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

SHOLOM RUBASHKIN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. C13-1028-LRR No. CR08-1324-LRR **PETITIONER'S MERITS BRIEF IN SUPPORT OF § 2255 PETITION (EVIDENTIARY HEARING REQUESTED)**

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INTRODUCTION

Petitioner Sholom Rubashkin is serving a 27-year sentence of imprisonment arising out of his conviction on fraud and money laundering charges involving Agriprocessors, Inc., a kosher meat manufacturer formerly based in Postville, Iowa. The foundation for the length of Petitioner's sentence was the Court's finding that he caused $27 million in loss to a bank and engaged in a sophisticated money laundering scheme involving multiple layers of laundering transactions. Petitioner now moves for post-conviction relief pursuant to 28 U.S.C. § 2255 on account of three areas of government misconduct relating to loss amount, money laundering, and other matters.

Ground One. At sentencing, Petitioner's attorneys presented evidence that prosecutors caused loss to the bank by improperly using the threat of forfeiture to inject themselves into Agriprocessors' bankruptcy case and impose restrictions on the sale of the business in a bankruptcy auction. The government responded by presenting testimony from a key witness who denied forfeiture was used in the way Petitioner's attorneys alleged. The Court expressly credited the government witness's testimony and discredited contrary defense evidence, leading to the $27 million loss calculation and 27-year sentence.

Evidence previously undisclosed to Petitioner proves the government knowingly presented false and misleading sentencing testimony and withheld exculpatory evidence. This newly-discovered evidence includes detailed notes from a meeting between prosecutors and the bankruptcy trustee in which prosecutors imposed precisely the restrictions they later denied having imposed. In other words, *prosecutors' own words* show the falsity of the sentencing testimony they presented that led to the 27-year sentence. The government further failed to disclose information from both the bankruptcy trustee and fraud victim regarding the impact of the government's use of forfeiture on the bankruptcy sale process, and also did not disclose

information showing the full nature and extent of prosecutors' conduct in the bankruptcy proceeding.

Had the government disclosed the truth, Petitioner's sentencing range under the United States Sentencing Guidelines would have been considerably shorter than the 27-year sentence he received. The government contended, and the Court found, that the bank's loss was approximately $27 million after taking into the account the $8.5 million in proceeds from the bankruptcy sale. Had the bankruptcy auction sale resulted in a sales price in excess of the bank's debt, Petitioner's sentencing range would have been 30-37 months' imprisonment. Under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Brady v. Maryland*, 373 U.S. 83 (1963), the Court must grant this § 2255 Petition and permit Petitioner to be resentenced in a hearing free from false and misleading testimony and with full disclosure of the effects of the government's conduct on loss amount.

Ground Two. Petitioner next alleges the government violated his constitutional rights by failing to provide full and complete information regarding its *ex parte* communications with the trial judge prior to the immigration raid that gave rise to the charges against Petitioner. Petitioner acknowledges, however, that the Court's January 21, 2016, ruling (Dkt. No. 42) on his Motion to Recuse essentially addresses and rejects Ground Two. Petitioner therefore will not reargue Ground Two in this Merits Brief other than to incorporate by reference for error preservation purposes the allegations and arguments made in his Amended Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment and Sentence Pursuant to 28 U.S.C. § 2255.

Ground Three. The government also withheld exculpatory information from a key cooperating witness regarding the purpose of financial transactions the government characterized

as "money laundering." The money laundering charges rested on an extremely shaky foundation to begin with, as there were literally hundreds of financial transactions during the relevant time period that contradicted the government's laundering theory. Had the government disclosed the exculpatory information from the cooperating witness, Petitioner's counsel would have obtained key admissions from him on cross-examination and proven once and for all that the money laundering charges were built on a foundation of sand, not rock. This, in turn, would have reduced Petitioner's sentence by at least ten years as measured from the bottom end of the Sentencing Guidelines range. Petitioner is therefore entitled to a new trial.

FACTUAL AND LEGAL ANALYSIS

I. GROUND ONE: THE GOVERNMENT VIOLATED PETITIONER'S DUE PROCESS RIGHTS BY KNOWINGLY PRESENTING FALSE AND MISLEADING TESTIMONY AT SENTENCING ON MATERIAL ISSUES RELATING TO LOSS AMOUNT.

A. Background Regarding Agriprocessors.

Agriprocessors, Inc. was a meat processing company based in Postville, Iowa, and owned entirely by Petitioner's father, Aaron Rubashkin. (10/14/09 Trial Tr.[1] 14, 173; 10/19/09 Trial Tr. 84-85; 10/20/09 Trial Tr. (Lykens) 35 (App. 2, 6; 8-9; 13)). Petitioner had no ownership interest whatsoever in the company. (10/20/09 Trial Tr. (Lykens) 35; 10/21/09 Trial Tr. (Feldman) 31 (App. 13; 18)). Until 2008, Agriprocessors was the largest kosher meat company in the United States and had numerous well-known and valuable trademarks, especially among those who follow a strictly kosher diet. (Sarachek Aff. ¶ 8 (App. 38); Eichler Aff. ¶ 8 (App. 42-43); 10/19/09 Trial Tr. 115-16; 10/20/09 Trial Tr. 28-29; 4/28/09 Sent. Tr.[2] 57; 4/29/10 Sent. Tr. 501,

[1] All references to "Trial Tr." are to the trial transcript from Petitioner's criminal trial. The numbering of the transcript pages typically started over each day at 1, and thus each "Trial Tr." reference will be prefaced by a date and followed by a page number. In certain instances, however, the transcript for a particular date was broken down into further pieces according the identity of the witness. In those instances, the witness's name will be included in parentheses: e.g., "10/20/09 Trial Tr. (Lykens) 35.")

[2] All references to "Sent. Tr." are to the sentencing transcript in Petitioner's criminal case.

507. (App. 10-11; 15-16; 25; 29, 34) These trademarks included "Aaron's Best," "Shor Habor," "Iowa Best Beef," and "Rubashkin," among others, and were closely associated with Aaron Rubashkin himself. (Sarachek Aff. ¶ 8 (App. 38); 4/28/09 Sent. Tr. 57; 4/29/10 Sent. Tr. 507, 512 (App. 25; 34, 36A); Crim. Dkt. No. 150 at pp. 14-15). Aaron was integral to the company and a visionary in the kosher meat industry. (Sarachek Aff. ¶¶ 7, 8 (App. 38); Borenstein Aff. ¶¶ 5, 12 (App. 44, 46); Eichler Aff. ¶ 8 (App. 42-43); Goldfein Aff. ¶ 8 (App. 48-49); 10/19/09 Trial Tr. 84-85, 115-116; 10/21/09 Trial Tr. (Feldman) 31 (App. 8-9, 10-11; 18)). Under his leadership, Agriprocessors grew to more than $300 million in annual revenue in 2007 and over $68.6 million in assets as of mid-2008, according to a report prepared in 2011 by an independent financial advisor engaged by an independent bankruptcy trustee. (10/21/09 Trial Tr. (Feldman) 31; Triax Capital Advisors Report (App. 18, 50-78)). The independent financial advisor took into account – i.e., made downward adjustments for – the accounts receivable later determined to be inflated. (App. 50-78). Thus, the $68.6 million figure does not include any inflated or illegitimate receivables.

On May 12, 2008, federal agents conducted a raid on the Agriprocessors plant in connection with alleged immigration violations. (10/14/09 Trial Tr. 85 (App. 3)). In the months following the raid, the government charged or indicted various Agriprocessors employees on immigration charges, including an employee named Katrina Freund. (Crim. Dkt. No. 1[3]). The government later superseded the indictment against Ms. Freund to add Agriprocessors and Petitioner as defendants, then superseded it numerous additional times to add and amend financial fraud and forfeiture charges against Petitioner and other defendants. (Crim. Dkt. Nos. 80, 94, 150, 177, 413, 464, 544). Agriprocessors filed for bankruptcy on November 4, 2008

[3] All references to "Crim. Dkt." are to the Court's docket in *United States v. Sholom Rubashkin et al.*, Case No. 2:08-cr-01324 (N.D. Iowa).

(Bankr. Dkt.[4] No. 3 (App. 121)), and an independent bankruptcy trustee, Joseph Sarachek, was appointed by the bankruptcy court on November 20, 2008, to run the company (Bankr. Dkt. No. 56 (App. 122)). Trustee Sarachek had no prior connection to the Rubashkin family or Agriprocessors. (Sarachek Aff. ¶ 4 (App. 38)).

B. The Curious History of the Forfeiture Allegations.

The government did not seek forfeiture in the original Indictment, Superseding Indictment, or Second Superseding Indictment, all of which focused primarily on immigration offenses. (Crim. Dkt. No. 1 (Indictment dated September 17, 2008); No. 80 (Superseding Indictment dated November 13, 2008); No. 94 (Second Superseding Indictment dated November 20, 2008).[5] Instead, the government waited until December 11, 2008, when financial fraud charges were beginning to rise to the forefront, to assert criminal forfeiture for the first time as part of the Third Superseding Indictment. (Crim. Dkt. No. 150). Criminal forfeiture charges were included in each subsequent Superseding Indictment. (Crim. Dkt. No. 177 (Fourth Superseding Indictment dated January 15, 2009); No. 413 (Fifth Superseding Indictment dated March 31, 2009); No. 464 (Sixth Superseding Indictment dated May 14, 2009); No. 544 (Seventh Superseding Indictment dated July 16, 2009)).

By the time the government sought forfeiture in the Third Superseding Indictment on December 11, 2008, Agriprocessors already had filed for bankruptcy and the bankruptcy court had appointed Trustee Sarachek to run the company. (Bankr. Dkt. No. 56 (Order Approving Appointment of Trustee E. Sarachek as Chapter 11 Trustee) (App. 122)). Thus, the government cannot plausibly claim to have pursued forfeiture to protect against the dissipation of assets. In

[4] All references to "Bankr. Dkt." are to the Bankruptcy Court's docket in *In re Agriprocessors, Inc.*, Case No. 08-02751 (Bankr. N.D. Iowa).

[5] Sholom Rubashkin was not named as a defendant until the Superseding Indictment, and Agriprocessors was not named as a defendant until the Second Superseding Indictment.

fact, the government chose *not* to seek forfeiture in September or November 2008 when the company was not yet controlled by a court-appointed independent trustee. (Crim. Dkt. Nos. 1, 80). In retrospect, and as detailed below, it is clear the government used forfeiture to impose restrictions on the future ownership and operation of Agriprocessors, including, in particular, to prevent Aaron Rubashkin from having a role with the company despite never charging him with a crime. It is equally clear the government's use of forfeiture hurt the very victims it is duty-bound to protect.

C. The Primary Fraud Victim Did Not Want the Government to Pursue Forfeiture.

First Bank Business Capital ("First Bank") was the primary victim of the financial fraud. On December 4, 2008, a few days before forfeiture was alleged for the first time in the Third Superseding Indictment, representatives from First Bank met with representatives from the United States Attorney's Office for the Northern District of Iowa. (App. 79-80). The substance of that meeting has not been disclosed to Petitioner, but an exchange of correspondence between Assistant United States Attorney Peter Deegan and First Bank's outside counsel, Lloyd Palans, on December 8 and 9, 2008, clearly shows First Bank did not want the government to assert forfeiture claims against Agriprocessors. (App. 79-82). First Bank explained to the government that it had serious concerns about the effect the forfeiture claim would have on the sales price of Agriprocessors' assets in a bankruptcy sale, and thus on First Bank's recovery:

> [W]e believe that the public assertion of forfeiture claims, even if accompanied by a statement that your office will work with potential purchasers, is likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets as a "going concern" or a turnkey operation and thereby "chill" the bidding process. In particular, although we are encouraged that your office is willing to communicate with potential purchasers about its expectations for the sale process, there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets.

(Letter from Palans to AUSA Deegan dated December 9, 2008 (App. 81-82)).

First Bank was no mere bystander. It was *the* victim of the financial fraud alleged against Petitioner. First Bank also was in the midst of trying to avoid or mitigate its losses from that fraud, with help from Trustee Sarachek, who was duty-bound to maximize the value of the estate for First Bank and other creditors. On its face it is difficult to understand why the government would openly defy the wishes of the victim in these circumstances. In context, however, it is clear the government was more interested in punishing Aaron Rubashkin, an uncharged third-party, than protecting the victim of the fraud offense. Two days after Palans' letter, the government asserted forfeiture for the first time in the Third Superseding Indictment. (Crim. Dkt. No. 150 at p. 14).

D. Bankruptcy Trustee Sarachek Also Did Not Want Prosecutors to Pursue Forfeiture.

First Bank was not alone in its opposition to the government's use of forfeiture. Bankruptcy Trustee Sarachek (who, as noted above, was appointed by the bankruptcy court to run Agriprocessors in November 2008 and had absolutely no connection to prior ownership or management) also believed it unwise and harmful to creditors. Trustee Sarachek and his counsel met with prosecutors in early December 2008 to discuss his concerns, telling them forfeiture "would kill off bidders" and "enormously hurt [his] ability to do his job." *See* Notes From December 5, 2008 Meeting Between Trustee Sarachek and Prosecutors ("December 5 Meeting Notes") (App. 83-91).[6]

[6] Petitioner obtained these notes for the first time during investigation of this § 2255 Petition. The notes were prepared by Attorney James Reiland, who at the time was an associate with the well-respected national law firm Kelley Drye & Warren LLP. Reiland and his partner, Julian Solotorovsky, were retained to represent Trustee Sarachek in criminal matters relating to the Agriprocessors bankruptcy. Reiland's notes from the December 5, 2008 meeting – the accuracy and authenticity of which he and Solotorovsky affirm in sworn declarations (App. 92, 93) – are essentially a transcript of the meeting between Trustee Sarachek, his counsel, and prosecutors, as Reiland took down the statements made by each of the meeting's participants with attribution. Paula Roby was one of Trustee Sarachek's attorneys in attendance and actively participated in the meeting on his behalf. The government never disclosed the substance of the December 5 meeting despite the clear relevance of numerous statements made by

As Trustee, Sarachek's mission was straightforward: to make Agriprocessors as attractive as possible to bidders and thus yield the highest possible purchase price in a bankruptcy sale. *See In re GSC, Inc.*, 453 B.R. 132, 169 (Bankr. S.D.N.Y. 2011) ("The Trustee's decision of what is best for the estate should be undertaken with the goal of maximizing the value of the estate."); *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) ("It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate."). The higher the purchase price, the greater the recovery for creditors like First Bank—and, in turn, the lower the eventual loss amount for Petitioner for criminal sentencing purposes.

E. The Government Used Forfeiture as a Tool to Punish Petitioner's Father and Dictate Who Could Own and Operate the Successor to Agriprocessors.

Despite the opposition of First Bank and Trustee Sarachek, the government insisted on pursuing forfeiture. In their December 5, 2008, meeting with Trustee Sarachek and his counsel (including, among others, Paula Roby, who would later serve as the key government witness at sentencing on the issues raised in Ground One of this § 2255 Petition), prosecutors explained that they wanted to prevent Aaron Rubashkin and other members of his family from having any ownership or management role in the successor entity to Agriprocessors. Absent forfeiture, prosecutors said, they had no way to enforce that restriction. In the words of AUSA Richard Murphy: "No Rubashkins is very important to us—non-negotiable. The problem is we don't have a seat at the table." December 5 Meeting Notes at p. 6 (App. 86-87). The government never disclosed the fact or substance of this meeting to Petitioner's counsel, despite its unmistakable relevance to loss amount.

Trustee Sarachek, his counsel, and the government attorneys themselves regarding the government's "No Rubashkin" rule and the adverse impact of the government's actions on the bankruptcy sale process.

1. The Government's Use of Forfeiture Was Unlawful.

Although not a necessary component of proving Petitioner's right to post-conviction relief, it is important to understand that the government's use of forfeiture was unlawful. The government identified three specific assets for which it sought forfeiture: (1) "the corporate name 'Agriprocessors, Inc.'"; (2) "any and all trademarks of Agriprocessors, Inc., including but not limited to: Iowa Best Beef . . . Shor Habor . . . Aaron's Best . . . and Rubashkin"; and (3) "any and all corporate stock of Agriprocessors, Inc." (*See, e.g.*, Crim. Dkt. No. 150 at pp. 14-15). The government claimed forfeiture authority pursuant to 8 U.S.C. § 1324(b), which states:

> Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section [harboring of illegal aliens], the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

The government also claimed forfeiture authority under 18 U.S.C. § 982:

> The court, in imposing sentence on a person convicted of a violation of [8 U.S.C. § 1324] . . . shall order that the person forfeit to the United States, regardless of any provision of State law—
>
> (i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and
>
> (ii) any property real or personal—
>
> (I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or
>
> (II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

The government's assertion of criminal forfeiture suffered from numerous defects. First, the government had no right to pursue forfeiture of "any and all corporate stock of Agriprocessors, Inc.," because the corporate stock was legitimately owned entirely by Aaron Rubashkin, an uncharged third-party. The government was well aware of his ownership, having

alleged it in the indictment itself. *See, e.g.*, Fourth Superseding Indictment (Crim. Dkt. No. 177) at ¶ 1.a ("One hundred percent of defendant AGRIPROCESSORS' stock was owned by A.R., an individual living in Brooklyn, New York."). In seeking criminal forfeiture of assets not held by any defendant, the government plainly exceeded its statutory forfeiture authority. *See United States v. Bajakajian*, 524 U.S. 321, 332 (1998) ("The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners."); *United States v. Peters*, 777 F.2d 1294, 1296 (7th Cir. 1985) ("An examination of the forfeiture provision reveals that Congress clearly intended that the government acquire only that interest which the criminal defendant held in the property.").

The government's attempt to forfeit "any and all trademarks" and "the corporate name, Agriprocessors, Inc." also exceeded its statutory authority. A corporate name and trademarks do not "facilitate" criminal immigration or fraud offenses under any reasonable interpretation of the word. *See United States v. Seher*, 562 F.3d 1344, 1368 (11th Cir. 2009) ("Property would facilitate an offense if it makes the prohibited conduct less difficult or more or less free from obstruction or hindrance."); *see also United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) ("substantial nexus" to crime required). Indeed, a trademark is "merely a word or symbol indicating the origin of a commercial product." *Power Test Petroleum Distributors, Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97 (2d Cir. 1985).

Nor can the government plausibly claim the corporate name or trademarks are derived from or traceable to "proceeds" of immigration or fraud offenses. "Proceeds of a fraud is defined as property that a person would not have but for the criminal offense." *United States v. Coffman*, 859 F. Supp. 2d 871, 875 (E.D. Ky. 2012); *see also United States v. Anguilo*, 897 F.2d 1169, 1212-14 (1st Cir. 1990) (applying "but for" test). Agriprocessors owned its corporate

name and trademarks long before any fraud or immigration allegations, and thus did not derive those assets from any criminal offenses. *See Anguilo*, 897 F.2d at 1212-14 (reversing forfeiture where defendant obtained forfeited assets before any criminal activity occurred).

In short, prosecutors attempted to criminally forfeit assets that were held by an uncharged third-party and/or had no nexus to criminal offenses, and did so in a manner that, if permitted, would expand criminal forfeiture authority far beyond what Congress authorized.

2. The Government Pursued Forfeiture Because Prosecutors Were Unwilling to Accept the Bankruptcy Law Definition of "Good Faith Purchaser" or Allow a Bankruptcy Judge to Decide Whether Aaron Rubashkin Could Have a Role in the Successor to Agriprocessors.

Bankruptcy law has long recognized that there is nothing improper about a company entering bankruptcy, reorganizing its operations in a way that reduces or eliminates crippling debt, and then emerging from bankruptcy with existing ownership still in place. Indeed, Chapter 11 of the Bankruptcy Code exists for the very purpose of allowing debtors a fresh start without necessarily changing ownership, and courts acknowledge in the context of Chapter 11 liquidations that "[i]t is commonplace, and involves no impropriety, for the debtor himself to bid at a foreclosure sale." *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1019 (7th Cir. 1988). The primary concern bankruptcy courts have in the liquidation context is making sure the bidding process for the debtor's assets is not compromised by bidder collusion that might drive *down* the price. To ensure there is no such collusion, bankruptcy courts must determine whether a bidder is a "good faith purchaser" before allowing the sale to occur. *See* 11 U.S.C. § 363(m); *In re Trism, Inc.*, 328 F.3d 1003, 1006 (8th Cir. 2003) (goal is to enhance value of the estate). "The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate." *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998).

In the case of Agriprocessors, however, prosecutors were unwilling to accept the bankruptcy law definition of "good faith purchaser." To them, "good faith" had a very different definition – *No Rubashkins* – and they used the threat of forfeiture to ensure their definition was given effect despite being told both by First Bank (the victim of the fraud and largest creditor of Agriprocessors) and Trustee Sarachek that the threat of forfeiture would chill bidding for Agriprocessors' assets and hurt creditors. In other words, prosecutors insisted on a definition of "good faith purchaser" that would have the *opposite* effect of the bankruptcy law goal of maximizing the value of the estate.

Specifically, during their December 5, 2008, meeting with Trustee Sarachek and his counsel, prosecutors made clear that *they* got to define "good faith purchaser," not a bankruptcy judge: "[AUSA Deegan:] Right now, until we take some action [forfeiture] to put our marker down, people are asking us to rely on the Bankruptcy process and a promise that 'good faith' means the same to you as we need it to mean." (December 5 Meeting Notes at 8 (emphasis in original) (App. 88)). Elsewhere during the meeting, AUSA Deegan stated: "'Good faith' – what does that mean? Whatever judge says. Very broad." (Id. at 4 (App. 85)).

These statements undermine the Bankruptcy Code. Congress enacted 11 U.S.C. § 363 with a clear goal in mind – maximizing the value of the debtor's estate for the benefit of creditors. In one fell swoop, the prosecutors in this case effectively repealed 11 U.S.C. § 363 and unilaterally replaced it with a new definition of "good faith" that was no longer designed to protect creditors, but rather to punish individuals like Aaron Rubashkin whom prosecutors had decided, for whatever reason, not to seek to prosecute criminally. The Eighth Circuit has criticized similar prosecutorial interference in the past. *See United States v. Riley*, 78 F.3d 367, 371-72 (8th Cir. 1996) (reversing prosecutors' attempt to take over an insurance business, forfeit

all revenues, and determine which creditors to pay; "Insurance regulation is the prerogative of the States. And if it were not, federal bankruptcy law would prove the proper forum for distributing the inadequate assets of defendants' failed or neglected businesses. . . The government here seemingly lost sight of this statutory limit on its authority.").

3. The Government Used the Threat of Forfeiture to Prevent Aaron Rubashkin and His Family From Having an Ownership, Management, or Consulting Role With the Successor to Agriprocessors.

During the December 5, 2008, meeting with Trustee Sarachek, AUSA Richard Murphy (then the Northern District of Iowa's Criminal Division Chief) said "No Rubashkins is very important to us" and characterized it as being "non-negotiable." (December 5 Meeting Notes at 6 (App. 86-87)). Shortly thereafter, AUSA Murphy reiterated that there could be "No involvement of Rubashkins or family from any standpoint (control, benefit)" in the successor entity to Agriprocessors. (Id.) (emphasis in original).

Prosecutors delivered the same message directly to potential bidders. In early February 2009, prosecutors met with Eli Soglowek, a successful businessman in the food industry for whom Agriprocessors would be a strategic acquisition and who just days earlier had submitted a term sheet offering $40 million for Agriprocessors' assets. According to Soglowek,

> [R]epresentatives of the United States Attorney's Office told me that if [my company] purchased the assets of Agriprocessors, no member of the Rubashkin family or any related entity could have any management, consulting, or ownership role in the business going forward. I was told by representatives of the United States Attorney's Office that if it was discovered that any Rubashkin was involved in the business going forward, there would be 'very bad consequences' for me and [my company].

(Soglowek Aff. at ¶ 5 (App. 94-95)).

Nearly a dozen other prospective and actual bidders provide similar information. David Wagschal, whose company, Kosher Standard, was the highest bidder during a bankruptcy auction in March 2009, said he was forced to meet with prosecutors during the auction:

> The U.S. Attorney's Office representative told me that if my company bought the Agriprocessors business, the U.S. Attorney's Office would confiscate the brand names and trademarks. He told me the business would have to 'start from scratch' and there could be no remnants of any connections to the Rubashkins. He said the U.S. Attorney's Office would be 'watching [me]' and that it would not be easy to get funding or run the business.

(Wagschal Aff. at ¶ 9 (App. 98)). Wagschal's partner, Jeff West, said:

> The prosecutor was hostile and threatening. He accused my partner and me of being connected in some way to the Rubashkins or having the intention of buying the business and reselling it back to the Rubashkins . . . The prosecutor said he would be watching us closely and said or implied that the government might exercise its forfeiture rights after our purchase of the business."

(West Aff. at ¶ 7 (App. 100)). Another bidder, Meyer Eichler, said:

> [AUSA] Murphy forewarned us in no uncertain terms that if he (or members of his office) were to discover that any member of the Rubashkin family had either an equity interest or a management role in the company after we purchased it, the U.S. Attorney's Office would not allow this."

(Eichler Aff. at ¶ 4 (App. 42)). Eichler's colleague, Sid Borenstein, reiterated the point:

> During the meeting, the U.S. Attorney's Office representative informed us that 'under no circumstances' would the government permit a sale to take place to a buyer that had Aaron Rubashkin as a minority investor, nor would the government permit him to play a management role."

(Borenstein Aff. at ¶ 7 (App. 45)).

Other prospective bidders report similar warnings from Trustee Sarachek regarding the inability to use members of the Rubashkin family in running the new business. Trustee Sarachek, of course, had been told directly by prosecutors that the prohibition on members of the Rubashkin family having an ownership or management interest was "non-negotiable" and was directed by prosecutors to pass this message along to bidders (Sarachek Aff. at ¶ 13 (App. 39)). Frederick Goldfein and Robert Sherman were among the prospective bidders to have received this message from Sarachek. (Goldfein Aff. at ¶¶ 4, 5 (App. 48); Sherman Aff. ¶ 5 (App. 102)). Another bidder, Abraham Shaulson, heard the same thing from counsel for Metropolitan Life

Insurance Company ("MLIC"), another large Agriprocessors creditor: "MLIC's counsel stated in an email to me dated May 17, 2009, that 'the US Attorney had a concern at the prior Bankruptcy Section 363 sale that any purchaser of the Agriprocessors assets have no ties with the Rubashkins.'" (Shaulson Aff. at ¶ 5 (App. 106)).

F. The Government Continued to Impose the "No Rubashkin Rule" Clear to the End of the Bankruptcy Auction Process and Long After It Became Clear the Sale of Agriprocessors' Assets Would Not Generate Sufficient Revenue to Pay Off First Bank and Other Creditors.

Trustee Sarachek chose not to accept Eli Soglowek's $40 million offer in late January 2009, but rather to use that bid as a "stalking horse" in an auction sale. (Sarachek Aff. at ¶ 14) (App. 39)).[7] Sarachek expected the auction process would result in a bid *higher* than $40 million. (Id.) However, Soglowek withdrew his offer shortly after meeting with prosecutors. (Soglowek Aff. ¶ 6 (App. 95)). Later, the bankruptcy auction had significantly fewer bidders than expected due to the government's threats of forfeiture. The highest bidder at the auction offered only around $16 or $17 million for the business—considerably less than the balance on Agriprocessors' line of credit with First Bank, and far less than Trustee Sarachek expected to receive given that the business had more than $68.6 million in assets and $300 million in annual revenue.[8] (Wagschal Aff. ¶¶ 7, 11 (App. 98, 99); Sarachek Aff. ¶¶ 16, 17 (App. 40)). Indeed, Trustee Sarachek told bidders they could expect to earn $25 million per year "in their sleep" if

[7] "A 'stalking horse' is a company chosen to make the first bid on a bankrupt company. This method allows the distressed company to avoid low bids." *In re Great Northern Paper, Inc.*, 299 B.R. 1, 3 & fn. 2 (D. Me. 2003). "Once the stalking horse has made its bid, other potential buyers may submit competing bids for the company's assets." *Id.* "The bid of the stalking horse sets the price so that other bidders will offer an adequately high purchase price." *Id.*

[8] During the bankruptcy proceeding, one of Trustee Sarachek's financial advisors, Marc Ross, prepared an "Insolvency Analysis" to determine whether Agriprocessors was insolvent at the time certain payments were made. Ross, who was the government's first witness at Petitioner's criminal trial, concluded the company had $68.6 million in assets as of June 27, 2008, *even after removing inflated and illegitimate accounts receivable and inventory.* (App. 50-78). Petitioner believes for numerous reasons that Ross's report understates the true value of Agriprocessors and its assets. Nonetheless, given the government's clear confidence in Ross, his report is an unassailable illustration of the disparity between the actual value of Agriprocessors' assets and the value obtained in the bankruptcy auction sale.

the business was operated correctly (Sherman Aff. at Attachment A, p. 2 (App. 104)), which would equate to an enterprise value well in excess of the balance of the First Bank line of credit. Nonetheless, the government continued to use forfeiture to restrict the future ownership and operation of the private business, with prosecutors going so far as meeting with the highest bidders *during the auction itself* to reiterate the forfeiture threat in an aggressive and intimidating manner. (Borenstein Aff. ¶¶ 6-11 (App. 44-45); West Aff. ¶¶ 5-9 (App. 100); Wagschal Aff. ¶¶ 7-11 (App. 98, 99)).

By the time of the auction in late March 2009, it was evident the warnings made by First Bank and Trustee Sarachek to prosecutors in December 2008 had come to fruition: *the government was scaring off potential bidders and preventing Trustee Sarachek from maximizing the value of the bankruptcy estate.* Immediately after the auction ended on March 24, 2009, First Bank declared a default on its post-petition financing arrangement with Trustee Sarachek because of its discomfort with the government's forfeiture position. (Palans letter to Trustee Sarachek dated March 24, 2009 (App. 108-110)). Specifically, in a letter Petitioner's counsel obtained for the first time while investigating this § 2255 Petition, First Bank explained: "[B]ased on discussions with certain government officials on or about March 24, 2009, [First Bank] deems itself insecure with respect to the actual or potential assertion by the United States of a right to forfeiture of assets of the Estate and the actions of the United States in pursuit of such a right or claim or right." (Id.) The government never disclosed to Petitioner the discussions on March 24, 2009, that led to First Bank feeling so threatened. However, as noted above, bidders report that prosecutors made hostile and threatening comments during the bankruptcy auction regarding the government's willingness to use forfeiture in the event the bidders had connections to the Rubashkin family. These were presumably the same discussions

that caused such concern to First Bank and led to the Bank declaring a default on its post-petition loan, although it is possible the government also had separate intimidating conversations with First Bank alone.

The government continued to make threats and impose restrictions in subsequent months. By Summer 2009, it was clear the bankruptcy auction would not result in sufficient proceeds to make First Bank whole. The only remaining bidder, SHF Industries, was offering only $8.5 million. (Sarachek Aff. ¶ 17 (App. 40)). Nonetheless, the government persisted in pursuing forfeiture (Crim. Dkt. No. 544 (Seventh Superseding Indictment dated July 16, 2009)), thus confirming the use of forfeiture was not designed to disgorge ill-gotten gains or obtain restitution for victims, but rather to punish Aaron Rubashkin and members of his family and dictate the future ownership and operation of the private company. On July 14, 2009, Iowa Deputy Attorney General Thomas H. Miller sent an email to AUSAs Murphy and Deegan regarding a statement from Deegan that Deegan had "no reason to believe [SHF's owner] is connected with the Rubashkin family." (App. 111). Miller stated, "it is my understanding that you are satisfied that your pending forfeiture action coupled with the certification that the purchaser must file under oath in order to complete the sale, should suffice to protect against that possibility [of a connection to the Rubashkin family]." (Id.) The same day, AUSA Murphy wrote a letter to counsel for SHF stating, "[w]e are also assured by the representations that neither your client nor the purchasing entity are currently, nor will become, associated in the purchase or operation of the plant, including through any financial or management interest or arrangement, with any of the previous owners or plant managers, including those charged with criminal offenses." (App. 113-114).

Later that month, on July 30, 2009, SHF's counsel had another conversation with the U.S. Attorney's Office, this time with AUSA Marty McLaughlin from the Civil Division. SHF's counsel later reported the following details of the conversation:

> [I]t seems to me that conceptually the USAO's forfeiture position/concern is a function of the USAO's comfort level about whether the new buyer…, either now or in the future, might be standing in for the Rubashkin family or its companies . . . Marty's forfeiture focus was on taking money which the buyer might pay, or assets which in the future the buyer might transfer, to the Rubashkin family or one of its entities.

(Eaton letter dated July 30, 2009 (App. 115-117, 161)). As of July 30, 2009, Aaron Rubashkin still had not been charged with a federal crime, nor would he ever be. Nor were any other members of the Rubashkin family besides Petitioner ever charged with a federal offense or named in a civil forfeiture proceeding. Nonetheless, the government continued to use the threat of forfeiture to remove the entire Rubashkin family from any ownership or management role in the kosher meat company Aaron had founded more than 50 years earlier. The government never informed Petitioner's counsel of its conversation with SHF's counsel.

G. The Government's Use of Forfeiture Drove Down the Value of Agriprocessors' Assets, Thus Increasing First Bank's Loss and, Inevitably, Petitioner's Sentencing Guidelines Range.

The government's improper use of forfeiture had exactly the effect the victim (First Bank) and Trustee Sarachek told them it would have: it scared bidders away from the bankruptcy auction process and drove down the value of Agriprocessors' assets. When the sale of Agriprocessors' assets was first announced in late 2008, Trustee Sarachek received inquiries from numerous interested parties, many of whom followed up by visiting Iowa, conducting due diligence, making financial arrangements, and taking other steps to demonstrate serious interest. (Sarachek Aff. ¶ 6 (App. 38); Wagschal Aff. ¶ 3 (App. 98); West Aff. ¶ 3 (App. 100); Shaulson Aff. ¶ 3 (App. 106)). By the time of the auction in March 2009, however, only a small number

of bidders placed bids, following which they were interrogated by prosecutors in the courthouse. (Sarachek Aff. ¶ 15 (App. 39); Borenstein Aff. ¶¶ 6-11 (App. 44-45); West Aff. ¶¶ 5-9 (App. 100); Wagschal Aff. ¶¶ 7-11 (App. 98-99)). Those bidders later withdrew from the process, leaving only SHF Industries and a disappointing purchase price of $8.5 million for assets valued at more than $68.6 million. (Sarachek Aff. ¶ 17 (App. 40)).

It is well established that "[m]arket forces must be allowed to operate freely to bring shareholders [or, in this instance, creditors] the best price" in an auction sale. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986); *accord* Erica M. Ryland, Bracing for the "Failure Boom": Should A Revlon Auction Duty Arise in Chapter 11?, 90 Colum. L. Rev. 2255, 2272 (1990) ("[E]xperience shows that shareholder value is maximized in a free-market bidding situation."). The participation of prior ownership is a crucial part of the operation of market forces. *See, e.g., In re Bonner Mall P'ship*, 2 F.3d 899, 915-16 (9th Cir. 1993) ("Old owners may have valuable expertise and experience that outside investors lack."); *In re BMW Group I, Ltd.*, 168 B.R. 731, 741 (Bankr. W.D. Okla. 1994) (prior ownership often "brings special value to the reorganization effort")

Here, the government interrupted the "market forces" by insisting that Aaron Rubashkin could not be involved in the company on a going forward basis. Trustee Sarachek summarizes the impact this had on the bankruptcy process:

> Aaron Rubashkin, in particular, was vital to maximizing the value of the Company on a going forward basis, as he had the relationships with large customers and unmatched experience and knowledge in the industry. Mr. Rubashkin was the namesake for the "Aaron's Best" and "Rubashkin" trademarks, which had significant meaning and value in the glatt kosher meat industry and were among Agriprocessors' most valuable assets. Aaron Rubashkin's involvement was crucial to maximizing the company's value in a bankruptcy sale and I met with him numerous times during the sale process . . . the government's assertion of forfeiture claims and restriction on the involvement of members of the Rubashkin family clearly had a chilling effect on the

> Agriprocessors' bankruptcy sale process and resulted in the Company selling for a lower amount than it otherwise would have.

(Sarachek Aff. ¶¶ 8, 18 (App. 38, 40)). Nearly a dozen prospective bidders confirm that the government's "No Rubashkin" rule impacted their valuation of Agriprocessors' assets. These prospective bidders explain – exactly as courts have recognized – that the unique expertise, relationships, insight, and name recognition associated with Aaron Rubashkin had tremendous value, and thus his forced exclusion from the business had a substantial downward effect on what the bidders were willing to pay (and whether they submitted a bid at all). Prospective bidder Sid Borenstein summarized the issue as follows: "[t]he position of the U.S. Attorney's Office had a chilling effect on our interest in purchasing the assets of Agriprocessors . . . We viewed Aaron Rubashkin as a 'key man' without whose involvement we would have no ability to manage this business. Accordingly we did not submit a bid." (Borenstein Aff. ¶ 12 (App. 46)). *See also*:

- Abraham Shaulson: "The inability to have an employment or consulting relationship with any member of the Rubashkin family, or any company affiliated with the Rubashkins, drove the value of the business down substantially." (Shaulson Aff. ¶ 8 (App. 106-107)).

- Meyer Eichler: "[T]he exclusion of Rubashkin family members pronounced by the US Attorney's Office prevented the group of investors from making a formal offer for the company." (Eichler Aff. ¶ 7 (App. 42)).

- Nathan Tzivin: "Mr. Soglowek also told me that the threats and demands of the United States Attorney's Office is the principal reason [his company] withdrew the offer reflected in the $40,000,000 term sheet, and didn't appear to bid at the bankruptcy auction held on March 23rd and 24th, 2009." (Tzivin Aff. ¶ 7 (App. 119)).

- Frederick Goldfein: "We continued to be interested in the transaction but started to move much more slowly after receiving this information (about the Rubashkins not being allowed to be involved)." (Goldfein Aff. ¶ 8 (App. 48-49)).

- David Wagschal: "The meeting with the representative from the U.S. Attorney's Office, as well as the general restriction on affiliations with any Rubashkins, had a substantial downward effect on my valuation of

> Agriprocessors' assets . . . But for the restrictions that were placed on the operation of the business, I would have been willing to bid even higher." (Wagschal Aff. ¶¶ 10, 11 (App. 99)).

- Jeff West: "I found the meeting with the prosecutors very intimidating, and it had a substantial downward effect on my valuation of the Agriprocessors business, particularly when combined with the restriction on any involvement of members of the Rubashkin family. But for those issues, we would have bid considerably more than the $16 million that we offered during the bankruptcy sale . . . We ultimately decided not to purchase the business, in large part because of the threats from the government." (West Aff. ¶¶ 9, 10 (App. 100)).

Even the eventual buyer of Agriprocessors' assets, SHF Industries, considered pulling its offer after prosecutors continued threatening forfeiture. A letter from SHF's counsel on July 30 explains,

> I told [AUSA] Marty [McLaughlin] the buyer was keenly focused on the USAO's current position, because it is not too late to cut its losses by deciding not to close. I said it is not realistic to expect the buyer to incur the huge anticipated future financial commitment necessary to close and begin operating the company if an ever-present risk hangs over its head that the United States government might come in to forfeit and take assets . . ."

(App. 115-117).

In the end, SHF did go through with the purchase of Agriprocessors' assets, with the transaction closing in August 2009. However, SHF ultimately paid only $8.5 million for those assets even though they were independently valued at more than $68.6 million as of June 27, 2008, and Trustee Sarachek believed he was going to receive more than $40 million as of late January 2009. Sarachek accepted the SHF bid with great reluctance, as he "felt Agriprocessors was worth substantially more than $8.5 million." (Sarachek Aff. ¶ 17 (App. 40)). The declarations from Trustee Sarachek and prospective bidders and other evidence demonstrate that the government played the key role in causing the considerable shortfall in value.

The insufficient purchase price caused First Bank, which held the senior security interest in most of Agriprocessors' assets, to suffer a loss that the Court found totaled approximately $27

million. This later became the loss amount in Petitioner's criminal case, resulting in a substantial increase of 22 levels under the Sentencing Guidelines. The 22-level increase equates, roughly, to 24 years of additional imprisonment for Petitioner. Had the bankruptcy auction resulted in a higher price, or had the government been recognized at the time of sentencing as the cause of the loss, Petitioner would have faced a considerably shorter Sentencing Guidelines range. Indeed, had Trustee Sarachek received an offer in excess of $40 million for the assets, as he expected in late January 2009 he would when he declined to accept Soglowek's $40 million bid (Sarachek Aff. ¶ 14 (App. 39)), Petitioner's Sentencing Guidelines range would have been 30-37 months. As of the date of the filing of this Merits Brief, Petitioner has served more than 80 months.

H. Rather than Accepting Responsibility for its Role in Causing the Loss Amount, the Government Withheld Exculpatory Evidence and Presented False and Misleading Testimony at Petitioner's Sentencing Hearing.

At the sentencing hearing in April 2010, Petitioner's counsel argued the government was responsible for the large loss to First Bank in light of prosecutors' interference in the bankruptcy process:

> Additionally, part of FBBC's actual loss stems from the governmental interference amounting to misconduct. The government has not accused Aaron Rubashkin of any federal crime relating to Agriprocessors. Yet, during and prior to the bankruptcy, the U.S. Attorney's Office for the Northern District of Iowa insisted that none of the Rubashkin family retain an ownership interest in the company. Agriprocessors' sole owner was Aaron Rubashkin, whose name had immense value and good will in the Orthodox Jewish community. The government's position had the effect – foreseeable to the government but not the defendant – of reducing the sale or liquidation value of Agriprocessors.

(Defendant's Sentencing Memorandum (Crim. Dkt. No. 895) at p. 39)). Petitioner's counsel made this argument despite having incomplete information regarding the extent and effect of the government's interference on the bankruptcy process. Counsel did not know, for example, that prosecutors described the prohibition on Rubashkins as "non-negotiable" during a meeting with Trustee Sarachek on December 5, 2008, nor did the government disclose the warning the

government received from Trustee Sarachek's counsel that the use of forfeiture "would enormously hurt [Sarachek's] ability to do his job." (App. 87). Petitioner also was not aware that First Bank had warned the government on December 9, 2008, that the assertion of forfeiture was "likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets as a 'going concern' or a turnkey operation and thereby 'chill' the bidding process . . . there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value." (App. 81-82). The government also did not disclose that Paula Roby, who testified at the sentencing hearing that the "No Rubashkin" rule did not exist, was present at the December 5, 2008 meeting when prosecutors said, "No Rubashkins is very important to us—non-negotiable." (App. 86). In addition, the government did not disclose the full extent of the threats it made during the bankruptcy auction that scared bidders and led to First Bank calling its post-bankruptcy petition loan into default.

Instead of making these disclosures, the government knowingly presented false testimony from Paula Roby that she was unaware of any prohibition on the involvement of Rubashkins in the new entity. (4/29/2010 Sent. Tr. 501:24-502:5 (App. 29-30)). Roby further falsely testified, with the government's knowledge, that any rumors regarding a prohibition on Rubashkins were "very unreliable," (Id. 514:2-12 (App. 37)); that Trustee Sarachek "worked very, very hard to dispel any rumors that were in the community [regarding a 'No Rubashkin' rule]" (Id. 505:23-506:13 (App. 32-33)); and that prosecutors' use of forfeiture ultimately had no impact on the bankruptcy sale process. Roby also testified falsely regarding the timing of a key meeting with a large potential bidder (Id. 502:21-503:5 (App. 30-31)); offered misleading testimony about the purpose of "related party" disclosure requirements in bankruptcy sales (Id. 496:1-19 (App. 28)); and claimed not to know the government's position on certain matters relating to Rubashkin

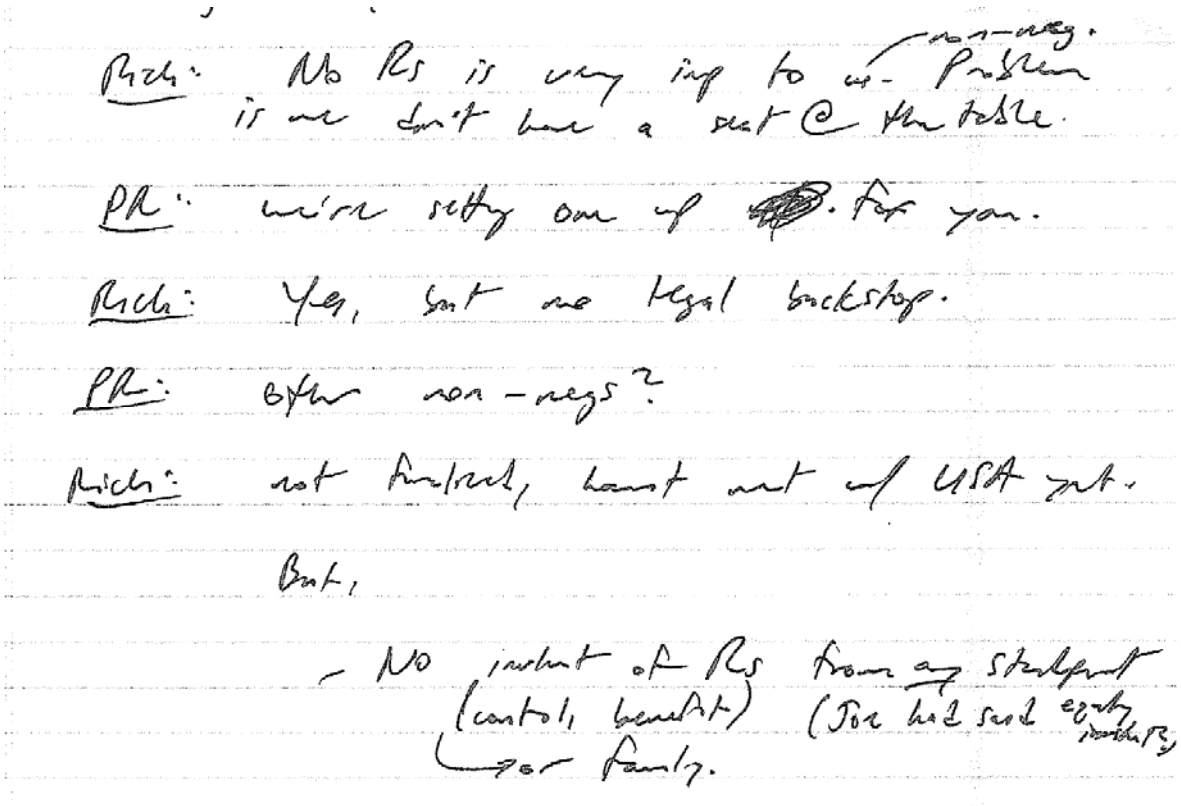
family involvement in the new entity (Id. 510:22-511:6 (App. 35-36)) despite having been in the room when prosecutors explained *exactly* what their position was.

I. Roby Provided False and Misleading Testimony Without Correction from the Government.

Roby provided false and misleading testimony on numerous occasions, including the following:

> Q. And is it your testimony that there was never an edict or prohibition that any purchaser could be involved with Aaron Rubashkin?
>
> A. Is there an edict that they couldn't, is that your question?
>
> Q. That they could not, yeah.
>
> A. There was none to my knowledge.

(4/29/10 Sent. Tr. at 502-03 (App. 30-31) In direct contrast to this sworn testimony, the government knew that Roby was present on December 5, 2008, when AUSA Murphy said, in unmistakable terms, "No Rubashkins is very important to us – non-negotiable." (App. 86). In fact, according to attorney notes from the meeting, the accuracy of which has been certified by the author of the notes and his partner (Reiland Aff. ¶¶ 5, 6 (App. 92); Solotorovsky Aff. ¶¶ 5, 6 (App. 93)), Roby was literally *the next person to speak* after AUSA Murphy pronounced the "No Rubashkin" rule and asked whether there were "any other non-negotiables," to which AUSA Murphy responded, again, that there could be "No involvement of Rubashkins from <u>any</u> standpoint (control, benefit)."



(App. 170; *accord* Reiland Aff. ¶¶ 5, 6 (App. 92) (certifying accuracy of handwritten notes); Solotorovsky Aff. ¶¶ 5, 6 (App. 93) (same)). Trustee Sarachek – Ms. Roby's client – confirms the government's restrictions: "[Prosecutors] were particularly focused on making sure the Company was not sold to Aaron Rubashkin or any other member of the Rubashkin family, and that no member of the Rubashkin family would have any involvement in managing the business on a going forward basis. Prosecutors made this restriction very clear to my attorneys and me during the meeting shortly after my appointment as Trustee." (Sarachek Aff. ¶ 12 (App. 39)). For Roby to testify later that there was no prohibition "to my knowledge" on a purchaser's involvement with Aaron Rubashkin is false and misleading and should have been immediately corrected by the government.

Roby also claimed not to know the government's attitude toward whether a bidder could include Aaron Rubashkin as a minority investor because "that question was never posed."

(4/29/10 Sent. Tr. at 510-11[9] (App. 35-36)). Again, this is inconsistent with AUSA Murphy's statement to Roby that there could be "[n]o involvement of Rubashkins or family from any standpoint" (emphasis in original). The word "any" is not ambiguous and surely would preclude Aaron from an ownership interest. Roby's testimony that she did not know the government's attitude on the subject is untrue.

Roby went further. When asked by a frustrated defense attorney why potential bidders were "hearing through the grapevine" about a prohibition on Aaron Rubashkin's involvement in the new entity if, in fact, there was no such restriction, Roby responded: "The grapevine can be a very unreliable thing." (4/29/10 Sent. Tr. at 501-02 (App. 29-30)).[10] In other words, despite having been physically in the room when AUSA Murphy pronounced "No Rubashkins" as a "non-negotiable" condition of the government's willingness to waive forfeiture rights, Roby

[9] In full, Roby's testimony on the point was as follows:

> Q. So you believe the state of the record is that if Soglowek wanted to come in and re-install Aaron Rubashkin, to purchase that company, they—they would say that's okay. That's your understanding?
> A. I – I can't have an understanding about that, because that question was never posed. I can't – I don't know what's in the minds of the US Attorneys. All I can tell you is I heard questions posed and assurances given.

[10] In full, she testified:

> Q. Okay. Well, if there was no rumor in the wind that – that there was a prohibition against Aaron Rubashkin in particular, then why is there any discussion about it?
> A. It's hard for me to testify about rumors in the wind.
> Q. Well, you were present for meetings when the question was asked. Why is the question asked unless somehow people are hearing through the grapevine that there's a no-Aaron-Rubashkin edict?
> A. The grapevine can be a very unreliable thing.

(4/29/10 Sent. Tr. 501-02. App. 29-30)). Later, Roby reiterated the false testimony:

> Q. Well, wouldn't you agree, since this was a company run by Jewish Americans who had gained some level of renown, that if – if the rumor went into the Jewish business community that there was a no-Rubashkin edict, that that might cost value on the property?
> A. Mr. Sarachek, Mr. Ross, Mr. Schwab, all the partners of Triax Capital Advisors, are also, in my opinion, Jewish people of some renown, and they worked very, very hard to dispel any rumors that were in the community and to market this as vigorously as possible.

(4/29/10 Sent. Tr. 506. App. 33)). The government did not correct her testimony in either instance.

provided testimony suggesting that any bidders concerned about a No Rubashkin rule were acting unreasonably or, worse yet, fabricating *their* stories. The Court – which, of course, did not have the benefit of AUSA Murphy's statement that "No Rubashkins" was "non-negotiable" or any of the other evidence the government failed to provide to Petitioner's counsel – ultimately credited Roby's testimony and discredited the testimony and evidence presented by the defense. (Court's Sentencing Order (Crim. Dkt. No. 927) at pp. 22-23).

Roby also testified that Trustee Sarachek "worked very, very hard to dispel any rumors that were in the community [regarding a restriction on Rubashkins] and to market this as vigorously as possible." (4/29/10 Sent. Tr. 506 (App. 33)). Again, this testimony was false. And the government *knew* it was false at the time of the sentencing hearing and failed to correct it. Indeed, Trustee Sarachek confirms that "at the government's direction, I disclosed to Eichler, Shaulson, and others that members of the Rubashkin family could not be involved in buying or managing the company." (Sarachek Aff. ¶ 13 (App. 39)). Thus, far from "dispel[ling] any rumors" about a No Rubashkin rule, Sarachek *perpetuated* those so-called "rumors" – which, of course, were not rumors at all.

Roby also testified falsely – or, at least, highly misleadingly – with respect to the *effect* of the government's use of forfeiture on the bankruptcy sale process. She claimed that prosecutors' forfeiture allegation "did not" have any impact on bidders in the Agriprocessors bankruptcy. But during the December 5, 2008, meeting, Roby heard her co-counsel warn prosecutors that their forfeiture position "would kill off bidders" and "enormously hurt [Trustee Sarachek]'s ability to do his job" of maximizing the value of the Agriprocessors estate. (December 5, 2008 Meeting Notes at 6, 7 (App. 86-88)). She also was well aware of First Bank's concerns about forfeiture, which were summarized in a letter from First Bank's counsel to AUSA Deegan dated

December 9, 2009, stating "the public assertion of forfeiture claims, even if accompanied by a statement that your office will work with potential purchasers, is likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets as a going concern or a turnkey operation and thereby 'chill' the bidding process." (App. 81-82). First Bank's counsel further warned, "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets." (Id.) As Roby knew by the time of her sentencing testimony, these warnings had come true: out of the numerous potential bidders who expressed interest to Trustee Sarachek in purchasing Agriprocessors as a going concern, few actually submitted bids, and some of *those* bids were withdrawn following meetings with prosecutors. If viewed in isolation, Roby's testimony that forfeiture allegations had no effect on bidders could be dismissed as a mere erroneous opinion; in the context of her surrounding testimony, however, it is clear Roby was trying to perpetuate the false impression that the government did not improperly interfere in the bankruptcy process and thus the loss was attributable to Petitioner.

Yet another clear instance of false testimony arose when Roby testified about the timing of Eli Soglowek's $40 million bid for Agriprocessors' assets. The $40 million bid, if accepted, would have completely paid off First Bank's debt and thus resulted in a loss amount of $0 attributable to Petitioner for criminal sentencing purposes. However, Soglowek was forced to meet with prosecutors shortly after making the $40 million bid and decided soon after the meeting to withdraw the bid. (Soglowek Aff. ¶ 6 (App. 95)). During the sentencing hearing, Roby falsely testified that Soglowek met with prosecutors *before* making his $40 million bid, thus giving the false impression the meeting with prosecutors had not caused him any discomfort. In full, she stated:

A. There had been some discussion about concern that there might be someone coming in buying on behalf of Mr. Rubashkin. But at the meeting that I sat in with Mr. Soglowek, my trustee and Mr. Soglowek made it very clear that they saw him as an indispensable advisor, and they were told by the United States Attorney's Office that that was not a deal breaker. That did not – was not something that was going to trigger any action or make it impossible to buy this company.

Q. What was the date of that?

A. I don't recall the date offhand.

Q. Was it in January or was it in April?

A. Well, it wouldn't have been in January because that's when my son was in the hospital, so it would have been sometime after that.

Q. It was in April when Soglowek came back for a second run at trying to buy the company, right?

A. **It was before Soglowek entered its $40 million bid. We met with the US Attorneys prior to that**.

(4/29/10 Sent. Tr. 502-03 (emphasis added) (App. 30-31)). Roby's own fee petitions, which her firm submitted to the Bankruptcy Court, show the falsity of her testimony. Soglowek submitted his $40 million offer on January 25, 2009. (Bankr. Dkt. 329 (App. 123-152)). Roby's fee petitions – as well as those of Trustee Sarachek – show Soglowek met with the U.S. Attorney's Office twelve days later, on February 6, 2009. (App. 153-155). In other words, Soglowek met with the U.S. Attorney's *after* entering his $40 million bid, in contrast to Roby's testimony that he "met with the US Attorney's *prior* to [entering the bid]" (emphasis added). Roby's testimony gave the false and misleading impression that Soglowek's meeting with the government did not discourage him in any way from moving forward with his offer. The actual timing of that

meeting – as well as affidavits from Soglowek and his associate, Nathan Tzivin (App. 94-95 and 118-119) – show the opposite is true.

Government counsel actively participated in eliciting Roby's false and misleading testimony. Counsel asked her whether she was "aware of any agreement out there that relates to some agreement not to hire Rubashkins." Roby answered "no," she was not aware of any such agreement. (4/29/10 Sent. Tr. 495-96 (App. 27-26)). Given that the very counsel conducting the questioning had himself had been present when Trustee Sarachek was told in December 2008 that "No Rubashkins" could be involved in the new business "from any standpoint," counsel surely knew, or should have known, he was eliciting false and misleading testimony.

The government also elicited – again, without correction – testimony implying it was the *bankruptcy judge*, and not *prosecutors*, who wanted to know whether prospective bidders had connections to the Rubashkin family. Petitioner argued that a "related party disclosure" requirement in the bankruptcy auction process – which required prospective bidders to disclose any connections to Rubashkin family members – was part of how prosecutors enforced their "No Rubashkin" rule. Roby, in response to leading questions from the government, testified instead that related party disclosures are a "routine" requirement in Chapter 11 cases and reflect the bankruptcy law definition of "good faith purchaser":

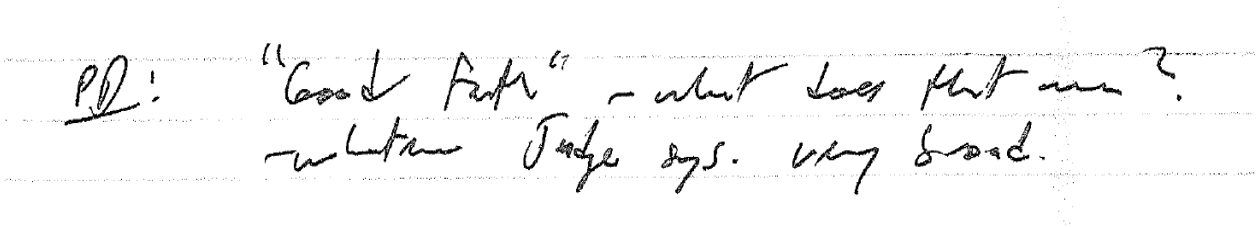
> A. There was in – in the bidding procedures a provision that required anyone who wished to be a qualified bidder to identify their connections with several parties, including the related parties in the bankruptcy, A.A. Rubashkin and sons, the Rubashkin family, but also with creditors, with – you know, with anyone involved in Agriprocessors. That's – that's a fairly routine thing for us to do. We need to make disclosures to the bankruptcy court. Ultimately, my trustee is responsible to the creditors and to Judge Kilburg, and he needs to go in and be able to say in good faith that he has qualified bidders ready to bid.
>
> Q. All right. And so this whole idea of related parties, is that something that happens in bankruptcy as part of the procedures on a pretty regular basis?

A. It has happened in bankruptcies I have seen in the past, yes.

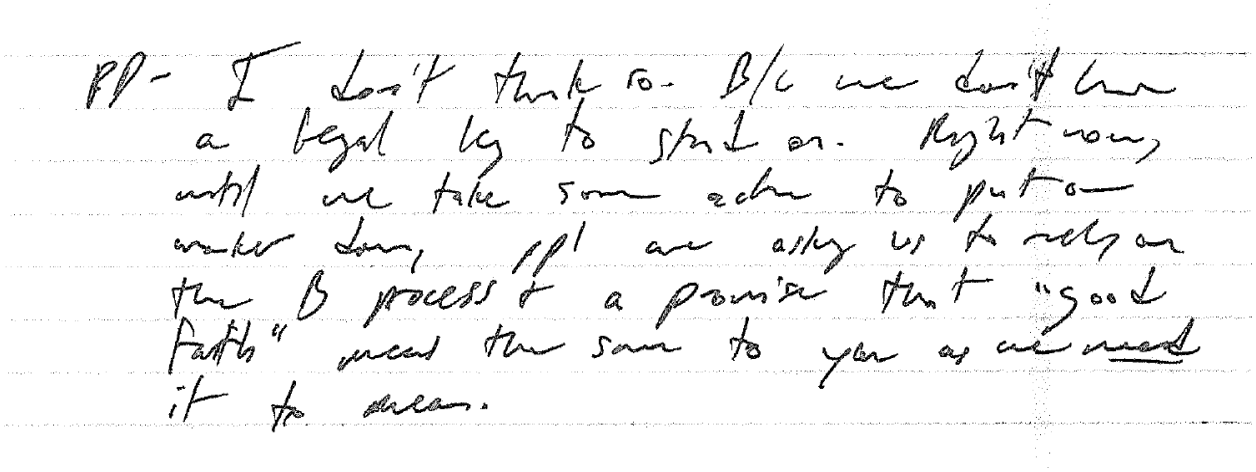
Q. All right. And is that – the question of related parties, is that a concern to the bankruptcy court?

A. Absolutely.

(4/29/10 Sent. Tr. 496 (App. 28)). This testimony was highly misleading. The December 5, 2008, notes make clear the related party disclosure requirement was designed to determine whether a prospective bidder had connections to the Rubashkins. Thus, the related party disclosure was not a "fairly routine thing" designed to allow the Trustee to "say in good faith that he has qualified bidders ready to bid," but rather was a *unique* requirement included *at the insistence of prosecutors* because they *did not trust the bankruptcy law definition of "good faith purchaser."* (December 5, 2008 Meeting Notes at 4 (App. 85) ("[AUSA Deegan:] 'Good faith' – what does that mean? Whatever judge says. Very broad.")).



In fact, in the December 5, 2008, meeting, prosecutors made clear they were pursuing forfeiture precisely because they did not *want* a bankruptcy court to apply "routine" bankruptcy principles in deciding whether a potential bidder was qualified and acting in good faith. In government counsel's own words, "Right now, until we take some action [forfeiture] to put our marker down, people are asking us to rely on the Bankruptcy process and a promise that 'good faith' means the same to you as we need it to mean." (Id. at 8) (emphasis in original).



It was, at a minimum, highly misleading for the government later to elicit testimony that the related party disclosure in the Agriprocessors bankruptcy was "routine" and something that happens "on a pretty regular basis."[11]

J. Roby Harbored Serious but Undisclosed Bias Against Petitioner.

Although not known to Petitioner's counsel at the time of sentencing, it is clear, in retrospect, that Roby's role in providing false and misleading testimony was not coincidental. Roby harbored serious bias against Petitioner (despite having never met the man) to the point that she described him to one of her clients as the "sleaziest bastard to ever walk the earth." (Dizack Aff. ¶ 12 (App. 157)). Roby also told the client she "was going to make sure he [Petitioner] was put away for a long time." (Id.)

Given Roby's willingness to disclose her bias to an out-of-state client who had no connection to Agriprocessors, it is inevitable she would have disclosed the same to government

[11] Roby's testimony on the "related party disclosure" requirement also was misleading for a second reason. Bankruptcy courts are concerned about related party bidding because they want to ensure there is no collusion between a creditor and debtor that might depress the sales price and thus harm other creditors. *See In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."). It would make no sense for a bankruptcy court to impose a related party disclosure requirement for the purpose of disqualifying an interested bidder from the process for punitive reasons unrelated to bidder collusion. Such a disqualification would reduce the number of bidders and thus undermine the goal of the bankruptcy auction process to maximize the value of the estate. Thus, even if related party disclosures are "routine," it is not for the reasons Roby's testimony implied.

attorneys directly involved in prosecuting Petitioner. She was, after all, Trustee Sarachek's "primary liaison" with the government and assisted government attorneys in gathering information for both this and other fraud cases. The government did not, however, disclose her bias to the defense.

K. The Court Found Roby's Testimony Credible and Discredited Contrary Defense Evidence.

The government's presentation of false and misleading testimony resulted in the Court finding Roby credible and *dis*crediting contrary evidence from defense witnesses regarding the No Rubashkin rule:

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

(Court's Sentencing Memorandum (Crim. Dkt. No. 957) at pp. 22-23). Moreover, because the government turned the issue into one of credibility, it would have been futile for Petitioner's attorneys to appeal the Court's finding. *See United States v. Dierling*, 131 F.3d 722, 736 (8th Cir. 1997) ("The sentencing court's assessment of the credibility of witnesses is nearly unreviewable.").

Now that the undisclosed evidence has come to light, it is clear the government's presentation of false and misleading testimony caused the Court to make an erroneous finding of fact. A government attorney said "No Rubashkins is very important to us," described it as "non-negotiable," and insisted there could be "no involvement of Rubashkins or family from <u>any</u> standpoint." His own words therefore contradict the Court's conclusion that "there was no such condition attached to the sale of Agriprocessors." Trustee Sarachek further confirms the

existence of a No Rubashkin rule and acknowledges telling bidders about it. Nonetheless, the government took no step to correct the Court's erroneous finding. In fact, the government continues to insist it did not present false or misleading testimony at sentencing. *See* Amended Answer to § 2255 Petition at 3, 5 (Dkt. No. 10) ("Nor did the government present inaccurate testimony at sentencing.").

Furthermore, the information withheld by the government would have affected Petitioner's position on the loss in value caused by the government's interference in the bankruptcy process. Had Petitioner known of Trustee Sarachek's statements that forfeiture would "kill off bidders" and "enormously hurt his ability to do his job," and First Bank's statement that forfeiture would "have a significantly negative impact on the prospects for the sale" and result in "few, if any, potential purchasers [being] willing to navigate through a pending forfeiture proceeding and pay fair value," he would have argued for an even greater reduction in loss amount as a result of the government's unforeseeable and wrongful conduct.

L. The Government's Presentation of False and Misleading Testimony Violated Petitioner's Due Process Rights.

Under *Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors are forbidden from knowingly presenting false testimony and must correct it whenever it occurs, even if not elicited by them. Similarly, *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to disclose exculpatory evidence. "*Brady* and *Napue* apply when the suppressed evidence concerns the credibility of a witness, as well as when the suppressed evidence directly concerns the guilt or punishment of the accused." *United States v. McCarty*, 177 F.3d 978 (5th Cir. 1999) (emphasis added); *see also United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008) (government must disclose evidence "favorable to an accused" and "material either to guilt or to punishment"); *Honken v. United States*, 42 F. Supp. 3d 937, 1013 (N.D. Iowa 2013) ("[I]t is the government's

responsibility to elicit the truth when a falsehood is in any way relevant to the case."). "Evidence is 'material' if it creates a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). The same materiality standard applies to a *Napue* violation. *See Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (*Napue* violation is material if "the false testimony could … in any reasonable likelihood have affected" the outcome of the proceeding).

The government violated *Napue* repeatedly during Petitioner's sentencing hearing with Roby's testimony and did so again after the hearing ended when the Court, relying on what it believed was credible testimony from Ms. Roby, made an inaccurate factual finding on a material issue. The government also violated *Brady* by failing to disclose, at a minimum: (1) the existence or substance of the December 5, 2008, meeting with Trustee Sarachek in which prosecutors announced – in front of Ms. Roby – the "No Rubashkin" rule and were warned that pursuing forfeiture would "kill off bidders" and "enormously hurt [Sarachek's] ability to do his job" of maximizing the value of the estate; (2) the substance of prosecutors' meetings with prospective bidders in which they made threats and prohibited Aaron Rubashkin's involvement in the successor entity; (3) the substance of their "discussions" regarding forfeiture with First Bank in March 2009 that unsettled the Bank to such a degree it declared a default on its post-petition financing; (4) the statements from First Bank that forfeiture would "have a significantly negative impact on the prospects for a sale" and that "few, if any, potential purchasers [would be] willing to navigate through a pending forfeiture proceeding and pay fair value"; and (5) the direction prosecutors provided to Trustee Sarachek to communicate to potential bidders the "No Rubashkin" rule.

As a result of the government's presentation of false and misleading testimony and failure to provide exculpatory information, the Court rejected Petitioner's position on the "No Rubashkin" rule. The Court also would have, in any event, lacked complete information on how much higher the winning bid would have been had the government not wrongfully used criminal forfeiture to punish Aaron Rubashkin and other uncharged members of his family. The following facts now shed light on that subject: (1) Trustee Sarachek and numerous bidders aver under oath that the government's "No Rubashkin" position had a substantial downward effect on the sales price; (2) Agriprocessors' assets were independently valued at more than $68.6 million as of June 27, 2008, even after making downward adjustments for inflated and illegitimate receivables; (3) the actual sale price of only $8.5 million represents a remarkably low recovery for a business sold as a going concern in comparison to at least $68.6 million in assets; (4) Eli Soglowek's $40 million bid, if accepted, would have been large enough to completely payoff the balance of Agriprocessors' line of credit with First Bank, and thus would have resulted in a loss amount of $0 for Sholom Rubashkin and Sentencing Guidelines range of 30-37 months' imprisonment; (5) Trustee Sarachek believed he could do even *better* than Soglowek's $40 million bid at a bankruptcy auction and informed potential bidders they could expect to make $25 million per year "in their sleep;" and (6) First Bank expected the bids to be higher, too, as evidenced by its refusal to accept a $16 million bid at the conclusion of the initial bankruptcy auction on March 24, 2009. These facts lead to the inescapable conclusion that had the government not wrongfully interfered in the bankruptcy process; caused a company with at least $68.6 million in assets to sell as a going concern for only $8.5 million; knowingly withheld material exculpatory information regarding loss amount; and knowingly presented false and misleading testimony at sentencing (and failed thereafter to correct the Court's resulting

incorrect factual findings), Petitioner would have faced a vastly lower Sentencing Guidelines range.

M. Although the Court Should Grant the § 2255 Petition on the Papers, Petitioner Requests Discovery and an Evidentiary Hearing In the Event the Government Continues to Claim It Did Not Violate Brady or Napue.

It is difficult to imagine a clearer example of the government presenting false or misleading testimony than occurred here. In response to a question about whether the government imposed a restriction in the bankruptcy proceeding on Rubashkin involvement, Roby testified, "there was none, to my knowledge." Later, she said "[t]he grapevine can be a very unreliable thing" when asked about why there were rumors in the community regarding a "No Rubashkin" rule and claimed Trustee Sarachek worked to "dispel" any such rumors. Sarachek's affidavit directly refutes her testimony, and the December 5, 2008, Meeting Notes conclusively establish AUSA Murphy told her and Trustee Sarachek that "No Rubashkins is very important to us" and "non-negotiable" and there could be "No involvement of Rubashkins from any standpoint." Moreover, it is self-evident that Roby's testimony was material because the Court relied upon it in concluding there was not a "No Rubashkin" rule.

Even if one assumes, for sake of argument, that Roby merely forgot about prosecutors' "No Rubashkins" statements during the December 5, 2008, meeting, and that she somehow misunderstood what Trustee Sarachek was communicating to potential bidders, the government violated *Napue* when it failed to correct her testimony. The "No Rubashkin" rule *came from prosecutors themselves* and thus was clearly within the scope of the government's actual and constructive knowledge. *See Drake v. Portuondo*, 553 F.2d 230, 241-43 (2d Cir. 2009) (finding *Napue* violation where prosecutor presented false and misleading testimony from expert witness whom the prosecutor himself had interviewed; "Obviously, [the prosecutor] knew that this portion of [the witness's] testimony was false, because the falsehood related to a conversation

[the witness] had with [the prosecutor]"). The government then violated *Napue* again when it failed to correct the Court's erroneous finding that "there was no such condition attached to the sale of Agriprocessors." *See Honken*, 42 F. Supp. 3d at 1013 ("[I]t is the government's responsibility to elicit the truth when a falsehood is in any way relevant to the case.").

Under these circumstances, the Court must grant Petitioner's § 2255 motion and permit him to be resentenced. The facts here are similar to *United States v. Weintraub*, 871 F.2d 1257, 1264-65 (5th Cir. 1989), in which the prosecution withheld mitigating evidence from the defense regarding the drug quantity for which the defendant was responsible. The Fifth Circuit reversed the denial of the § 2255 motion and remanded for resentencing because the withheld information "was material to Weintraub's punishment" and therefore should have been disclosed. *See also United States v. Gregory*, Nos. 91-6400, 91-6431, 1992 WL 393144, at *10-12 (6th Cir. 1992) (reversing and remanding in light of *Brady* violation where undisclosed evidence might have affected drug quantity determination).

Given Petitioner's overwhelming evidence (including the handwritten notes from the December 5, 2008, Meeting confirming the government's imposition of a No Rubashkin rule; the declarations from two licensed attorneys confirming the accuracy of the handwritten notes; the declaration from the Bankruptcy Trustee himself confirming the No Rubashkin rule; the declarations from numerous bidders confirming the No Rubashkin rule; and the unambiguous evidence of other false and misleading testimony from Roby, including blatant inconsistency between her testimony and her fee petitions regarding the timing of a key meeting), there are only two paths forward. *First*, if the government will concede the *Napue* and *Brady* violations, Ground One should be granted without a hearing and Petitioner resentenced in a new hearing free from false or misleading testimony. *Second*, if the government will *not* concede the due

process violation – i.e., if the government inexplicably argues that Bankruptcy Trustee Sarachek, Attorney Reiland, Attorney Solotorovsky, Mr. Eichler, Mr. Borenstein, Mr. Wagschal, Mr. West, Mr. Soglowek, Mr. Sherman, Mr. Wachs, Mr. Goldfein, Mr. Soglowek, and Mr. Shaulson are all liars – Ground One should be granted without a hearing anyway in light of the overwhelming evidence in Petitioner's favor. *See Williams v. TESCO Services, Inc.*, 719 F.3d 968, 974 (8th Cir. 2013) (affirming summary judgment in light of "overwhelming evidence in the summary judgment record"); *see also Grady v. United States*, 269 F.3d 913, 918-19 (8th Cir. 2001) (applying summary judgment standards to § 2255 Petition); *Sosa-Jimenez v. United States*, No. C11-4032-MWB, 2014 WL 559022, at *3-4 (N.D. Iowa Feb. 11, 2014) (same).

If for some reason the government argues, or the Court concludes, that Ground One should be denied despite the overwhelming evidence of false and misleading testimony, Petitioner requests an evidentiary hearing and discovery to address the disputed matter. In particular, Petitioner requests depositions of AUSAs Murphy and Deegan to determine their position on the facts surrounding: (a) their decision to pursue forfeiture; (b) their involvement in the bankruptcy process; (c) their December 5, 2008, meeting with Trustee Sarachek and his counsel; (d) their meeting with First Bank in early December 2008; (e) their meetings with bidders in February and March 2009; (f) their meeting with First Bank on March 24, 2009 that led to First Bank declaring a default on its post-bankruptcy petition loan to Agriprocessors; (g) their conversations with SHF Industries; (h) their conversations with Paula Roby; (i) other matters relating to the effect of forfeiture and the "No Rubashkin" rule on loss amount; and (j) restrictions the government imposed on the ability of the Trustee Sarachek to do business with Cottonballs, Best Value Trucking, and other Rubashkin-owned entities. Petitioner further requests the following written discovery: (a) all documents reflecting the government's valuation

of Agriprocessors' assets at the time the government first alleged forfeiture in December 2008 and at the time of each subsequent assertion of forfeiture in superseding indictments, including, at a minimum, all Net Equity Worksheets prepared by the U.S. Attorney's Office;[12] and (b) all communications between the government and third-parties (including, but not limited to, Paula Roby, Trustee Sarachek, U.S. Bankruptcy Trustee Habbo Fokkena, and actual and prospective bidders) regarding forfeiture and/or the No Rubashkin rule.

II. GROUND TWO: THE GOVERNMENT VIOLATED PETITIONER'S DUE PROCESS RIGHTS BY FAILING TO DISCLOSE SUBSTANTIAL *EX PARTE* COMMUNICATIONS WITH THE TRIAL JUDGE.

In Ground Two, Petitioner alleges the government violated its *Brady* obligations by failing to disclose the nature and extent of its pre-indictment *ex parte* communications with the trial judge, thus preventing Petitioner from making a timely motion for recusal. Petitioner acknowledges the Court essentially rejected Ground Two when it denied his Motion to Recuse on January 21, 2016. (Dkt. No. 42). Petitioner therefore will not re-argue Ground Two here, other than to incorporate by reference for error preservation purposes the facts and arguments in his Amended Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment and Sentence Pursuant to 28 U.S.C. § 2255. (Dkt. No. 27-2). Furthermore, and again only for error preservation purposes, Petitioner requests the deposition of at least one government

[12] The U.S. Attorney's Manual requires prosecutors to complete a "Net Equity Worksheet" prior to alleging forfeiture. *See* U.S. Attorney's Manual at § 9-111.123 *et seq.* The purpose of the Net Equity Worksheet is to determine whether the value of the assets being forfeited exceeds the value of outstanding liens or mortgages. *Id.* Here, if the government valued Agriprocessors' assets at an amount higher than the outstanding debt to First Bank, it would have to disclose that information under *Brady* because it would be material to whether the Bank's ultimate loss was "reasonably foreseeable" to Petitioner. Indeed, if the government believed First Bank was going to be made whole, it is difficult to understand how Petitioner could have reasonably foreseen a $27 million loss.

By contrast, if the government valued Agriprocessors' assets at an amount *lower* than the debt to First Bank, Petitioner is entitled to know why the government sought forfeiture despite this negative net equity. *See* U.S. Attorney's Manual at §9-111.123 (if liens and mortgages exceed the anticipated proceeds from sale of property, prosecutors must "document the circumstances that warrant the continuation of the forfeiture action"). The answer presumably relates to the government's desire to keep Aaron Rubashkin from remaining involved in the business on a going forward basis.

attorney regarding *ex parte* contacts with the trial judge prior to trial and sentencing, as well as written discovery from the government to include any and all written communications between the trial judge and government prior to Petitioner's indictment and sentencing.

III. GROUND THREE: THE GOVERNMENT VIOLATED PETITIONER'S DUE PROCESS RIGHTS BY FAILING TO DISCLOSE EXCULPATORY INFORMATION FROM A KEY COOPERATING WITNESS.

At trial and sentencing, the Government presented evidence of financial transactions in which funds were transferred from the Agriprocessors' operating account at Citizens State Bank to the accounts of related entities Kosher Community Grocery ("KCG") and Torah Education ("TE"). *See, e.g.*, Government Trial Exs. 2021, 2027. The government also presented evidence of transfers from the KCG and TE accounts to the Agriprocessors' account at Decorah Bank & Trust, which served as a "sweep" account for First Bank. *See id.* The Government characterized these transactions as money laundering:

> [D]efendant's only purpose for routing the funds through the Torah Education and Kosher Community Grocery Store accounts was to make the funds appear to be payments by customers so that First Bank did not become aware that defendant was depositing Agriprocessors funds into the sweep account at Decorah Bank and Trust.

Government's Resistance to Defendant's Motion for Judgment of Acquittal at 20 (Crim. Dkt. No. 738). The jury ultimately convicted Mr. Rubashkin of ten counts of money laundering in violation of 18 U.S.C. § 1956.

The Government's case on money laundering suffered from two significant weaknesses.

First, during the period when the alleged laundering through the TE and KCG[13] accounts was occurring, undisputed evidence showed that Agriprocessors typically transferred money *directly* from its operating account at Citizens State Bank to the sweep account at Decorah Bank

[13] Trial evidence showed that TE and KCG were real companies with substantial assets and not shell companies created for some improper purpose. (10/14/09 Trial Tr. 171-72; 10/22/09 Trial Tr. (Bensasson) 46-47. App. 4-5; 20-21)).

& Trust *on the same dates* as the transfers from the TE and KCG accounts. *See* Government Trial Ex. 2028. Similarly, Agriprocessors frequently transferred money directly from its operating account at Luana State Bank to the sweep account at Decorah Bank & Trust. *See* Government Trial Ex. 2031. In 2008 alone, more than 325 checks totaling more than $30 million were written directly from an Agriprocessors operating account to the sweep account at Decorah Bank & Trust. *See* Government Trial Exs. 2028, 2031. By contrast, fewer than 200 checks totaling less than $15 million flowed through the KCG and TE accounts. *See* Government Trial Exs. 2021, 2027.

The hundreds of direct transfers from an Agriprocessors account to the sweep account undermine the government's theory that the "only purpose" for Petitioner to pass funds through the KCG and TE accounts was to conceal the source of the funds from First Bank. There is no plausible reason why Petitioner would on some occasions use what the government characterized as a "sophisticated" and "multi-layered" laundering scheme to keep the bank from learning that an Agriprocessors account was the source of the funds, and yet on hundreds of other occasions occurring on the very same days have checks written directly on an Agriprocessors account. The hundreds of direct transfers therefore prove Petitioner did not use the KCG and TE accounts for the purpose of concealment.

Second, the government's own exhibits show that checks were written from the KCG or TE accounts to the sweep account before corresponding checks were written from the Agriprocessors operating account at Citizens State Bank to the KCG or TE accounts. *See* Trial Ex. 2021 (earliest checks in the sequence were from KCG to Decorah Bank & Trust); 2027 (same with respect to TE account). In other words, the checks from the operating account to the KCG and TE accounts clearly were designed to backfill a hole that had been created by earlier

checks from KCG or TE to the sweep account. The government might have characterized these transactions as "check kiting." However, perhaps recognizing that check kiting charges would not have affected the Sentencing Guidelines calculation, the government chose instead to label them as "money laundering" despite the inconsistency between the government's money laundering theory and the actual timing of the KCG and TE checks.

Prior to trial, cooperating witness Mitchel Meltzer provided exculpatory information to the government that would have tipped the scales in Petitioner's favor on the money laundering charges. This exculpatory information was never disclosed to Petitioner's trial counsel. Had it been disclosed, and keeping in mind the already-weak evidence supporting the money laundering charges, there is a "reasonable probability" the jury would have acquitted Petitioner on those ten counts. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("[The] touchstone of materiality is a 'reasonable probability' of a different result."). This, in turn, would have substantially affected Petitioner's Sentencing Guidelines calculation, as he no longer would have been subject to four additional levels under USSG §2S1.1.

Meltzer was a key government witness who worked in the Agriprocessors accounting department from 1996 to 2009. (Meltzer Aff. ¶ 1 (App. 159)). Meltzer provided the following information to prosecutors and law enforcement agents during interviews prior to his trial testimony:

> Sholom Rubashkin was always in a very tight cash position as a result of constant expansions to the Agriprocessors plant and his financial support for Jewish entities such as the shul and kosher grocery and restaurant, as well as the requirement for "up front" payment for purchasing cattle. As a result, Sholom often "played the float" to try to help with short-term cash flow problems. When banking practices changed in the early 2000s to cause checks to be processed in 1-3 days instead of the usual 3-7 days, Sholom tried to "re-create" the lost float by transferring monies to and from other accounts. By including additional accounts in the movement of funds, Sholom could give himself an extra day or two before certain expenditures would be settled. I told the agents and prosecutors that I did

> not believe Sholom intended to defraud the bank with these transactions; rather, he was simply trying to keep the company going in any way he could. My understanding was, and is, that the movement of funds was simply a means of managing cash flow.

(Meltzer Aff. ¶ 3 (App. 159-160)).

Crucially, Meltzer also informed the government prior to trial that First Bank "never reviewed actual checks as part of its audit." (Id. at ¶ 4). It follows that Agriprocessors would not have needed to move funds through the KCG and TE accounts in order to conceal the source of those funds from First Bank. (Id.) The bank would have been none the wiser even if funds were transferred directly from one Agriprocessors account to the other (which they often were).

Meltzer's information provided what would have been the final link in exposing the insufficiency of the government's evidence on money laundering. The evidence already established more than 325 transactions in the year 2008 alone that were inconsistent with the government's theory that Petitioner passed funds through the TE and KCG accounts to fool the bank regarding the source of funds. The evidence further established that checks were written from the KCG and TE accounts to the sweep account before corresponding checks were written from the Agriprocessors operating account(s) to KCG or TE—exactly the opposite order than one would expect if, as the Government argued, the "only" purpose of the transactions with KCG and TE was to conceal the source of funds. Meltzer's information would have confirmed that the transactions with KCG and TE "could only have been designed to extend the time of the 'float' and help with short-term cash flow management." (Id.)

Having provided this important information to the government, Meltzer states: "When I testified at trial, I was surprised that no one asked me whether I thought Sholom intended to defraud the bank in connection with the various financial transactions and movement of funds. I would have said 'no.'" (Id. at ¶ 5).

Petitioner's counsel's investigation reveals that the government did not provide this information to Petitioner's trial counsel. Accordingly, trial counsel did not elicit this crucial information from Mr. Meltzer during cross-examination at trial. This information comes from a witness called by the Government to testify at trial, and was admissible.

The claim of due process violations under *Brady* and *Alcorta v. Texas*, 355 U.S. 28 (1957) was not raised on direct appeal because Petitioner was not aware of all the facts supporting this claim, nor could he have, through the exercise of reasonable diligence at the time, discovered such facts. Only the government knew what Meltzer had disclosed during his interviews with them, and thus only the government possessed this key information. *See, e.g.*, *Brady*, 373 U.S. at 86 (failure to disclose co-defendant's statements was due process violation justifying post-conviction relief).

In its Resistance to Petitioner's Motion for Leave to Amend his § 2255 Petition, the government argued Petitioner was "was well aware of this argument [regarding playing the float] and the facts supporting it." (Dkt. No. 36-1 at 7). The government presumably will reiterate this argument here. However, the government misses the point. Of course Petitioner knew there was no intent to launder money in connection with the transfer of funds to KCG and TE. What Petitioner did *not* know is whether Meltzer would admit that fact and others corroborating it during cross-examination. *See United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012) (finding *Brady* violation despite government's claim the defendant already knew the exculpatory information; "whatever [the defendant] knew, he did not know what [the witness] told the SEC under oath"). Indeed, it is undisputed that Meltzer made false statements to a bank and lied under oath to the grand jury. (10/26/09 Trial Tr. (Meltzer) at 24-26 (App. 23)). Under the circumstances, counsel surely would not take a chance in asking Meltzer about the purpose and

history of the transfer of funds among accounts without knowing what Meltzer told the government about those issues. *See Mahaffy*, 693 F.3d at 131 ("Not knowing what [the witness] might testify to, [the defendant] did not call him at trial."). An unexpected answer could have been devastating. The government's failure to disclose Meltzer's prior statements therefore prejudiced Petitioner.

The failure to disclose Meltzer's exculpatory information warrants overturning Petitioner's convictions, as there is, at a minimum, a "reasonable probability" the result of the trial would have been different as it relates to the convictions for money laundering. *Kyles*, 514 U.S. at 434. In addition, even if the Government can somehow articulate a new theory to save the money laundering convictions, Petitioner still is entitled to a new sentencing hearing in light of the undisclosed exculpatory evidence provided by Meltzer. The calculation of the Sentencing Guidelines range was premised on the government's theory that the laundering was "sophisticated" for purposes of USSG §2S1.1(b)(3) because it involved two or more layers of transactions. Meltzer's testimony would have confirmed, however, that Petitioner, at most, moved funds through the KCG and TE accounts solely to extend the time of the float and not for any purpose of concealment. Had this information been disclosed, the government could not have proven two or more layers of laundering transactions and thus could not have established "sophisticated" laundering pursuant to USSG §2S1.1(b)(3).

If the government admits withholding exculpatory information from Meltzer, Petitioner requests that his convictions be reversed and a new trial granted on the money laundering charges. If the government denies withholding exculpatory information, Petitioner requests an evidentiary hearing.

CONCLUSION

Petitioner has provided overwhelming evidence of *Brady* and *Napue* violations in Ground One. The Court therefore should grant Ground One without a hearing, order the government to produce any remaining undisclosed exculpatory information, and set this matter for a new sentencing hearing. Alternatively, and at a minimum, the Court should grant Petitioner's request for discovery and set this matter for an evidentiary hearing.

Petitioner recognizes that Ground Two already has essentially been decided. He therefore asks that the Court confirm the denial of Ground Two, the denial of Petitioner's discovery requests, and the denial of his request for a hearing, so that the matter is preserved for appeal.

Finally, with respect to Ground Three, Petitioner requests dismissal of the money laundering charges or, at a minimum, a new trial on those charges. Furthermore, if the government denies withholding material exculpatory information from cooperating witness Mitchel Meltzer, Petitioner requests an evidentiary hearing and discovery.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on March 21, 2016 by

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