

TABLE OF CONTENTS

| | | |
|-------------|---|----|
| I. | Introduction | 1 |
| II. | Procedural Background | 2 |
| III. | Post-Booker Sentencing Considerations | 3 |
| IV. | The Sentencing Factors as Applied to DEFENDANT | 4 |
| | A. The Nature and Circumstances of the Offense and DEFENDANT’s History and Characteristics | 5 |
| | 1. DEFENDANT’s Cooperation with the Government | 5 |
| | 2. DEFENDANT’s Good Character and Unblemished Personal History | 7 |
| | 3. DEFENDANT’s Offense | 13 |
| | B. The Kinds of Sentences Available | 14 |
| | C. The Sentencing Guidelines | 17 |
| V. | The Minimally-Sufficient Sentence in this Case | 18 |
| VI. | Fine and Restitution | 22 |
| VII. | Conclusion | 23 |

TABLE OF AUTHORITIES

| | |
|--|--------|
| <i>Blakely v. Washington</i> , 124 S. Ct. 2531 (2004) | 23 |
| <i>Government of Virgin Islands v. Davis</i> , 43 F.3d 41 (3d Cir. 1994) | 23 |
| <i>Roberts v. United States</i> , 445 U.S. 552 (1980) | 5 |
| <i>United States v. Anderson</i> , 365 F. Supp. 2d 67 (D. Maine 2005) | 17 |
| <i>United States v. Booker</i> , 125 S. Ct. 738 (2005) | passim |
| <i>United States v. Denardi</i> , 892 F.2d 269 (3d Cir. 1989) | 4 |
| <i>United States v. Gaind</i> , 829 F. Supp. 669 (S.D.N.Y. 1993) | 20 |
| <i>United States v. Jaber</i> , 362 F. Supp. 2d 365 (D. Mass. 2005) | 3 |
| <i>United States v. Jones</i> , 352 F. Supp. 2d 22 (D. Maine 2005) | 16 |
| <i>United States v. Kelley</i> , 355 F. Supp. 2d 1031 (D. Neb. 2005) | 16 |
| <i>United States v. Niemoeller</i> , No. 02-09-CR-1, 2005 WL 1799456 (S.D. Ind. July 15, 2005) ... | 17 |
| <i>United States v. Quillen</i> , 335 F.3d 219 (3d Cir. 2003) | 23 |
| <i>United States v. Ranum</i> , 353 F. Supp. 2d 984 (E.D. Wis. 2005) | 3 |
| <i>United States v. Redemann</i> , 295 F. Supp. 2d 887 (E.D. Wis. 2003) | 20 |
| <i>United States v. Speed Joyeros, S.A.</i> , 204 F. Supp. 2d 412 (E.D.N.Y. 2002) | 20 |
| <i>United States v. Syme</i> , 276 F.3d 131 (3d Cir. 2002) | 22 |
| <i>United States v. Vaknin</i> , 112 F.3d 579 (1st Cir. 1997) | 23 |

I. Introduction

DEFENDANT respectfully submits this memorandum in order to provide information to assist the Court in fashioning a sentence “sufficient but not greater than necessary” to achieve the statutory purposes of punishment, as required by 18 U.S.C. § 3553(a) in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Booker restored district courts’ ability to fashion a sentence tailored to the individual circumstances of the case and defendant by requiring courts to consider factors other than the sentencing range prescribed by the United States Sentencing Guidelines. Indeed, under Section 3553(a), courts are *required* to sentence below the range if such a sentence would be sufficient to achieve the purposes of punishment.

Here, DEFENDANT respectfully requests that the Court consider several important circumstances of this case in fashioning a sentence. *First*, DEFENDANT’s cooperation with the government—which will be the subject of a Section 5K1.1 motion—was extensive, immediate, and resulted in the guilty pleas of four other defendants in this and another case. *Second*, DEFENDANT’s good character and unblemished personal history, as attested to by the more than 20 people who have written to the Court, show that his criminal behavior in this case is truly aberrant and that he poses no risk of recidivism. *Third*, DEFENDANT has already faced ruination—losing his livelihood, business and retirement assets built over a lifetime of entrepreneurship, and his personal reputation—as a result of his criminal conduct.

These circumstances alone warrant a sentence substantially below that provided for by the sentencing guidelines. But what is truly extraordinary here is that an opportunity has arisen for the Court to fashion a sentence that, in addition to punishing DEFENDANT, directly benefits the

community and advances the goals of the federal agency defrauded in this case. This opportunity involves imposing terms of imprisonment and home detention, and a requirement that DEFENDANT work full-time at the _____ Rescue Mission, a homeless shelter which he has supported in the past with a generous donation of land.

II. Procedural Background

DEFENDANT pleaded guilty to one count of conspiracy to defraud the United States by impeding the lawful functions of the U.S. Department of Housing and Urban Development (HUD), 18 U.S.C. §§ 371-72. In a memorandum opinion dated _____, 2005, the Court resolved the amount of loss to be attributed to the defendants in this case for purposes of determining the sentencing guidelines range. DEFENDANT now stands before the Court for sentencing.

III. Post-Booker Sentencing Considerations

The Court is no doubt aware of the broad ramifications of *United States v. Booker* for this proceeding. The sentencing guideline range is no longer binding on the Court, but is only one of five factors to be considered in determining the sentence. *Booker*, 125 S. Ct. at 764-65. The other four factors are (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentence available; (3) the need to avoid unwarranted sentencing disparity; and (4) the need to provide restitution. *Id.*; 18 U.S.C. § 3553(a)(1), (a)(3), (a)(6)-(7).

In considering the Section 3553(a) factors, the sentencing guidelines are to be given no more or less weight than any other factor. *See United States v. Jaber*, 362 F. Supp. 2d 365, 370-76 (D. Mass. 2005) (providing comprehensive analysis of why sentencing guidelines do not reflect statutory purposes of punishment); *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (same).

Perhaps even more important, however, is that *Booker* establishes a new, independent limit on the sentence that may be imposed. The primary sentencing mandate of Section 3553(a) states that courts must impose the minimally-sufficient sentence to achieve the statutory purposes of punishment—justice, deterrence, incapacitation, and rehabilitation:

The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)].

18 U.S.C. § 3553(a) (emphasis added). This so-called “parsimony provision” is not simply a factor to be considered in determining sentence; it represents a cap above which the Court is *statutorily prohibited* from sentencing—even when a greater sentence is recommended by the sentencing guidelines. *See United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., concurring in part, dissenting in part).

IV. The Sentencing Factors as Applied to DEFENDANT

Aside from the sentencing guidelines range, two of the Section 3553(a) factors are particularly relevant in DEFENDANT’s case: the nature and circumstances of the offense and the history and characteristics of the defendant; and the kinds of sentence available. 18 U.S.C. § 3553(a)(1) & (3).

A. The Nature and Circumstances of the Offense and DEFENDANT's History and Characteristics

1. *DEFENDANT's Cooperation with the Government*

DEFENDANT understands that the government will be moving for a downward departure under Section 5K1.1 of the sentencing guidelines based on DEFENDANT's substantial assistance in the investigation and prosecution of this case.¹ DEFENDANT's cooperation is worth discussing here for another reason: it gives significant insight into his character. *See Roberts v. United States*, 445 U.S. 552 (1980) (cooperation is a "laudable endeavor that bears a rational connection to a defendant's willingness to shape up and change his behavior").

In this case, DEFENDANT's cooperation was unhesitating and extremely fruitful. Literally one phone call from Assistant U.S. Attorney _____ prompted DEFENDANT's immediate and voluntary production of all relevant documents and multiple statements giving a thorough account of the crime. DEFENDANT completely laid out his own wrongdoing and that of the other participants. His proffers and follow-up statements were particularly valuable because they came at the beginning of the government's investigation, thus obviating substantial investigative work.

DEFENDANT even developed and implemented an undercover investigative opportunity for the government. CO-DEFENDANT had contacted DEFENDANT, wanting to discuss the case. DEFENDANT alerted the government and expressed a willingness to record the conversation. AUSA _____ thought a recording would be valuable, and DEFENDANT wore a body wire to a meeting with CO-DEFENDANT. The statements that he captured showed both

¹ Traditional departure analysis still applies in determining what sentence is ultimately recommended under the sentencing guidelines.

CO-DEFENDANT's knowledge of the scheme and his attempts to keep it under wraps, which included falsely denying his illegal conduct to the government. DEFENDANT's assistance was critical, because in mortgage loan conspiracies it is often impossible to prosecute the loan processor, who can plausibly deny knowledge of the builder's financial dealings with customers. CO-DEFENDANT's guilty plea followed swiftly upon the revelation of DEFENDANT's cooperation, as did the pleas of co-defendants _____, _____, and, slightly later, _____.

DEFENDANT did not lightly undertake the decision to cooperate with the government. His co-defendants were long-time friends and/or business associates. He felt responsible for involving EMPLOYEE 1 in this situation, for example, and did not relish assisting in EMPLOYEE 1's criminal prosecution. Nonetheless, the impact of his wrongdoing became clear to DEFENDANT in his initial conversations with counsel. When AUSA _____ called, DEFENDANT did not hesitate. He knew what he had to do to begin to right his wrongs. His cooperation unlocked the case from the very beginning.

2. *DEFENDANT's Good Character and Unblemished Personal History*

Twenty-five people have taken it upon themselves to write to the Court to share their impressions of DEFENDANT, hoping to give some insight into the person before the Court for sentencing. *See* Letters attached hereto as Exhibits A through Y. The sheer number of people who wish to be heard speaks well of DEFENDANT, but what is truly remarkable is the wide range of people writing. In addition to family and current friends, the correspondents include people who met DEFENDANT decades ago and, despite not staying in close touch with him through the years, still want to be heard. *See, e.g.*, Letter of _____, Exhibit A; Letter of _____, Exhibit B; Letter of _____, Exhibit C.

One theme reverberates throughout the letters: DEFENDANT's lifelong habit of helping others in times of need and personal crisis—quietly, and often at his significant expense. This defining characteristic emerged early. When DEFENDANT's father fell ill in middle age, leaving the family without support, DEFENDANT dropped what he was doing and took his father's place running the family fuel oil business. *See* Letter of _____, Exhibit D. In his early twenties at the time, DEFENDANT spent the next 10 years as the sole financial support for his parents and his two younger sisters—all the while supporting a young family of his own. *Id.* After keeping the fuel oil business afloat for his family's sake during the energy crisis of the 1970s, DEFENDANT purchased the business (by any typical measure, his already-earned inheritance) from his father in order to secure his parents' and siblings' financial future. *Id.* Then DEFENDANT paid his parents' life insurance costs for many years after that. *Id.*

At the same time DEFENDANT was supporting his parents and siblings, he was assisting his cancer-stricken father-in-law through his final years. *See* Letter of _____, Exhibit E. After FATHER-IN-LAW died, DEFENDANT made sure he was there to help his mother-in-law with the challenge of raising a teenage son on her own. *Id.*

Most people would view such sacrifices as “enough,” and not feel the need to do more. But not DEFENDANT. When his sister wanted to start a gift shop business in the early-1990s but lacked the credit to do so, DEFENDANT did not hesitate to co-sign for her commercial loan or to personally repay the loan balance when the business failed a few years later. *See* Letter of _____, Exhibit D. More recently, DEFENDANT's sister-in-law nearly lost her home when her mortgage loan servicer made serious errors handling her tax escrow. DEFENDANT spent

several months uncovering the mistake and battling with the servicer to correct it, saving his sister-in-law from eviction. *See* Letter of _____, Exhibit F; Letter of _____, Exhibit E.

DEFENDANT's largess extends well beyond his family. Several people note the impossibility of listing the people DEFENDANT has helped over the years. As one 30-year friend of DEFENDANT's writes,

[DEFENDANT] is not someone interested in his own welfare. Many times over the years I know when people were in need and he reached in his pocket and gave them \$1,000, \$1,500 or more, depending on their need. He is one of the most generous, caring, and honorable people I know.

Letter of _____, Exhibit G. Another friend, himself a beneficiary of DEFENDANT's financial help, echos this point:

He has lost more money trying to help people than he has ever received in return. Yet, he would still help out again today if he was needed.

Letter of _____, Exhibit H.

DEFENDANT's good deeds tend to be done quietly, without fanfare or even public acknowledgment. Like the time he gathered financial support and basic food assistance "behind the scenes" for someone who lost his income when he was seriously injured. *See* Letter of _____, Exhibit I. Or when DEFENDANT delivered Christmas wreaths and money to several needy families in his church congregation—insisting that he was simply the delivery person, not the generous benefactor. *See* Letter of _____, Exhibit F. And the time DEFENDANT paid the funeral expenses for a friend's son without even being asked to do so. *Id.*

One of DEFENDANT's financially most significant charitable deeds occurred when he donated a plot of land to the _____ Rescue Mission, a homeless shelter in CITY, Pennsylvania. The Mission faced a huge problem several years ago: it lacked space to expand its primary

revenue generator, a recycling center, and to fix its ailing septic system. *See* Letter of Rev. DIRECTOR (with attached videotape), Exhibit J. Without expansion space, the Mission faced sanitary problems and was limited in the number of people it could serve and the amount of recycling it could do. *Id.*

After learning of the Mission's problems, and discussing the Mission with community officials, DEFENDANT donated a plot of land adjacent to the Mission's existing facility. *Id.* DEFENDANT's donation removed the bottle neck and had a lasting positive impact on the Mission's work, as detailed in Rev. DIRECTOR's letter and videotape. *Id.* All this was done without public acknowledgment; there is no "DEFENDANT wing" of the _____ Rescue Mission recycling center.

Hard work and good fortune have enabled DEFENDANT to help people financially. But in many instances, it is the intangible support and encouragement DEFENDANT has provided that has most impacted peoples' lives. EMPLOYEE 2, DEFENDANT's employee of 14 years, speaks of DEFENDANT as a role model, moral compass, and confidant whose guidance through various personal crises has made all the difference:

Personally, DEFENDANT has looked over my future, not just financially, but morally also. He has helped guide me through more crisis, such as my marriage separation (which he was more help than any counselor), loss of my parents, and when my daughter was diagnosed with cancer. His guidance and advice was invaluable to me. Your Honor, I am positive, that without DEFENDANT in my life, I would not be the person I became.

Letter of EMPLOYEE 2, Exhibit K.

Another person deeply influenced by DEFENDANT is FRIEND. FRIEND grew up across the street from DEFENDANT's family, and she describes DEFENDANT as "a father

figure” who instilled family values in the neighborhood children and who organized team games, once even providing trophies for all the kids. *See* Letter of FRIEND, Exhibit C. Even more unusual is that DEFENDANT’s concern for FRIEND lasted long after DEFENDANT’s family left the neighborhood. As she puts it,

[DEFENDANT] trusted me before I trusted myself. His support and guidance continued well into my adulthood as I pursued my own dreams and ambitions, and he has always kept a watchful but unimposing eye on me. When I hit a few bumps in the road (as we all do), DEFENDANT and his family were the people who were always there for me, as they still are.

Id.

DEFENDANT’s dedication to children is emphasized by others, as well. Several people have written to explain how he helped countless elementary school children by advocating for them as a member of the school board and by raising money for school sports teams. Letter of _____, Exhibit I; Letter of _____, Exhibit F. Most poignant, though, is DEFENDANT’s daughter’s account of the tremendous impact he has had on the lives of her two children. *See* Letter of _____, Exhibit M. Her words, expressed in a letter and a poem, speak for themselves.

Lastly, many people have written to describe DEFENDANT’s honesty and integrity in the business realm, where he had his legal and moral lapse in this case. Without exception, DEFENDANT’s employees and business associates attest to his unusually high business principles. BUSINESS ASSOCIATE, who has had business dealings with DEFENDANT over 30 years, sums it up nicely: “[DEFENDANT] would never give you the short end of the stick.” Letter of BUSINESS ASSOCIATE, Exhibit G. DEFENDANT is “honest, up-front, and a man who keeps his word,” and business dealings with him are marked by “confidence, trust, and loyalty,” according to two business associates with a combined 50 years’ experience with

DEFENDANT. See Letter of _____, Exhibit N; Letter of _____, Exhibit O. And Mr. _____, DEFENDANT's longtime employee, states that "[w]ithout a doubt, he is the most caring and compassionate business man I have ever come across." Letter of EMPLOYEE 2, Exhibit K.

3. *DEFENDANT's Offense*

The offense in this case is serious. As DEFENDANT states in his letter to the Court, he violated HUD's rules and lied about the source of many of his customers' down payment and closing costs funds. See Letter of DEFENDANT, Exhibit P. His actions caused substantial monetary losses to HUD. While DEFENDANT viewed his actions at the time as a "common-sense" response to counter-intuitive regulations, he now acknowledges his arrogance in thinking he could disobey rules with which he disagreed. *Id.*

The unique regulatory backdrop in this case certainly does not excuse DEFENDANT's crime, but it is relevant to assessing his moral blameworthiness and, ultimately, to determining his sentence. Many issues, including the permissibility of grant companies, factor into the evaluation of DEFENDANT's character. While DEFENDANT fully acknowledges the illegality of his conduct, the unusual factual circumstances of this case remains an important consideration in assessing the nature of the offense.

B. The Kinds of Sentences Available

In this case, the Court has a rare opportunity to fashion a sentence that does more than simply punish the defendant. Reverend DIRECTOR, the Executive Director of the _____ Rescue Mission, has written the Court to request that a component of DEFENDANT's sentence be dedicated to community service at the Mission. See Letter of Rev. DIRECTOR, Exhibit J.

As discussed above, a land donation by DEFENDANT enabled the Mission to expand its facility and operations. While expansion enabled the Mission to better serve the homeless, it also brought new challenges. The Mission financed its expansion by taking on \$600,000 in low-interest debt, and launched a capital campaign to retire the debt within three years. *Id.* Two years in, the capital campaign has stalled with only \$100,000 raised, and the Mission is struggling to make loan payments. *Id.*

Reverend DIRECTOR wants DEFENDANT to lead a renewed fund raising effort for the Mission. *Id.* Rev. DIRECTOR is particularly interested in bringing a fresh perspective and innovative approaches to the flagging capital campaign. DEFENDANT, as an entrepreneur and experienced fund raiser, has the expertise and community contacts to make a real difference in the Mission's efforts.² *Id.* Progress on the campaign would permit the Mission to refocus on its mission of serving the homeless and indigent. *Id.* Rev. DIRECTOR is willing to do whatever is necessary to facilitate this proposed component of DEFENDANT's sentence. *Id.*

In addition to directly benefitting the community, a sentencing component conditioned on work at the Mission uniquely advances the goals of HUD, the federal agency defrauded in this case. According to HUD, ending chronic homelessness is one of the agency's top priorities. In a 2001 speech before the National Alliance to End Homelessness, then-Secretary of Housing and Urban Development Mel Martinez emphasized HUD's role in combating homelessness:

As the federal government's primary provider of targeted homeless assistance, the Department of Housing and Urban Development has the lead federal role in finding homes for the homeless. . . . HUD's homeless funding represents nearly three-fourths of all targeted federal homeless assistance.

² DEFENDANT's experience includes leading a similar capital campaign to finance a \$100,000 pipe organ for his church. *See* Letter of _____, Exhibit F.

Transcript of Secretary Martinez's Remarks, available at <http://www.hud.gov/news/speeches/homelessness.cfm>. A sentence with a substantial component contingent on DEFENDANT's full-time work at the Mission would therefore be particularly appropriate in this case.

It is clear that the Court has discretion to sentence DEFENDANT entirely or in part to home detention contingent on full-time work at the _____ Rescue Mission. DEFENDANT was convicted of a Class D felony, which means that imprisonment is not statutorily required. *See* 18 U.S.C. § 3561(a); PSR (rev. 7/5/05) at ¶ 68. The sentencing guidelines range, before any Section 5K1.1 departure motion, is located in Zone D of the sentencing table. *See* U.S.S.G. § 5A (Nov. 2000);³ PSR at ¶ 69. Under the pre-*Booker* regime, this would normally have mandated imprisonment and precluded any home detention sentence. *See* U.S.S.G. § 5C1.1(f). Of course, the government's anticipated Section 5K1.1 departure motion in this case would have given the Court the discretion to impose home detention even pre-*Booker*.

After *Booker*, however, the sentencing guidelines are not binding and courts have discretion to impose split sentences, or sentences of probation, even when the defendant falls within Zone D of the sentencing table. Many courts have done precisely this. *See, e.g., United States v. Jones*, 352 F. Supp. 2d 22, 25 (D. Maine 2005) (varying from guidelines to impose sentence of home detention despite fact that departure under sentencing guidelines not warranted); *United States v. Kelley*, 355 F. Supp. 2d 1031 (D. Neb. 2005) (sentence of home

³ Unless otherwise specified, all references to the sentencing guidelines are to the version effective November 1, 2000, which applies in this case.

detention); *United States v. Niemoeller*, No. 02-09-CR-1, 2005 WL 1799456 (S.D. Ind. July 15, 2005) (same); *United States v. Anderson*, 365 F. Supp. 2d 67 (D. Maine 2005) (split sentence).

Thus, a split sentence involving imprisonment and home detention, as well as work at the _____ Rescue Mission, is available to the Court. Under Section 3553(a)(3), the Court must consider the availability of this option in determining the proper sentence in this case. For the reasons discussed separately below, such a sentence should be imposed.

C. The Sentencing Guidelines

The revised pre-sentence investigation report determines DEFENDANT's sentencing guidelines range as 33-41 months' imprisonment based on an offense level of 20 and a criminal history category of I (0 points). PSR at ¶¶ 35-44, 47, 64. Given the anticipated Section 5K1.1 departure motion, however, the advisory guidelines sentence to be considered by the Court is whatever lesser sentence that accounts, in the Court's estimation, for DEFENDANT's cooperation with the government. *See* 18 U.S.C. § 3553(a)(5) (sentencing courts must consider sentencing guidelines policy statements, of which Section 5K1.1 is one).

DEFENDANT preserves his objections, overruled in the Court's _____, 2005 memorandum opinion, to the Court's legal and factual rulings on loss amount as well as to the Court's ruling as to the applicable burden of proof for sentencing guidelines enhancements.

V. **The Minimally-Sufficient Sentence in this Case**

As discussed above, *Booker* and 18 U.S.C. § 3553(a)'s parsimony provision impose a statutory cap on sentences, no matter what is recommended under the sentencing guidelines: the sentence must be "sufficient, but not greater than necessary" to achieve the purposes of

punishment. Here, it is respectfully submitted that a sentence of 6 months' imprisonment followed by two years' supervised release with conditions of 6 months' home detention and 12 months' full-time work at the _____ Rescue Mission is sufficient to achieve the goals of punishment.

Justice is certainly served by this proposed sentence. DEFENDANT recognizes that the seriousness of his offense and the resulting harm warrants imprisonment; he is not attempting to avoid this reality. Six months' imprisonment is a substantial term for a person with a sterling record of good deeds in the community. An additional 6 months' home detention provides further punishment, but could permit DEFENDANT to begin the community service portion of the proposed sentence.

Most important, it is hard to imagine a more just disposition than dedicating a significant part of DEFENDANT's sentence to the direct alleviation of homelessness. DEFENDANT impeded HUD's functioning through his illegal conduct in this case; now it is time for him to further HUD's mission. The proposed punishment truly fits the crime. DEFENDANT's full-time work at the _____ Rescue Mission will directly benefit the community and further the goals of HUD and the Mission. Rev. DIRECTOR has a plan for utilizing DEFENDANT's talents to secure the Mission's financial health, and is ready to work with the Court and Probation Office in any way necessary to make this happen.

The proposed sentence likewise achieves the goals of deterrence, incapacitation, and rehabilitation. Specific deterrence and incapacitation are relatively minor considerations in this case, given DEFENDANT's law-abiding history, his moral uprightness, and his debarment from further participation in HUD programs. In short, DEFENDANT presents no risk of recidivism.

General deterrence is amply served by the substantial imprisonment component of the proposed sentence, as well as by the many collateral consequences this case has had for DEFENDANT, as briefly discussed below. Finally, DEFENDANT's need for rehabilitation, while slight relative to many offenders, is met by the proposed sentence. DEFENDANT placed his own judgment above the law in this case, and he recognizes his arrogance in this regard. The proposed sentence will further solidify DEFENDANT's respect for the law.

In determining the minimally-sufficient sentence, the Court must essentially ask whether a more severe sentence would achieve greater justice, deterrence, incapacitation, or rehabilitation. Respectfully, it would not in this case. In making this judgment, it is important to examine the ruination that DEFENDANT has already suffered as a result of his conduct and this prosecution. While these consequences are not a complete substitute for judicial punishment, they are critically important to assessing what further punishment is necessary in this case. Because such consequences satisfy some of the purposes of punishment, they are widely recognized as grounds for departure under the sentencing guidelines. *See, e.g., United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 439-40 (E.D.N.Y. 2002); *United States v. Redemann*, 295 F. Supp. 2d 887, 894-97 (E.D. Wis. 2003); *United States v. Gaind*, 829 F. Supp. 669, 670-71 (S.D.N.Y. 1993).

DEFENDANT has lost everything he had built through a lifetime of entrepreneurship. DEFENDANT's business creditors called their long-term loans after this case was brought, and he was forced to liquidate all of his major assets—including the old fuel oil business property that DEFENDANT had worked so hard for early in life—to cover the loans. *See* Letters of DEFENDANT and _____, Exhibits P & F. And, of course, DEFENDANT's entire business is

gone, not just his operations at _____. He has had no income and a negative cash flow for nearly a year, and has lost the assets he planned to use for his retirement.⁴ Most important, though, is the harm to DEFENDANT's reputation in the community—an asset he painstakingly earned and jealously guarded. Thus, at nearly 60, DEFENDANT faces the daunting task of rebuilding his life.

DEFENDANT recognizes that he has brought much of this upon himself. But the punishment is no less real for being self-inflicted, and that is what matters in assessing the need for additional judicial punishment. Moreover, it is noteworthy that the collateral consequences DEFENDANT has suffered have been exacerbated by substantial, often inaccurate publicity that this case has engendered. The local newspapers have reported as fact many unfounded allegations about DEFENDANT's operations at _____—accusations that DEFENDANT could not vigorously dispute given the pendency of this case.

VI. Fine and Restitution

Imposition of a fine is discretionary, and, defendant respectfully submits, should not be ordered in this case. DEFENDANT's financial condition is such that he is currently unable to pay any significant fine, and is not likely to be able to do so in the foreseeable future. *See* PSR at ¶¶ 58-62 (financial condition); *supra* note 4 (correction to PSR); U.S.S.G. § 5E1.2(a) (fine not recommended if defendant unable to pay). Moreover, DEFENDANT may have a significant

⁴ The revised pre-sentence investigation report indicates \$7,800 in monthly income, which was accurate when the report was first prepared in January 2004 but has not been the case for nearly a year. PSR at ¶ 58. Counsel for DEFENDANT has brought this to the attention of the Probation Officer, who does not dispute that DEFENDANT has taken no salary and has had a negative cash flow for at least 10 months.

restitution obligation in this case, which would further limit his ability to pay any fine. *See* PSR at ¶¶ 30, 62.

The pre-sentence investigation report notes the applicability in this case of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. *See* PSR at ¶ 76. DEFENDANT wishes to preserve an objection under *Booker* to the imposition of a restitution order based on the Court's determination, by a preponderance of the evidence, of HUD's loss. *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002), which upholds restitution orders based on judicial fact-finding under the Victims and Witness Protection Act, 18 U.S.C. § 3663(a)(1)(A), has been abrogated by *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *United States v. Booker*, 125 S. Ct. 738 (2005).

Moreover, under the MVRA, "restitution must be . . . based upon losses directly resulting from [the defendant's criminal] conduct." *United States v. Quillen*, 335 F.3d 219, 222 (3d Cir. 2003) (quoting *Government of Virgin Islands v. Davis*, 43 F.3d 41, 45 (3d Cir. 1994)). Thus, "the government must show . . . that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)." *United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997). Because the Court applied a substantially broader standard of causation in its guidelines loss decision, the determination of HUD's unrecouped loss made in the _____, 2005 memorandum opinion cannot support a restitution order. DEFENDANT likewise preserves his objections to the loss determinations in the Court's _____, 2005 opinion.

VII. Conclusion

For the reasons discussed above, DEFENDANT respectfully requests that the Court impose a sentence of 6 months' imprisonment followed by two years' supervised release with conditions of 6 months' home detention and 12 months' full-time work at the _____ Rescue Mission, in CITY, Pennsylvania.

Respectfully submitted:

Attorney for Defendant _____

Dated: _____