money laundering did not involve fictitious entities or offshore financial accounts. The government argues that "while [KCG and TE] were not fictitious, they functioned as shell corporations for the purpose of Defendant's money laundering scheme." Defendant asserts that KCG and TE were not shell corporations. "A shell corporation is a company that is incorporated, but has no significant assets or operations." *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 737 (7th Cir. 2008) (internal quotation marks omitted). Shell corporations "typically have no physical

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[13](...continued)

> (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense [. . .]; and (B) the offense level for that offense can be determined; or
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> (2) **8** plus the number of offense levels from the table in §2B1.1 [. . .] corresponding to the value of the laundered funds, otherwise.

presence (other than a mailing address) and generate little or no independent economic value." *Id.* (internal quotation marks omitted). The government has failed to present evidence that KCG and TE were shell corporations. Furthermore, the evidence presented at trial and the Hearing indicated that KCG and TE did have a physical presence, independent operations and independent economic value. Accordingly, the court finds that KCG and TE were not shell corporations.

The government also asserts that Defendant's money laundering offenses involved two or more levels of transactions. Defendant argues that his conduct simply involved "the diversion of payments into other accounts that Agriprocessors clearly and openly controlled, and then repaying the funds to the bank." Def. Sent. Mem. at 43. This characterization of Defendant's laundering misstates the evidence presented at trial. The court finds that Defendant's money laundering involved two or more levels of transactions. Defendant caused customer payments to be diverted from the depository account to another account controlled by Agriprocessors. From there, the funds were deposited into either KCG or TE's account before the payments were returned to Agriprocessors and then to FBBC. This involves two or more layers of transactions. It is of no consequence that each individual layer was not particularly sophisticated. *See United States v. Pizano*, 421 F.3d 707, 731 (8th Cir. 2005) ("The guideline does not require a finding that each layer was composed of a complex transaction.").

b. Application

Because Defendant's laundering involved two or more layers of transactions, the court shall apply the 2-level upward adjustment for sophisticated laundering.[14] This brings

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[14] The court notes that it did not base the upward adjustment pursuant to §2B1.1(b)(9)(C) for bank fraud committed with sophisticated means on the same conduct on which it based the enhancement for sophisticated laundering. The commentary regarding sophisticated laundering states that the court shall not apply the enhancement (continued...)

Defendant's offense level to **35**.

2. Conclusion

In conclusion, the court finds that Defendant's offense level for money laundering is **35**. The court now turns to consider various sentencing adjustments in Chapter 3 of the Guidelines.

VIII. CHAPTER THREE ADJUSTMENTS

The court turns to consider the application of the following Chapter Three adjustments: (1) a **4**-level increase if Defendant "was an organizer or leader of a criminal activity that involved five or more participants," pursuant to USSG §3B1.1(a); (2) a **2**-level increase if Defendant "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense," pursuant to §3B1.3; and (3) a **2**-level increase for obstruction of justice, pursuant to §3C1.1. Defendant argues that none of these adjustments should apply.

A. Organizer or Leader: USSG §3B1.1(a)

Section 3B1.1(a) provides: "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels." "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." USSG §3B1.1 (introductory commentary). Accordingly,

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[14](...continued)
when "the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense [bank fraud] is the only conduct that forms the basis for application of [the sophisticated laundering enhancement]." USSG §2S1.1, cmt. 5(B). The court finds that Defendant committed bank fraud with sophisticated means primarily by creating an intricate system using numerous false documents, some of which contained forged signatures. The court finds that Defendant committed sophisticated laundering by laundering the diverted customer payments through two or more "layers."

the court considers all relevant conduct in determining Defendant's role. Application Note 4 distinguishes a "leader" from one who is involved in "mere management or supervision":

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

USSG §3B1.1 (cmt.) 4.

1. Analysis

Defendant argues that it is "factually inaccurate to characterize him as an organizer of the offense," because "he lacked significant decision making authority that would have allowed him to stop the illegal conduct."[15] Def. Sent. Mem. at 38. Defendant also argues that the fact he did not "claim a right to a larger share of the fruits of the crime," or "personally gain from the offense" demonstrates that this enhancement should not apply. Defendant does not dispute that there were five or more participants in the relevant criminal activity.

Even if the court assumes without deciding that Defendant did not have a claim to

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[15] Although Defendant objects to the application of a 4-level enhancement for being an "organizer or leader" pursuant to §3B1.1(a), he concedes that a 3-level enhancement for being a "manager or supervisor (but not an organizer or leader)" pursuant to §3B1.1(b) is warranted.

a larger share in the fruits of the crime and did not personally gain from the offense,[16] the balance of the factors set forth in comment 4 weigh heavily in favor of a finding that Defendant was an organizer or leader. Among other reasons, the court finds that Defendant was a leader or organizer of the offense because he: (1) directed Hendry to create fake invoices and bills of lading; (2) told Hamilton to divert customer payments to different accounts and to refrain from posting payments to the customer accounts receivable; (3) directed Hamilton to maintain a separate set of books in order to keep track of actual accounts receivable; (4) directed Hamilton to add "round-up" checks to the deposits containing diverted checks in order to conceal the nature of the deposits; (5) directed Meltzer to write a personal check with the subject line "meat" as a round-up check; (6) directed Bensasson, and, in Bensasson's absence, Meltzer, to submit fraudulent advance requests and collateral certificates to FBBC; (7) directed Bensasson to fraudulently manipulate Agriprocessors' monthly financial statements; (8) directed Billmeyer to create a list of no-match employees and then prevented her from taking any action to resolve the issues surrounding those employees; (9) directed Althouse to place workers who did not have proper work identification on the Hunt payroll behind Billmeyer's back; (10) financed a scheme to help certain undocumented Agriprocessors workers obtain new fake employment identification documents with the assistance of Beebe, Guerrero-Espinoza and another beef employee who traveled to Minnesota to obtain false employment documents; and (11) personally inspected new fake documents on the Sunday immediately prior to the enforcement action as the fraudulent re-hiring took place.

Based on these facts, the court finds that Defendant exercised significant decision-making authority in the hatching and execution of the fraudulent scheme. He directed subordinate employees on the manner and means of committing bank fraud, money

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[16] Defendant's fraudulent conduct kept the family business alive from which Defendant withdrew a substantial salary and monetary payments for his personal expenses.

laundering and harboring. The nature of Defendant's participation also demonstrates that, although he was not the owner of Agriprocessors, he was in charge. He himself rarely, if ever, drafted the false documents necessary to commit and conceal the bank fraud. These tasks were left to lower-level employees. Similarly, he directed Billmeyer, Althouse, Beebe and Guererro-Espinoza to maintain Agriprocessors' harboring of undocumented workers. The evidence shows that Defendant made it a point to remove himself from the details of the harboring scheme. Defendant also had sufficient control to direct his subordinate employees to adjust their behavior over time to continue concealing and perpetrating the fraud and harboring as it snowballed into a larger and more complicated scheme. Defendant also recruited others to commit various crimes. For example, when Billmeyer refused to take certain action with respect to harboring undocumented workers, Defendant directed Althouse to take the reins and re-hire the undocumented workers. Defendant's degree of control and authority was close to absolute. He told his employees when, where and how to commit the various crimes.

2. Application

In light of the foregoing analysis, the court finds that Defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. Accordingly, the court shall increase Defendant's offense level by **4**. This brings Defendant's offense level to **39**.

B. Abuse of Position of Trust: USSG §3B1.3

Section 3B1.3 provides for a **2**-level upward adjustment "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense[.]" "Public or private trust" is:

> a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose

> responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. The adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

USSG §3B1.3 cmt. (n.1).

"Once the sentencing court has determined that a person occupies a position of private trust, 'the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense' before the enhancement may apply." *Waldner*, 580 F.3d at 706 (quoting USSG §3B1.3 cmt. (n.1)).

1. Analysis

The government argues that Defendant occupied a position of trust as a corporate officer and manager of Agriprocessors. In support of this argument, the government cites trial evidence that suggests that Defendant was regarded as Agriprocessors' CEO and that he made the day-to-day financial decisions about Agriprocessors and was able to manipulate Agriprocessors' financial statements "at will." Gov't Sent. Mem. at 45.

Although courts have held that corporate officers sometimes hold positions of trust, "'the issue of whether an abuse-of-trust enhancement applies is fact intensive because it turns on the precise relationship between the defendant and his victims and therefore cannot be decided on the basis of generalities.'" *Waldner*, 580 F.3d at 707 n.5 (8th Cir. 2009) (citing *Septon*, 557 F.3d at 937) (alterations omitted). Typically, "'an arms-length commercial relationship will [. . .] not suffice for the enhancement to apply[.]'" *Id.* (quoting *Septon*, 557 F.3d at 937); *see also United States v. Blackwell*, 254 F. App'x 228,

230 (4th Cir. 2007) (stating that a district court "must carefully distinguish between those arms-length commercial relationships where trust is created by the defendant's personality or the victim's credulity, and relationships in which the victim's trust is based on the defendant's position in the transaction") (internal quotation marks omitted).

The enhancement is proper in an arms-length transaction when "the defendant has broad discretion to act on behalf of the victim, and the victim believes the defendant will act in the victim's best interest." *Id.* (citing *United States v. Bollin*, 264 F.3d 391, 416 (4th Cir. 2001)). Stated another way, "'[a]pplication of the enhancement requires more than a mere showing that the victim had confidence in the defendant. Something more akin to a fiduciary function is required.'" *Id.* (quoting *United States v. Caplinger*, 339 F.3d 226, 237 (4th Cir. 2003)); *see also United States v. Thorn*, 446 F.3d 378, 389-90 (2d Cir. 2006) ("'An abuse of trust enhancement may not be imposed on a defendant convicted of fraud solely because of a violation of a legal obligation to be truthful and a victim's reliance on a misrepresentation.'") (quoting *United States v. Hirsch*, 239 F.3d 221, 227 (2d Cir. 2001)).

In certain cases, the Eighth Circuit Court of Appeals has "'upheld the application of the enhancement in situations involving arms-length commercial relationships.'" *Waldner*, 580 F.3d at 707 (quoting *Septon*, 557 F.3d at 937). Such situations include: (1) statements made during a debtor's bankruptcy examination at a Section 341 meeting, *Id.* (citing *In re Parmetex, Inc.*, 199 F.3d 1029, 1036 (9th Cir. 1999) (McKeown, J., dissenting)); (2) a relationship between an insurance agent and an out-of-state mortgage company, *United States v. Fazio*, 487 F.3d 646, 659 (8th Cir. 2007); and (3) a relationship between a chiropractor and the insurance companies to which he submitted claims for reimbursement, *United States v. Erhart*, 415 F.3d 965, 972 (8th Cir. 2005). In each of these cases, the defendant exercised significant discretion in his or her relationship with the victimized commercial party.

Defendant was a corporate officer. The relationship at issue is Agriprocessors' business relationship with the victims, namely the victim banks. With respect to FBBC and MBFB, the court finds that Defendant did not have discretion to act on their behalf. Defendant's obligation was merely to remain truthful in his and Agriprocessors' dealings with those banks. FBBC and MBFB had confidence that Agriprocessors' representations were accurate and truthful. These banks suffered a loss because they believed that Agriprocessors' representations were true, when in fact Defendant had manipulated Agriprocessors' financial condition to appear much stronger than it was. In other words, the government has not shown that there was a fiduciary relationship between Defendant, Agriprocessors and the victim banks. Rather, the government has proven that, through Agriprocessors' misrepresentations, Defendant violated his legal obligation to deal truthfully with FBBC and that FBBC and MBFB relied on these misrepresentations to their detriment. This is insufficient for the application of the abuse of trust enhancement. *Blackwell*, 254 F. App'x at 230.

The government also argues that the enhancement should apply because: (1) Defendant owed a fiduciary duty to Agriprocessors' shareholder; and (2) Defendant abused his positions as a corporate officer of both KCG and TE when he committed the money laundering offenses. These arguments are unavailing. The abuse of trust enhancement "'turns on the precise relationship between the defendant and his *victims*,'" not other third parties. *Waldner*, 580 F.3d at 707 n.5 (quoting *Septon*, 557 F.3d at 937) (emphasis added). The government has not presented evidence showing that TE, KCG or Agriprocessors' owner, Aaron Rubashkin, are victims. As previously stated, the victims in this case include FBBC, MBFB and Waverly Sales, Inc. Because Defendant's relationship was an arms-length commercial transaction with these victims, the abuse of trust enhancement does not apply.

2. Conclusion

In light of the foregoing analysis, the court declines to apply the abuse of trust enhancement. *See United States v. Reid*, 164 F. App'x 308, 312 (4th Cir. 2006) (finding that upward adjustment pursuant to §3B1.3 "cannot be affirmed on the ground that [the defendant] had a position of trust with respect to the banks that were victimized by the check kite and induced to make loans in reliance on false information," since "[a]ll the transactions between representatives of [the business] and the victim banks were part of an arms-length commercial relationship that is not within the scope of §3B1.3").[17]

C. Obstruction of Justice: USSG §3C1.1

The government argues that the court should apply a **2**-level upward adjustment pursuant to USSG §3C1.1 for obstruction of justice. Section 3C1.1 provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense by **2** levels.

USSG §3C1.1 (emphasis in original).

1. Analysis

The government argues that the obstruction adjustment is warranted because Defendant: (1) committed perjury during trial; (2) committed perjury during the detention hearing held on November 18, 2009; (3) destroyed and concealed evidence; and (4) interfered with material witnesses. Because the court shall apply the adjustment in light of Defendant's perjured testimony at trial, it need not analyze the obstruction enhancement

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[17] Defendant argues that the application of both the aggravating role adjustment and the abuse of trust adjustment would constitute double-counting. Because the court declines to apply the abuse of trust adjustment, it need not address this argument.

with respect to the other bases the government proposes.

"[C]ommitting, suborning, or attempting to suborn perjury" is an example of the type of conduct to which the obstruction adjustment applies. USSG §3C1.1 cmt. (n.4); *see also United States v. Titlbach*, 300 F.3d 919, 924 (8th Cir. 2002) ("A defendant who commits perjury is subject to an obstruction enhancement under USSG §3C1.1."). "A witness commits perjury 'if [he] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Taylor*, 207 F.3d 452, 454-55 (8th Cir. 2000) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)).

At trial, Defendant testified about his conduct underlying the offenses of conviction. The undersigned presided over Defendant's trial and was therefore able to observe the demeanor and credibility of each witness's testimony, including Defendant's. Based on the undersigned's observations at trial, the trial transcript and the other evidence presented and which the court credited, the court finds that Defendant lied at trial under oath. The court finds that Defendant's lies were willfull. The court also finds that Defendant's lies were material, because they related directly to the nature of his involvement in the offenses of conviction. For instance, Defendant's perjured trial testimony includes his claim that he never asked Hendry to create bills of lading to match false invoices. Defendant's testimony directly conflicted with Hendry's testimony on this matter, and the government introduced evidence of fake invoices and bills of lading in a folder labeled "Sholom." *See* Gov't Tr. Ex. 2096. The undersigned finds that Defendant's testimony on this matter is incredible and credits Hendry's testimony over Defendant's. Similarly, during his trial testimony, Defendant claimed that he had not directed Hamilton to create and add "round-up" checks to the customer checks that Agriprocessors diverted by depositing into accounts other than the sweep account. This conflicts directly with Hamilton's testimony. Again, the court credits Hamilton's testimony and discredits

Defendant's testimony. Defendant argues that the trial testimony at issue "is the type about which two witnesses easily could differ." Def. Sent. Mem. at 45. The court disagrees—based on its evaluation of the credibility of the respective witnesses, Defendant knew that his misstatements were inaccurate and untruthful.

2. Application

In light of the foregoing, the court finds that, by perjuring himself at trial, Defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the [. . .] prosecution [. . .] of the instant offense[s] of conviction," and that Defendant's obstructive conduct related to Defendant's offenses of conviction. Accordingly, the court shall apply the 2-level upward adjustment in USSG §3C1.1. This brings Defendant's offense level to **41**.

IX. PRE-DEPARTURE ADVISORY SENTENCING GUIDELINES RANGE

Prior to the application of any departure or variance, Defendant is **Criminal History Category I** with a total adjusted offense level of **41**. His advisory Sentencing Guidelines range is **324-405 months of imprisonment**. *See* USSG Sentencing Table.

X. DEPARTURES

Although it does not specifically request an upward departure, the government notes that the court has authority to depart upward in the instant sentencing. The government bases its upward departure argument on the following Guidelines provisions: (1) extraordinary obstruction of justice pursuant to USSG §5K2.0(a)(3); and (2) criminal conduct that did not enter into the above Guidelines analysis, pursuant to §5K2.2. Defendant asks the court to depart downward due to Defendant's relationship with his autistic minor son, his charitable and civic deeds and his mental health.

A. Overview

In discussing the propriety of Chapter 5 departures generally, the Eighth Circuit Court of Appeals stated:

> Departures are appropriate if the sentencing court finds that there exists an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described." USSG §5K2.0. The guidelines provide that sentencing courts [are] to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, a court may consider whether a departure is warranted. USSG §1A1.1, cmt. n.4(b).

United States v. Chase, 451 F.3d 474, 482 (8th Cir. 2006) (formatting altered).

The decision whether to depart from the advisory Sentencing Guidelines rests within the sound discretion of the district court. *See, e.g., United States v. Thin Elk*, 321 F.3d 704, 707-08 (8th Cir. 2003) (reviewing for an abuse of discretion "because the decision to depart embodies the traditional exercise of discretion by the sentencing court") (citations and internal quotation marks omitted). However, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases[.]" *Koon v. United States*, 518 U.S. 81, 98 (1996). The district court must "carefully articulate the reasons for departure, particularly where the waters are unchartered." *United States v. Reinke*, 283 F.3d 918, 925-26 (8th Cir. 2002).

"The district court is not left adrift [. . .] in determining which cases fall within and which cases fall outside of the 'heartland.'" *United States v. McCart*, 377 F.3d 874, 877 (8th Cir. 2004) (citing *Koon*, 518 U.S. at 94). In USSG §5K2.1, *et seq.*, "[t]he Sentencing Commission enumerated some of the factors that it believed were not adequately accounted for in the formulation of the Guidelines and might merit consideration as aggravating or mitigating circumstances." *Thin Elk*, 321 F.3d at 708 (citing USSG §5K2.0).

B. Upward Departures

First, the government argues that an upward departure pursuant to USSG §5K2.0(a)(3) may be warranted because Defendant engaged in "extraordinary obstruction of justice." Gov't Sent. Mem. at 69. Section 5K2.0(a)(3) provides, in relevant part:

> A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

USSG §5K2.0(a)(3). The government argues that "[D]efendant's obstructive conduct was present in the offense to a degree substantially in excess of the norm" and therefore warrants an upward departure.

Second, the government argues that an upward departure pursuant to USSG §5K2.21 is warranted due to Defendant's criminal conduct that the court has not already taken into consideration in its Guidelines analysis. Section 5K2.21 provides:

> The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

USSG §5K2.21. The government argues:

> Here, the record establishes [D]efendant committed an unprecedented amount of criminal conduct which has not entered into the determination of the advisory guidelines. For example, [D]efendant led one of the most extensive alien harboring conspiracies in the history of the Northern District of Iowa. Defendant financed an effort to obtain fake resident alien cards for dozens of illegal workers. Defendant regularly paid employees in cash and under the table. And [D]efendant made illicit cash payments to the former mayor of Postville.

Gov't Sent. Mem. at 70.

The court agrees that Defendant's obstructive conduct in the instant action was more excessive than that involved in a typical financial crime case and that it likely falls out of the heartland of similar cases. The court also agrees that its analysis of Defendant's Guidelines range does not take into account a large amount of Defendant's criminal conduct. These factors demonstrate that Defendant's conduct likely falls outside the heartland of typical financial fraud crimes.

Although an upward departure would be permitted under USSG §5K2.0(a)(3) and §5K2.21, the court declines to depart upward because a sentence within the computed Guidelines range is sufficient to satisfy the goals of sentencing. However, the court will consider the facts underlying the potential upward departures in conjunction with its analysis of the factors enumerated in 18 U.S.C. § 3553(a). Additionally, in the event the court is required to re-sentence Defendant, it reserves the right to revisit these upward departure provisions to determine whether their application would be appropriate.

C. Downward Departures

Defendant moves the court for a downward departure based on his charitable and civic work and his mental condition. The court has considered Defendant's arguments and evidence on these matters and declines to exercise its discretion to depart downward. The court is unpersuaded that these factors move Defendant's offenses outside the heartland of typical financial fraud claims.

Defendant also contends that his relationship with his autistic minor son is a sufficient basis for a downward departure in this case, citing *United States v. Spero*, 382 F.3d 803 (8th Cir. 2004). In *Spero*, the Eighth Circuit Court of Appeals affirmed a district court's eight-level downward departure under §5K2.0 based in part on the defendant's relationship with his developmentally disabled child. *Spero*, 382 F.3d at 804-805. The Eighth Circuit Court of Appeals found "that [the defendant]'s role in [his son]'s life is

indispensable" and a lengthy incarceration "would cause an extreme setback for [the defendant's son] and the rest of the family." *Id.* at 805.

The court is unpersuaded that this factor merits a downward departure in this case. In *Spero*, the defendant's relationship with his son was one of multiple factors the court considered. *Id.* at 803. The downward departure in *Spero* was also based on the defendant's "extraordinary efforts at restitution." *Id.* This factor is not present in the instant action. Accordingly, the court declines to exercise its discretion to depart downward. However, the court shall further consider the arguments Defendant raises in support of a downward departure in conjunction with his Motion for Downward Variance. *See United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009) ("[W]e now clarify that departure precedent does not *bind* district courts with respect to variance decisions, it is merely persuasive authority[.]") (emphasis in original).

XI. VARIANCE

Next, the court turns to consider Defendant's Motion for Downward Variance. Post-*Booker*, the court must determine whether a non-Guidelines sentence is appropriate after determining the Guidelines range and any permissible departures within the Guidelines structure. *United States v. Myers*, 503 F.3d 676, 684 (8th Cir. 2007). The court has a "responsibility to select a sentence that [is] 'sufficient, but not greater than necessary' to comply with the statutory sentencing purposes." *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (quoting 18 U.S.C. § 3553(a)); *see also United States v. Butler*, 594 F.3d 955, 967 (8th Cir. 2010) (same). "[A] district court's job is not to impose a reasonable sentence, but rather to impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of § 3553(a). *United States v. Lytle*, 336 F. App'x 587, 588 (8th Cir. 2009) (citations and internal quotation marks omitted). In analyzing a motion for a downward variance, a "district court has wide discretion to weigh the factors in each case and assign some factors greater weight than others[.]" *United*

States v. Kane, 552 F.3d 748, 755 (8th Cir. 2009) (citation omitted).

Defendant asks the court to vary downward because: (1) "the advisory [G]uidelines as calculated [. . .] call for a *fundamentally unreasonable* sentence"; (2) Defendant did not commit the offense conduct for personal gain or out of a sense of greed, but rather, "in order to continue what he viewed as the critical Lubavitch mission of providing Kosher food to the Jewish community"; (3) Defendant's "charitable and civic activities are truly extraordinary"; (4) Defendant has a special relationship with his developmentally-disabled minor son; and (5) Defendant suffers from depression "that affected him during the period of the offense conduct, impaired his judgment and attention, and combined with his upbringing and religion to make it almost impossible for him to oppose his father and leave the business." Motion for Downward Variance at 2, 8, 10, & 19 (emphasis in original).

Defendant devotes a substantial amount of evidence and argument to his contention that his offenses of conviction were not motivated out of a sense of personal greed, but rather, out of a sense of duty to maintain his family business for religious purposes. No matter Defendant's motive, he defrauded the victim banks out of millions of dollars. He unlawfully placed his family business's interest above the victim banks' interest. His family business and he personally benefitted at the expense of all the victim banks' innocent shareholders. The court finds that this is not a basis to vary downward in this case.

Defendant argues that a downward variance is warranted in light of his charitable deeds and civic involvement. The court finds Defendant's charitable and civic involvement is not an adequate basis for a downward variance in the instant action. Like most human beings, Defendant's character includes good traits and bad traits. In fashioning Defendant's sentence, the court shall consider all of defendant's history and characteristics—both the good, such as his charitable nature, and the bad, such as his dishonesty. In light of Defendant's character as a whole, the court finds that his charitable

and civic nature does not warrant a downward variance. Additionally, it is entirely possible that a number of Defendant's charitable deeds were funded with proceeds from his crimes. It is far easier to be generous with someone else's money instead of one's own.

Additionally, Defendant argues a downward variance is warranted in light of his special relationship with his developmentally-disabled son. The fact that Defendant's son is developmentally disabled is most unfortunate and evokes sympathy and compassion from all who know the child's circumstances. However, such considerations of sympathy and compassion are present in all criminal cases that come before this court. In the vast majority of cases, defendants leave behind loving family members, all of whom are adversely impacted by being separated from a spouse, parent or child. Defendant is not unique in that respect. Fortunately, and unlike many cases that come before this court, Defendant's son has a loving and competent mother as well as an extremely tight-knit, supportive extended family, all of whom are obviously devoted to him and accustomed to working with him. Accordingly, the court declines to vary downward on this basis.

Defendant argues that the court should vary because he suffers from depression that "affected him during the period of the offense conduct, impaired his judgment and attention, and combined with his upbringing and religion to make it almost impossible for him to oppose his father and leave the business." Motion for Downward Variance at 23. The court is unconvinced by this argument. The court finds the opinion testimony of Susan J. Fiester, M.D., to be unsupported by any credible and independent evidence. Dr. Fiester was called as a mitigating expert witness, not as a treating physician. In fact, she apparently did not even know Defendant during the relevant time period. Her opinions are based nearly exclusively on interviews of Defendant and his wife, both of whom have their own motivations in this case. Further, the court notes that, during the trial and the sentencing, many people described Defendant's behavior as energetic and cheerful during

the relevant time period. But, even if the court were to assume for the sake of argument that Defendant was depressed during the commission of the criminal offenses, there is no credible evidence that depression impaired his judgment and attention in any relevant respect. In fact, the contrary is true. The court declines to vary on this ground.

The court rejects Defendant's argument that a downward variance is necessary because "the advisory [G]uidelines as calculated [. . .] call for a *fundamentally unreasonable* sentence." *Id.* at 6 (emphasis in original). The court recognizes that this argument was made based on the probation officer's computation of the advisory Guidelines sentence being "life." Further, as previously noted, this court's mandate is to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of § 3553(a). "'Reasonableness is the appellate standard of review in judging whether a district court has accomplished its task.'" *United States v. Greene*, 513 F.3d 904, 907 (8th Cir. 2008) (quoting *United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006)). Were the court to vary, the court would vary upward to take into account additional criminal conduct involving harboring of illegal aliens, which was charged in over seventy counts of the Seventh Superseding Indictment and were later dismissed.

XII. FACTORS IN 18 U.S.C. § 3553(a)

In arriving at a sentence, the court carefully considered all of the statutory factors set forth in 18 U.S.C. § 3553(a). Having done so, the court finds that a sentence within the computed advisory Guidelines range is firmly rooted in credible evidence produced at trial and at sentencing and contained in the uncontested portions of the PSIR.

When the sentencing reconvenes, the court will impose a sentence of **324 months of imprisonment**.[18] This sentence is sufficient, but not greater than necessary, to comply

[18] The court notes that, even if it inadvertently erred in computing the advisory Guidelines sentence, it would still impose a sentence of 324 months of imprisonment after considering the factors in § 3553(a).

with the purposes of 18 U.S.C. § 3553(a).

XIII. RESTITUTION

The government asks the court to order Defendant to pay restitution to the victim banks and Waverly Sales, Inc. in an amount consistent with the court's actual loss calculation. Defendant objects to restitution for the same reasons that he objected to the calculation of the victims' actual amount of loss. Defendant also argues that MBFB is not a victim bank because it was not in privity of contract with Agriprocessors and that restitution is therefore not warranted. For all the reasons advanced by the government and the reasons stated by the court in Section VII.A.2, the court adopts the government's position with respect to restitution. The court finds S/A Van Gent's testimony on loss clearly and sufficiently establishes that Defendant should be responsible to pay restitution as follows: (1) $18,525,362.88 to FBBC; (2) $8,322,989.12. to MBFB; and (3) $3,800.51 to Waverly Sales, Inc. Restitution is due immediately. If, subsequent to the filing of the instant Sentencing Memorandum, any of the victims receive payments that reduce their actual loss, Defendant's restitution should be credited to reflect those payments.

XIV. FINE

Next, the court considers whether to impose a fine on Defendant. "The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." USSG §5E1.2(a). In light of the significant restitution obligation owed by Defendant, the court finds Defendant is unable to pay a fine. Accordingly, the court declines to impose a fine on Defendant.

XV. CONCLUSION

In light of the foregoing, the court finds that the appropriate sentence is **324 months of imprisonment**, followed by **5 years of supervised release**. Defendant shall be required to pay restitution as follows: (1) $18,525,362.88 to FBBC; (2) $8,322,989.12. to MBFB; and (3) $3,800.51 to Waverly Sales, Inc. Defendant shall not be required to pay a fine.

When the court reconvenes the Hearing on **June 22, 2010**, it shall sentence Defendant in a manner consistent with the instant Sentencing Memorandum.

IT IS SO ORDERED.

DATED this 21st day of June, 2010.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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

UNITED STATES OF AMERICA, Plaintiff, vs. SHOLOM RUBASHKIN, Defendant.	No. 08-CR-1324-LRR **ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

The matter before the court is Defendant Sholom Rubashkin's "Motion Under Rule 33(b)(1) for a New Trial" ("Motion") (docket no. 942).

II. RELEVANT PROCEDURAL HISTORY

On July 16, 2009, a grand jury returned a 163-count Seventh Superseding Indictment (docket no. 544) against Defendant. Count 1 charged Defendant with Conspiracy to Harbor Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). Counts 2 through 70 charged Defendant with Harboring and Aiding and Abetting the Harboring of Undocumented Aliens for Profit, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II) and 1324(a)(1)(B)(i). Count 71 charged Defendant with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. Count 72 charged Defendant with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. Counts 73 through 86 charged Defendant with Bank Fraud, in violation of 18 U.S.C. § 1344. Counts 87 through 110 charged Defendant with False Statements and Reports to a Bank, in violation of 18 U.S.C. § 1014. Counts 111 through 124 charged Defendant with Wire Fraud, in violation of 18 U.S.C. § 1343. Counts 125 through 133 charged Defendant with Mail Fraud, in violation of 18 U.S.C. § 1341. Counts 134 through 143 charged Defendant with Money Laundering and Aiding and Abetting Money Laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 2. Counts 144 through 163 charged Defendant with Willful Violation of an Order of the Secretary of Agriculture and Aiding and Abetting a Willful Violation of an Order of the Secretary of Agriculture, in violation of 7 U.S.C. § 195 and 18 U.S.C. § 2. The Indictment also contained a forfeiture allegation on Counts 1 through 70.

On June 25, 2009, the court granted Defendant's Motion for Separate Trial (docket no. 519). The court ordered separate trials on Counts 1 through 74 ("Immigration

Counts") and Counts 75 through 143 ("Financial Counts").[1] From October 13, 2009 to November 12, 2009, the court held a jury trial on the Financial Counts, which the court renumbered as Counts 1 through 91. The renumbered Counts are as follows: Counts 73 through 86 became Counts 1 through 14, Counts 87 through 110 became Counts 15 through 38, Counts 111 through 124 became Counts 39 through 52, Counts 125 through 133 became Counts 53 through 61, Counts 134 through 143 became Counts 62 through 71 and Counts 144 through 163 became Counts 72 through 91.[2]

On November 12, 2009, the jury returned guilty verdicts on Counts 1 through 71, 73 through 80, 84 through 89 and 91 (docket no. 736). The jury returned not guilty verdicts on Counts 72, 81, 82, 83 and 90.

On November 19, 2009, the court granted the government's motion to dismiss the Immigration Counts. *See* Order (docket no. 746). The allegations underlying the Immigration Counts dealt with the May 12, 2008 worksite enforcement action that resulted in the arrest of over 300 illegal immigrants (sometimes referred to herein as the "Waterloo cases").

On March 1, 2010, the court entered an Order (docket no. 854) denying Defendant's "Motion for Judgment of Acquittal" (docket no. 721) and Defendant's "Combined Motion for Judgment of Acquittal and Motion for New Trial" (docket no. 747).

From April 28, 2010 to April 30, 2010, the court held a sentencing hearing. The court took evidence and gave Defendant his right of allocution. The court took the sentencing issues under advisement. On June 21, 2010, the court filed a Sentencing

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[1] Counts 144 through 163 were charged after the court granted Defendant's Motion for Separate Trial. These counts were tried with the Financial Counts.

[2] The remainder of the instant Order refers to the Financial Counts in their renumbered version.

Memorandum (docket no. 927), detailing the court's interpretation and computation of the advisory sentencing guidelines, revealing the sentence it intended to impose after considering all of the factors under 18 U.S.C. § 3553(a), discussing the evidence supporting its sentence and declining to vary from the advisory guideline range. On June 22, 2010, the sentencing hearing reconvened and the court formally imposed a guideline sentence. On July 2, 2010, Defendant filed a Notice of Appeal (docket no. 932).

On August 5, 2010, Defendant filed the Motion. On August 24, 2010, the government filed its Resistance (docket no. 950). On September 8, 2010, Defendant filed a Reply (docket no. 955). Defendant requests oral argument on the Motion. The court finds oral argument is unnecessary. The Motion is fully submitted and ready for decision.

III. RELEVANT FACTUAL BACKGROUND

Beginning on May 12, 2008, Immigration and Customs Enforcement ("ICE") conducted a worksite enforcement action at the Agriprocessors, Inc. ("Agriprocessors") meat packing plant in Postville, Iowa. During the enforcement action, federal agents discovered evidence that Agriprocessors employed hundreds of illegal immigrants. Over 300 undocumented workers were arrested, charged and convicted of one or more immigration-related crimes and sentenced.[3]

ICE, along with numerous other entities, including the United States Attorney's Office ("USAO") for the Northern District of Iowa, began planning the enforcement action in October of 2007. In the fall of 2007,[4] the USAO advised the undersigned that the office

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[3] Defendant was not arrested in the enforcement action on May 12, 2008. The United States Attorney charged him in a Complaint filed October 30, 2008. On November 12, 2008, a grand jury indicted him on immigration-related crimes. Defendant was charged with a variety of financial fraud crimes in several superseding indictments, the earliest of which was filed November 20, 2008.

[4] The court does not recall mention of a potential enforcement action prior to December of 2007, but it appears from reliable documentation that USAO made the (continued...)

was considering a worksite enforcement action in the eastern part of the Northern District of Iowa and that law enforcement expected to arrest several hundred persons on immigration-related felony offenses. USAO inquired as to the undersigned's schedule, which was promptly provided.[5] The undersigned did not receive any details beyond that. At some later time, when it became clear that the government intended to go forward with the enforcement action, the undersigned contacted numerous district court judges in the Eighth Circuit and inquired whether they would be willing to come to Iowa and assist if the need arose. The undersigned also contacted the Chief Judge of the Eighth Circuit Court of Appeals to ask that specified out-of-district judges be designated to the Northern District of Iowa to assist. As the undersigned stated in a June 2008 article, "[t]he court definitely couldn't accommodate that number [of defendants] without planning." The Third Branch Article (docket no. 950-2) at 74.

The undersigned was never informed—through a powerpoint presentation or otherwise—who the targets of the prosecutions would be or even where the worksite enforcement action was to take place. The undersigned's planning was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location. The undersigned did not tour the Cattle Congress grounds in Waterloo, Iowa. However, court

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[4](...continued)
undersigned aware of the potential worksite enforcement action as early as October of 2007.

[5] It is important to note that the United States District Court for the Northern District of Iowa has two court locations that are approximately 350 miles apart (Sioux City in the western part of the district and Cedar Rapids in the east). The undersigned is the only district court judge chambered in the eastern side of the district who handles criminal felony matters. Magistrate Judges do not have the authority under federal statute to accept a plea or sentence in a felony criminal matter. *See* 28 U.S.C. § 636. Thus, inquiries concerning the undersigned's availability from prosecutors and defense attorneys are routine and appropriate.

personnel toured the grounds and worked on the grounds of the Cattle Congress making preparations prior to the day of the enforcement action.

After the administrative arrest of nearly 400 people, court personnel, including the undersigned district court judge, Chief Magistrate Judge Paul Zoss and Magistrate Judge Jon S. Scoles arrived at the Cattle Congress grounds in Waterloo to begin the work of the court. Although the undersigned had obtained designations for several district judges to travel to the Northern District of Iowa to assist, initially the only district judge on the grounds was the undersigned. As it became clear that the number of arrestees would, in fact, be in the hundreds, District Court Judge Mark W. Bennett from the Northern District of Iowa and District Court Judge Ralph Erickson from the District of North Dakota traveled to Waterloo to assist.

As defense counsel concedes, no court could move off-site with its personnel, over thirty interpreters from outside the district, defense attorneys and technology without significant advance planning. Logically, the Chief Judge of the District and the only resident judge near Waterloo would have to be consulted. During and soon after the legal proceedings in Waterloo, numerous articles and letters were written concerning the process. For instance, an attorney who declined to represent defendants in Waterloo wrote a letter criticizing the court's involvement. An interpreter also wrote an article critical of the proceedings. A legal publication entitled "The Third Branch" featured an article discussing the court's preparations for the large number of defendants that came before it. Additionally, the United States House of Representatives Judiciary Subcommittee conducted hearings related to the enforcement action and the subsequent court proceedings.

These publications, among other documents, led a defendant in a related case to file a motion seeking the undersigned's recusal pursuant to 28 U.S.C. § 455(a), which states that a judge "shall disqualify [her]self in any proceeding in which [her] impartially might reasonably be questioned." *See United States v. Martin De La Rosa-Loera*, 08-CR-1313-

LRR, docket no. 30. Defendant Martin De La Rosa-Loera filed the Motion to Recuse on August 13, 2008, after his plea of guilty was accepted but prior to the court conducting his sentencing hearing. De La Rosa-Loera attached twenty-four exhibits to his Motion to Recuse, including: (1) articles from national and local newspapers; (2) press releases from interest groups, the government and Mr. Robert Phelps, the Clerk of Court for the Northern District of Iowa; (3) letters from a public interest group to the undersigned and from a local attorney to a Congresswoman; (4) criminal docket sheets; and (5) an interpreter's "personal account" of his involvement in the Waterloo cases. De La Rosa-Loera argued that the undersigned should recuse herself based on the court's pre-enforcement action planning. On September 29, 2008, the court denied the Motion to Recuse. *See* Order (docket no. 60 in 08-CR-1313-LRR). In the Order, the court discussed its pre-enforcement action planning, deemed it logistical in nature and stated that any and all preparation was conducted pursuant to her role as Chief Judge of the Northern District of Iowa. *Id.* at 6. Defendant's trial counsel concede that they were familiar with De La Rosa-Loera's Motion to Recuse and the court's Order denying it.

Pursuant to a Freedom of Information Act ("FOIA") request, Defendant has procured numerous ICE memoranda that contain information concerning the enforcement action planning. Defendant claims these memoranda contain "new evidence" proving that the undersigned had a statutory obligation under 28 U.S.C. § 455(a) to recuse herself. From that assertion, Defendant claims a new trial is required pursuant to Federal Rule of Criminal Procedure 33(b).

IV. ANALYSIS

Defendant moves for a new trial under Federal Rule of Criminal Procedure 33(b)(1), which states "[a]ny motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). "The standard for a new trial on the basis of newly discovered evidence 'is rigorous because these

motions are disfavored.'" *United States v. Hollow Horn*, 523 F.3d 882, 889 (8th Cir. 2008) (quoting *United States v. Baker*, 479 F. 3d 574, 577 (8th Cir. 2007)). To prevail on the Motion, Defendant must prove that:

> (1) the evidence must in fact be newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Womack, 191 F.3d 879, 886 (8th Cir. 1999). For the reasons set forth below, Defendant fails to prove at least four prongs of this test. However, Defendant also appears to argue that the Motion should not be subject to this test, because the "newly discovered evidence" relates to the "integrity of the trial" and not to "the substantive issues of guilt." Defendant's Brief in Support of the Motion ("Def. Brief") (docket no. 942-1), at 17 n.1. The court first addresses the Eighth Circuit Court of Appeal's traditional five-prong test and then proceeds to consider whether Defendant's purported "newly discovered evidence" compromises the "integrity of the trial."

A. Five-Prong Test

As an initial matter, the court notes that it will consider the five prongs in relation to the issues at trial. In his papers, Defendant appears to argue that the five-prong test should be applied as if the court were ruling on a motion to recuse brought prior to trial. *See* Reply at 2-5. Nevertheless, the court will address the issue of recusal on the merits.

1. The unavailability of the evidence

Defendant argues that the undersigned's failure to recuse herself from presiding over his trial warrants a new trial. He supports this claim with internal ICE memoranda, which he asserts constitute the "newly discovered evidence." The court's first inquiry is whether

these ICE memoranda can be considered "newly discovered evidence" for purposes of a Rule 33(b)(1) Motion.

a. Legal standard

"Rule 33 allows a district court to grant a new trial if the defendant brings forward 'newly discovered *evidence*.'" *United States v. Lenz*, 577 F.3d 377, 381 (1st Cir. 2009) (quoting Fed. R. Crim P. 33(b)(1)) (emphasis in *Lenz*). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In *Lenz*, the First Circuit Court of Appeals held that "[w]hether or not a witness will testify truthfully if called to the stand is not 'evidence' that can be used as a basis to invoke Rule 33 of the Federal Rules of Criminal Procedure." *Lenz*, 577 F.3d at 381 (quoting *United States v. Turns*, 198 F.3d 584, 588 (6th Cir. 2000)).

The Sixth Circuit Court of Appeals has distinguished "newly discovered evidence" from "newly available evidence." *Turns*, 198 F.3d at 588. The Eighth Circuit Court of Appeals has made a similar distinction. *See United States v. Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984) (holding that "when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not newly discovered"); *see also United States v. Lofton*, 333 F.3d 874, 876 (8th Cir. 2003) (holding that a codefendant's willingness to testify to exculpatory evidence post-trial is not "newly discovered evidence" for Rule 33 purposes when the defendant did not subpoena the codefendant to testify at trial).

b. Analysis

Drawing from the reasoning of the above cases and the Federal Rules of Evidence generally, the court holds that the ICE memoranda do not constitute "newly discovered evidence." First, the purported "evidence" is not evidence at all. Defendant fails to point to anything in the memoranda which would be admissible on any issue relating to the

Financial Crimes of which Defendant was convicted, tend to exculpate him or have any bearing on his guilt whatsoever. *See* Fed. R. Evid. 401 (defining relevant evidence). The jury convicted Defendant based on overwhelming evidence establishing the elements of the Financial Crimes charged.[6]

Second, the ICE memoranda on which Defendant bases the Motion can more accurately be characterized as "newly available" as opposed to "newly discovered." Defendant concedes that he was aware, well in advance, of trial that the undersigned met with representatives from USAO, the United States Marshals Service and ICE to make necessary arrangements prior to the enforcement action. Specifically, one of Defendant's attorneys admits that, prior to trial, he "familiarized himself with the Order issued by [the undersigned] on September 29, 2008, in *United States v. De La Rosa-Loera*, N.D. Iowa No. 08-CR-1313-LRR relating to Mr. De La Rosa-Loera's motion requesting [the undersigned] recuse herself." Affidavit of F. Montgomery Brown ("Brown Aff.") (docket no. 942-3) at 2. In his Motion to Recuse, De La Rosa-Loera made arguments similar to those Defendant now makes. De La Rosa-Loera requested that the undersigned recuse herself from sentencing him. He attached a number of exhibits to his Motion to Recuse, including various news articles discussing contacts between the undersigned and USAO, the record from the congressional hearings related to the enforcement action and press releases from USAO.

Defendant contends that the ICE memoranda contain information that was not available prior to their release. He claims that the ICE memoranda prove that the undersigned's actions prior to the enforcement action exceeded logistical preparation. Specifically, Defendant argues that the ICE memoranda contain new information indicating

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[6] In the court's Order (docket no. 854) denying Defendant's Motion for a Judgment of Acquittal and Motion for New Trial, the court gave a detailed description of the evidence presented against Defendant and discussed at length the sufficiency of the evidence on every count of conviction.

that the undersigned expressed approval for the enforcement action and that the planning meetings were earlier in time and more frequent than he originally believed. If the ICE memoranda are given a fair reading, Defendant fails to show that any information made available to the undersigned by law enforcement was not directly linked to logistical preparations for the court.

Defendant fails to make any novel arguments based on the ICE memoranda that he could not have raised based on what was clearly available to him before trial. For instance, the exhibits attached to De La Rosa-Loera's Motion to Recuse plainly state the fact that law enforcement agencies through USAO contacted the undersigned months before the enforcement action. It is immaterial for purposes of this motion if the contact was made in October or December of 2007. Defendant's argument that the ICE memoranda detail evidence of the undersigned's personal "support" for the enforcement action are likewise without merit. Throughout the Motion, Defendant misstates and mischaracterizes the memoranda.[7] The undersigned did not pledge to "support the operation in any way possible." Def. Brief at 14. The very exhibits to which Defendant cites confirm this fact. Any reference to the undersigned's "support" of the operation clearly appears in the context of the court's duty to logistically prepare for the arrest of hundreds of persons.

Accordingly, the ICE memoranda constitute "newly available" information not "newly discovered evidence." They do not contain any evidence that tends to disprove or contradict the court's analysis in its Order denying De La Rosa-Loera's Motion to Recuse.

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[7] Defendant's Reply Exhibits 6 and 7 are affidavits from legal ethics experts. The court notes that these experts draw upon the same mischaracterizations as Defendant to arrive at their opinions. For instance Mark Harrison's Affidavit (docket no. 957-6) states that "Judge Reade indicated full support for the initiative[.]" Def. Reply Ex. 6 at 3. Stephen Gillers's affidavit also states that "Chief Judge Reade is also quoted as having expressed her 'support' for the raid[.]" Def. Reply Ex. 7 at 4. Given these experts' proclivity to rely on defense counsel's mischaracterization of the facts, the court declines to credit their affidavits.

In other words, despite Defendant's best efforts to characterize the ICE Memoranda as revealing conduct by the undersigned that was purposefully concealed and therefore deceitful, they simply confirm all of the court's prior representations that the undersigned's pre-enforcement action involvement was logistical in nature. Defendant had the time and opportunity to file a motion to recuse prior to trial. For whatever reason, strategic or otherwise, Defendant opted not to seek the undersigned's recusal prior to trial. Rule 33(b)(1) is not designed to provide a defendant with another bite at the apple to test a new strategy in an effort to obtain a new trial with a different judge.

2. Defendant's diligence

The court assumes without deciding that Defendant was diligent in his attempts to discover the information at issue in the Motion, although the court notes that Defendant was on inquiry notice prior to December 9, 2008. At the December 9, 2008 status conference, the attorneys and the court discussed the filing of a recusal motion and selected January 30, 2009 as the deadline for filing such a motion. Transcript of Telephonic Hearing (docket no. 168) at 35.

3. Cumulative nature of the evidence

A defendant cannot satisfy his burden under Rule 33(b)(1) by presenting "newly discovered evidence" that is merely cumulative or impeaching. *Womack*, 191 F.3d at 886. The court finds that Defendant's newly available information is at best cumulative. As discussed above, Defendant had access to information that detailed the undersigned's pre-enforcement action involvement well in advance of trial. Any evidence discovered through Defendant's FOIA request is merely cumulative.

4. Materiality of the evidence

Defendant bears the burden of proving that the evidence at issue is "material." *Id.* Courts often interpret this prong in connection with the previous prong—whether the evidence is merely cumulative or impeaching. *See United States v. Maldonado-Rivera*, 489

F.3d 60, 66 (1st Cir. 2007) (stating that in order to receive a new trial under Rule 33 a defendant must show that "the evidence is material (as opposed to being merely cumulative or impeaching)"). As stated above, Defendant's "newly available" information is merely cumulative; therefore, it cannot also be material. Furthermore, the court finds that the "newly available" information has no bearing on any of the issues raised at Defendant's trial on the Financial Counts.

5. Nature of the evidence

To prevail on the Motion, Defendant must show that the proffered evidence is of "such a nature that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Womack*, 191 F.3d at 886. "To make a determination under this standard, the district court cannot view the [new evidence] in a vacuum; it must weigh the testimony against all of the other evidence in the record, including the evidence already weighed and considered by the jury in the defendant's first trial." *United States v. Kelly*, 539 F.3d 172, 189 (3d Cir. 2008).

Viewing the trial record as a whole, the court fails to see how any of the information related to the undersigned's involvement in planning for the court's relocation to Waterloo to handle hundreds of arrests would lead to an acquittal were Defendant retried on the Financial Counts. The undersigned's actions in preparing to handle the arrest of hundreds of workers would have no relevance to the issues in the financial fraud case and would not even be admissible evidence. *See* Fed. R. Evid. 401. At trial, the government presented substantial evidence proving Defendant's guilt on all counts of conviction. Defendant fails to provide any evidence or argument relating to how the undersigned's involvement or the appearance of impropriety prejudiced him or otherwise affected his trial. To the contrary, Defendant prevailed on significant pretrial motions, including his "Motion to the Chief District Judge for Revocation or Modification of Detention Order" (docket no. 134), his "Second Renewed Motion for Change of Venue" (docket no. 624) and his "Amended

Motion to Sever Counts 1-74 and Forfeiture Allegation from Counts 75-142" (docket no. 497). The court finds that Defendant's proffered evidence would not lead to an acquittal in the event he were retried.

6. Conclusion

For the reasons stated above, the court finds that Defendant fails to prove the five *Womack* prongs required to prevail on the Motion. Accordingly, the court shall deny the Motion for a New Trial brought under Rule 33(b)(1).

B. Integrity of the Trial

Defendant appears to argue that the Eighth Circuit Court of Appeals's five-prong test is inapplicable in the instant case. He states that "[t]he newly discovered evidence may bear upon 'the substantive issue of guilt,' *or* 'upon the integrity of the earlier trial.'" Def. Brief at 17 n.1 (emphasis in the original). The cases Defendant cites in support of this proposition are readily distinguishable from the instant case.

In *Holmes v. United States*, a deputy United States Marshal told a member of the jury that one of the defendants in the case was currently serving a six-year sentence. 284 F.2d 716, 718 (4th Cir. 1960). The Fourth Circuit Court of Appeals held that a defendant may prevail on Rule 33(b)(1) motion if the evidence "tends strongly to establish a defendant's innocence or shows the jury to have been subjected to improper influence[.]" *Id.* at 719. In the latter scenario, the Fourth Circuit Court of Appeals held that "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." *Id.* at 718. Here, Defendant fails to point to any evidence suggesting that the undersigned improperly influenced the jury's verdict. Even accepting Defendant's allegations as true, the undersigned presided over the trial related to the Financial Counts. Defendant was not tried on the Immigration Counts. Law enforcement uncovered evidence of Defendant's financial crimes well after the enforcement

action. Again, the court fails to see how Defendant's "newly available" information "could [] have affected the verdict" as *Holmes* requires. *Id.*

Aside from *Holmes* and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), Defendant's cited cases simply stand for the proposition that a court can consider a motion for a new trial based on evidence that the presiding judge should have recused him or herself. *See United States v. Elso*, 364 F. App'x. 595, 598 (11th Cir. 2010) (considering a motion for new trial based on recusal and holding that the defendant "failed to establish that he lacked knowledge of the evidence underlying his claim of judicial bias at the time of trial or that recusal was warranted"); *United States v. Venable*, 233 F. App'x. 313, 316 (4th Cir. 2007) (considering a motion for new trial based on recusal and holding that the district judge was not required to recuse himself); *United States v. Conforte*, 624 F.2d 869, 878-83 (9th Cir. 1980) (considering a motion for new trial based on newly discovered evidence that the district judge should have recused himself and rejecting it based on the defendant's lack of diligence and on the merits). The court is undertaking precisely this analysis in the instant Order. The court declines to credit Defendant's arguments related to *Liljeberg*. *Liljeberg* is a civil case involving the application of Rule 60(b) of the Federal Rules of Civil Procedure. The instant case involves Rule 33 of the Federal Rules of Criminal Procedure. Again, motions for new trial under Rule 33 are "disfavored." *Baker*, 479 F. 3d at 577.

C. Merits of Defendant's Recusal Argument

As stated above, the court finds that Defendant has not met his burden under Federal Rule of Criminal Procedure 33(b)(1). Nevertheless, the court will address Defendant's arguments related to recusal under 28 U.S.C. § 455(a).

1. Timeliness

Although § 455 does not contain an explicit timeliness requirement, the Eighth Circuit Court of Appeals has held that "a claim for judicial recusal under section 455 'will not be considered unless timely made.'" *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664

(8th Cir. 2003) (quoting *United States v. Bauer*, 19 F.3d 409, 414 8th Cir. 1994)). "Timeliness requires a party to raise a claim 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'" *Id.* (quoting *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987)). As outlined above, Defendant knew long before trial that USAO and law enforcement agencies contacted the undersigned prior to the enforcement action. He chose not to file a motion to recuse. Although he could have filed such a motion for the purpose of preserving the issue, he elected not to. Accordingly, the court finds that Defendant waived his request for recusal by failing to seek such relief in a timely manner.[8]

2. Merits of recusal claim

Even if Defendant timely raised his recusal arguments, the court finds that they are baseless. In relevant part, 28 U.S.C. § 455(a), the recusal statute, states:

> Any . . . judge . . . of the United States shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned.

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[8] Defendant states "[t]he Second, Fifth, Tenth and Eleventh Circuits have vacated convictions [when the trial judge should have recused him or herself]." Def. Brief at 7. Defendant's cited cases are unpersuasive. First, none of these cases analyzed a recusal motion pursuant to Rule 33(b)(1)'s framework. Second, timeliness or waiver was not an issue in three of the four cited cases. The defendants in three of the cited cases timely filed recusal motions "at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for such a claim." *Apple*, 829 F.2d at 333. In *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007), the defendant timely raised his recusal claim prior to trial. In *United States v. Bremers*, 195 F.3d 221, 224 (5th Cir. 1999), timeliness was not at issue as the defendant brought his recusal motion pre-trial upon learning the basis for recusal. In *United States v. Cooley*, 1 F.3d 985, 990 (10th Cir. 1993), the defendant moved for recusal eight weeks prior to trial. Last, in *United States v. Kelly*, 888 F.2d 732, 745-46 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that the district court inappropriately delegated the recusal issue to the parties and improperly considered jeopardy in his recusal analysis—two circumstances obviously not alleged here.

28 U.S.C. § 455(a). In other words, "[a] judge must recuse if '[her] impartiality might reasonably be questioned' because of bias or prejudice." *United States v. Burnette*, 518 F.3d 942, 945 (8th Cir. 2008).[9]

"Section 455(a) provides an objective standard of reasonableness." *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006). "The issue is 'whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'" *Id.* (quoting *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (en banc)). "Because a judge is presumed to be impartial, a party seeking recusal bears the substantial burden of proving otherwise." *Id.* (citing *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006)). "'[A] judge considering whether to disqualify [herself] must ignore rumors, innuendoes, and erroneous information published as fact . . . .'" *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (per curiam) (quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)). When deciding whether to grant a recusal motion, the court must "carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning [the court's] impartiality might be seeking to avoid the adverse consequences of [the judge] presiding over their case." *In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1358 (8th Cir. 1996) (quoting *in re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)). A judge's duty not to recuse herself when unwarranted is just as important as a judge's duty to recuse when required. *See Walker v. Bishop*, 408 F.2d 1378, 1382 (8th Cir. 1969).

Based on the facts and ignoring all rumor and innuendo, the court finds that recusal was not required in this case. An average person on the street, privy to all the facts of this case, would presume that the Chief Judge of a district court must perform certain duties to ensure that court proceedings are efficient and afford all constitutional guarantees to

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[9] It should be noted that Defendant makes no claim of actual bias or prejudice under 28 U.S.C. § 455(b).

defendants. That is precisely what the undersigned did in relation to the enforcement action.[10]

The temporary relocation of judges and other court personnel to other parts of the Northern District of Iowa was consistent with the court's past practice. For example, in April of 1996, the Honorable Michael J. Melloy, then-United States District Court Judge for the Northern District of Iowa, and the Honorable John A. Jarvey, then-United States Magistrate Judge for the Northern District of Iowa, presided over dozens of criminal immigration cases at the National Guard Armory in Charles City, Iowa.

Consistent with past efforts, attorneys and interpreters were provided checklists and pattern proceedings transcripts before the Waterloo court proceedings began. A reasonable, disinterested observer, knowing all the facts, would understand that these checklists and pattern proceedings transcripts were not a sinister effort on the part of the federal judges involved to "script" the Waterloo proceedings. The Magistrate Judges designed the checklists and pattern proceedings transcripts for the benefit of *all* participants to ensure that all laws were followed and all pertinent topics covered.[11] Checklists are routinely made available to all counsel in other criminal cases and have been posted on the court's website. They merely give life to the requirements of Federal Rule of Criminal Procedure 11. The pattern proceedings transcripts were deviated from, revised and improved throughout the Waterloo cases. They were revised continually in an attempt to find language that could be

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[10] The involvement of the undersigned, as well as the other judges in the Waterloo cases, was no different than other multiple-defendant cases. Judges routinely approve search warrants, decide where and when hearings will be held, conduct initial appearances, preside over arraignments and decide whether or not to approve plea agreements reached by the United States Attorney, the defendant and the defense attorney.

[11] Shortly before May 12, 2008, Judge Scoles was made aware of the charges that could be filed by virtue of reviewing and signing hundreds of complaints and search warrants.

interpreted more easily and that would make concepts as clear as possible to non-English speaking persons.

Any other statements or innuendo published in the media or elsewhere simply do not represent the facts. The pertinent facts are these: (1) the undersigned was never informed prior to the commencement of the enforcement action that Defendant was or could be a target of the enforcement action; (2) the undersigned was not told prior to May 12, 2008 where the enforcement action would occur; (3) the undersigned did not express personal support for or policy agreement with the enforcement action; (4) any knowledge that the court had prior to the enforcement action was specifically tailored to ensuring that the court could gather the necessary resources to guarantee arrestees their rights; (5) the undersigned did not visit the site at the Cattle Congress before the day of the commencement of the enforcement action; (6) providing the dates when the court is unavailable is common and necessary because the undersigned is the only district judge in the eastern part of the district that handles felony criminal matters; (7) the court did not perform any functions that fall within the executive branch (i.e. who to charge, what to charge and whether a plea agreement offer should be made and the terms of it); and (8) the undersigned did faithfully and impartially discharge and perform all of the duties that are incumbent upon her as the Chief Judge of the Northern District of Iowa.

If the undersigned were to recuse herself in the instant case it would provide an incentive to defendants to advance rumors and foster speculation in the media in an effort to judge shop. The court declines to do so.

Furthermore, an average person on the street would not question the undersigned's impartiality in this case because the facts relevant to Defendant's financial fraud trial were sufficiently attenuated from the cases arising out of the immigration enforcement action. Accordingly, the court finds that Defendant's arguments related to recusal are without merit.

D. Referral to Another Judge and Discovery

There is no Eighth Circuit Court of Appeals precedent requiring the undersigned to refer the Motion to another judicial officer or to permit discovery. Further, there is nothing to discover that would support the Motion. The Motion is totally devoid of merit and further proceedings with reference to it would be an useless waste of time. Accordingly, the court shall not refer the Motion or authorize discovery.

V. CONCLUSION

In light of the foregoing, the Motion (docket no. 942) is **DENIED**.

IT IS SO ORDERED.

DATED this 27th day of October, 2010.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CERTIFICATE OF TYPE COMPLIANCE

I hereby certify that Appellant's Addendum was prepared using Microsoft Word 2007, in 14 point Times New Roman type with serifs. I also certify that this Addendum has been scanned for, and is free of viruses.

CERTIFICATE OF FILING

I hereby certify that on 1/3, 2011, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.

CERTIFICATE OF SERVICE

I hereby certify that on 1/3, 2011, the following party was served through CM/ECF.

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