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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID JOHN OVIST,
Defendant.

Case No. 3:11-cr-00076 BR

DEFENDANT'S SENTENCING MEMORANDUM – GUIDELINE ISSUES

Defendant, David Ovist, through counsel, Matthew Schindler and Philip Lewis, offers the following memorandum of law and fact in support of his analysis of the application of the United States Sentencing Guidelines to his conviction. Mr. Lewis has drafted a separate sentencing memorandum to the Court setting out the defendant's analysis of the 18 USC §3553 factors as applied to Mr. Ovist.[1]

[1] A lengthy factual recitation seems unnecessary given the court's active listening throughout the jury trial. The defendant acknowledges that the court must calculate an advisory Guideline range even if it rejects it.

1. Uncontested Sentencing Guideline Calculations

Mr. Ovist agrees that the base offense level is 7 under U.S.S.G. §2B2.1(a)(1). He objects to all other Guideline enhancements and calculations.

2. The Government's sentencing advocacy implicates due process and the right to a jury trial.

This Court goes to great lengths to explain to every defendant who appears before it that they have myriad, important constitutional rights including the right to a jury trial where they are presumed innocent. It is axiomatic that a defendant cannot be punished for exercising a constitutional right. This principle is at the core of due process. It is the reason why the court works so hard during those plea colloquies to make sure that no one unknowingly or involuntarily gives up those rights.

In this case, the only conclusion that can be drawn from government's sentencing advocacy is that it is retaliating against Mr. Ovist for exercising his right to a jury trial.

February 11, 2011 the government transmitted a plea offer to Mr. Ovist through attorney Sam Kauffman. *See* Exhibit 1 attached. In it the government offered to allow Mr. Ovist to plead guilty to a superseding information charging a single count of wire fraud in violation of 18 USC §1343. The government reserved the right to argue that the loss was between was $1,000,000 and $2,500,000. The government further proposed that the parties agree that "no other specific offense characteristics would apply." Exhibit 1 at 5.

Since Mr. Ovist has no criminal history, the plea agreement would have called for the government to advocate for no more than an offense level 20[2], which, in Criminal History Category I, would have obligated the government to urge the court to sentence Mr. Ovist to no more than 33 months in prison. Of course, the reality is that the government would have actually asked for substantially less. It would have had no choice.

Given the government's extremely generous agreement concerning loss in *United States v. Ishwar Uttamchandani*, 3:12-CR-00613 BR, (no more than $200,000 in loss), and the sentencing recommendations in related cases involving Rick Shoop (2 months home detention), Jake Shoop (6 months home detention),[3] and Sherrie Inouye (probation), counsel has no doubt that Mr. Ovist would have been able to negotiate an additional §3553 variance if Mr. Ovist pleaded guilty. In counsel's professional judgment, based on experience, and a survey of other fraud and mortgage related cases in the district,[4] if Mr. Ovist pleaded guilty, the government would have advocated for no more than 18-24 months and probably less.

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[2] The plea agreement calls for a base offense level of 7. 16 points would be added for loss and Mr. Ovist would receive a 3 level reduction for acceptance of responsibility.
[3] Both of the Shoops are multiple convicted felons who committed this offense while on probation in another case.
[4] A spreadsheet is attached as Exhibit 2 and is discussed further below.

Prior to trial, the government was prepared to argue to the court that there were no Guideline enhancements that would apply other than the amount of loss. After Mr. Ovist exercised his right to a jury trial and relied on the presumption of innocence, the government now takes the position that his sentence should be enhanced for an abuse of trust (U.S.S.G. §3B1.3) and further that it should be enhanced because he obstructed justice (U.S.S.G. §3C1.1).[5] Those offense level points potentially represent, at the low end, a difference of 30 months (87 versus 57). If the government intends to argue at sentencing for a three level role enhancement under §3B1.1, the difference between what the government would have advocated pretrial and what it is now advocating is 75 months.[6]

The discrepancy between the government's current posture and its plea offer is constitutionally significant only if the relevant facts have not changed. Here nothing changed. Every single material fact the government now asserts justifies these enhancements was known to it on February 11, 2011 when it offered pretrial not to advocate for these very same enhancements.

There is simply no other inference that can be drawn from the government's position in this sentencing except that David Ovist should be punished for exercising his right to trial. The very fact that it is recommending a Guideline

[5] In its response to the draft presentence report, the government apparently advocated for a 3 level leadership role enhancement under U.S.S.G. §3B1.1(b). It is unclear if the government intends to continue to advocate for that enhancement now that it was rejected by probation.

[6] This is in addition to losing 3 points for acceptance of responsibility.

sentence here in light of the position it has taken in so many other Operation Stolen Dreams cases suggests retaliation. That is something the court cannot allow consistent with due process.

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkircher v. Hayes*, the Court has recognized this basic-and itself uncontroversial-principle. An individual certainly may be penalized for violating the law but he just as certainly may not be punished for exercising a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

This situation here is similar to the one in *Pearce* where the Court required that if a defendant has successfully had a criminal case overturned on appeal, upon resentencing the trial judge may not impose a greater sentence without articulating on the record a non-retaliatory basis for that increase. *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969).

3. <u>U.S.S.G. §2B1.1 provides no meaningful assistance arriving at an appropriate sentence in this case.</u>

A. The Guideline fails to meaningfully measure culpability.

The fraud Guideline, U.S.S.G. § 2B1.1, yields sentences in nearly every case that are greater than necessary to satisfy sentencing purposes. There are two key reasons for this. First, it "place[s] undue weight on the amount of loss involved in the fraud," which in many cases "is a kind of accident" and thus "a relatively weak indicator of the moral seriousness of the offense or the need for deterrence." *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004). *See also United States v. Adelson*, 441 F.Supp.2d 506, 510-511 (S.D.N.Y. 2006). Second, it imposes cumulative enhancements for too many closely related factors.[7]

The Commission has never explained why it is appropriate to accord such huge weight to loss or why it promulgated the many overlapping additional adjustments. "The [Sentencing] Commission has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic." *Adelson*, 441 F. Supp. 2d at 510. The Commission has given the court nothing by which it can feel secure in relying on this Guideline.

These systemic flaws in the Guideline have never been addressed by the Commission. This has left those of us dealing with its application in the real world searching for a way out.

[7] Constitution Project's Sentencing Initiative, Recommendations for Federal Criminal Sentencing in a Post-Booker World 9-10 (July 11, 2006), available at http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf; *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004).

This is not a situation where only criminal defendants are complaining that this system is unkind. The government too has struggled with the unfairness wrought by this Guideline. Its sentencing memos submitted in related cases involving the Shoops, Sherrie Inouye, and Donald Kazlauskas urged the court to vary substantially from the Guidelines for reasons specifically related to aspects of their conduct not considered by the Guidelines. For example, the Guideline fails to account for the fact that their personal profit from the scheme was a fraction of the loss. The Guideline fails to account for all of the impacts of the fact of conviction. The government emphasized the degree to which their employment would be affected in the future. None of these factors is considered by the Guideline. Each of them faced a Guideline sentence calling for a substantial prison term and none received one at the government's urging.[8]

This is a pattern repeated throughout the Operation Stolen Dreams mortgage fraud related prosecutions in this district. Over and over the government argues for something substantially less than what the Guidelines dictate. Such advocacy forces the court to consider the degree to which the Guideline does anything to advance its sentencing discretion in this case. If even the government acknowledges that it does not work, the court has sufficient reason to reject a Guideline sentence here.

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[8] The defendant respects that the government and the court view the Guideline as too harsh. He simply believes that he should benefit from that as well irrespective of his demand for a jury trial.

B. §2B1.1 generates sentences that are significantly harsher than pre-Guideline practice.

One obvious flaw in the Guideline is that it fails to account for the sentences actually imposed by the courts prior to the Guidelines. Initial Guidelines were "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts" including white collar offenses like this one. See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* at 47 (2004).

The chart below dramatically demonstrates the extraordinary increase in punishment for these offenses without any corresponding difference in the seriousness of the underlying crime:

Past Practice v. Today's White Collar Guidelines

	Past Practice*	2009 Guidelines
Fraud Sophisticated, $1 million	18-24 months/ 18% probation	46-57 months +
Embezzlement Sophisticated, $1 million	27-33 months/ 3% probation	41-51 months +
Bribery $100,000	4-10 months/ 29% probation	51-63 months
Tax Evasion $100,000	10-16 months/ 22% probation	33-41 months

What this chart illustrates is that the Guideline is the product of political expediency and not consistent with the kind of holistic justice contemplated by 18

USC §3553. No empirical studies justify it. It was simply created out of whole cloth to make politicians look like they are tough on crime and each subsequent "revision" to §2B1.1 has been focused on one goal: longer prison sentences for the sake of longer sentences.

"Since Booker, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in corporate fraud cases] and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives." See Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008). The court in this case is confronted with a Guideline sentence that is obviously too high.

C. Neither the United States District Courts for the District of Oregon nor the USAO appear to believe the Guideline is workable in mortgage related cases.

Attached to this memorandum as *Exhibit 2* is a spreadsheet the defense created capturing as many of the mortgage fraud prosecutions in this district as possible, including those related to this case. The spreadsheet is intended to orient the court to the landscape of these cases in this district in order to further assist it in the exercise of its sentencing discretion. The spreadsheet is organized by the case name. The government's sentencing memos for all of these cases can be viewed by simply clicking on the hyperlinked entry in the column for the government's sentencing recommendation. In the bottom right hand corner of the government's sentencing memos is a link that will take the court back to the Spreadsheet.

There are several key takeaways from the Government's approach to §2B1.1:

- In nearly every case, except those where the defendant chose to go to trial, the government advocated for departures from the Guidelines often urging the court to ignore a Guideline range calling for prison.

- Loss is a malleable concept subject to plea negotiation and charge bargaining.

- In many of those cases where the government was advocating for a variance or departure, including the cases related to Mr. Ovist, it relied on factors not considered by the Guideline.

- Not once did the government urge the court to depart upward because §2B1.1 was not severe enough even when the case involved significant criminal history or additional criminal conduct during the pendency of the case.

Regarding the US District Court's application of §2B1.1 generalization can be made:

- The courts appear to believe that even the government's generous approach to §2B1.1 is too parsimonious. Over and over again, one sees the court exceeding the recommendations of the government and sentencing defendants to probation or 1 day terms of incarceration.

- Even in situations where the defendant's had prior significant criminal history or where the defendants committed other crimes during the pendency of the case, the court did not depart upward from the Guideline.

- Almost no one received the Guideline sentence unless the government recommended it.

- The courts' sentencing decisions generally endorsed bargains limiting the amount of loss.

This exhibit supports the argument that the Guidelines have very limited efficacy in these cases.

Some of the individual cases are worth highlighting.

- *US v. Matthew Morrell*, 10-CR-257-BR, was a loan related fraud case. The Guideline range was 33-41 months. The banks actually lost $2.2 million. The government asked for a sentence of 24 months saying: "The government believes that this course of conduct over several years, combined with the size of the loss justifies a significant sentence of imprisonment notwithstanding the defendant's lack of criminal history and his cooperation in this case." The court imposed a sentence of 1 day.

- *US v. Benjamin Lucescu*, 09-CR-247-MO involved a mortgage broker convicted after a jury trial. The government argued that loss was more than $400,000 and further that a substantial 37 month prison sentence was warranted for this first offender. Judge Mosman disagreed, sentencing the defendant to a day in jail.

- *US v. Michael Han*, 09-CR-246-JO, involved a loan broker. Charge bargaining and plea negotiation allowed the defendant to avoid the Guideline. The government recommended one day in jail despite saying: "During an interview with an FBI Special Agent, defendant admitted that he provided false information on approximately **50%** of the residential loan applications he processed as a mortgage broker for TTM."

- In *US v. Morton Bohn,* 09-114-RE, the defendant was a CPA who defrauded a bank by generating false tax returns to support a construction loan. The government did not advocate for an abuse of trust enhancement even though defendant was a CPA. Government further argued for a sentence less than half the Guideline because defendant had health issues, was 70 years old, and had lost his CPA license.

- In *US v. Misti and Gerald Wallis*, 10-CR-196-KI, a mortgage fraud scheme, the government argued against probation's finding that the defendant was responsible for more than $400,000 in loss despite arguing for $468,199.48 in restitution. It argued that if the court found $400,000 in loss it should depart to probation. It charge bargained down to a misdemeanor bank larceny charge to cap her exposure to one year. Defendant was a licensed real estate broker and the government did not advocate for an abuse of trust enhancement.

- In *US v. Sherrie Inouye, Rick Shoop, and Jake Shoop*, related cases to this one, the government advocated for §3553 variances from the Guidelines because of factors not considered by the Guideline like their minimal profit and the impact on their career prospects of a felony conviction. Despite the fact that both Rick Shoop and Jake Shoop are multiple felons who committed this offense while on supervision, the government recommended neither spend a day in jail. Neither will.

4. <u>Issues Relating to Loss Under §2B1.1(b)(1)</u>

The government suggests $2,547,000 or so as "loss" in this case. At first glance, this seems reasonable. An FBI Agent testified that this is what his calculator told him. The exhibits supporting the government's loss advocacy are some evidence of some loss. However, the government's calculation is both wrong in that it does not represent the correct computation of the appropriate information and it is wrong from the standpoint that the lenders claiming a loss often did not in fact suffer an "actual loss" because the loans were securitized and sold. *See United States v. James,* 592 F.3d 1109, 1114-1117 (10th Cir. 2010). Beyond this, the concept of determining culpability by virtue of loss is further complicated by the unique confluence of circumstances present during the time period of the indictment.

One significant issue here arises from the fact that the victims abandoned the traditional role of risk management in favor of a securitization model that down streamed all risk of loss to others and allowed the banks to profit immediately. A flow chart giving an overview of the securitization process is attached as Exhibit 3. This chart was generated by Phil Querin, an attorney hired by the court as an expert to assist counsel for Donald Kazlauskas. Never before had lenders worked this way. This is unique in the history of American banking and it clearly contributed to these offenses.

The challenge of applying the Guideline here is further augmented in that it does not account for the fraudulent conduct of the victims as described in excruciating detail by the government in its various lawsuits against them.[9] There is no question that these victims contributed significantly to their own losses and do not appear before the court with clean hands.

[9] The malfeasance of the lenders in this case is discussed at length in regards to defendant's departure request under §5K2.10.

The court knows what is required of it: a reasonable estimate of actual loss. What losses actually occurred that were reasonably foreseeable to the defendant? Sometimes that is a simple task. If Aunt Mae invests her retirement account worth $100,000 with Fraud Inc. based on the promise of 50% yearly returns and Fredrick Fraud blows it on a yacht and cocaine, figuring the loss is easy. There is a clear connection between the amount of loss and the culpability of Fred Fraud. The harm in that kind of avarice combined with that kind of blameless victim is apparent.

On the other hand, when the claimed victims of a fraud are in fact fraudsters of a magnitude above and beyond anything an individual defendant could ever aspire to the court has to take a different tact in analyzing loss. There are relative culpability issues here that are non-existent in Aunt Mae's situation.[10]

Furthermore, the victims in this case did not defraud another well insured commercial entity. These victims defrauded hundreds of thousands of innocent taxpayers of the United States and all the other countries whose governments invested in the securities that these victims created out of these bogus loans.

The time frame of this indictment is also unique in the history of American banking. What was relevant to assessing loss in a mortgage fraud conspiracy during the entire history of the United States is not relevant to the period of time

[10] You could label this multiple causation or intervening criminal conduct, the net result is the same.

covered by this indictment. Never before and never again will the stated income paradigm be an acceptable form of risk management.[11] A mortgage fraud case from 2000 or even 2005 is no longer relevant because all of those cases relied on the foundational premise that the banks exercised meaningful due diligence and risk management. That was not true during the time of this indictment. This case clearly isn't about Aunt Mae being cheated out of her retirement.

These banks drove the economy off a cliff and the only meaningful accounting for that conduct has been the disgorgement of a tiny portion of the profits these victims stole through their own fraud. To suggest, in the face of history, and what the government itself says about these victims, that there was a "loss" to these victims is incredible. To further suggest that this fallacious loss, which only exists because of the complete abandonment of risk management by these victims, is an accurate measure of Mr. Ovist's culpability is absurd. He did not plunder Aunt Mae's retirement money. The final insult is the government's insistence the taxpayers yet again bear the cost of this catastrophe by paying to stuffing into a prison cell another productive person who doesn't belong there.

The other issue for the court here is that unlike the typical mortgage fraud scheme the values of the properties (collateral) were not enhanced with fraudulent

[11] The culpability of these lenders and their awareness of it are evidenced by the multibillion dollar settlements the banks have paid to settle the government's claims. In this case, the court has to question why would GreenPoint have a policy against seeking restitution if its successor ownership viewed it as a victim? How is that consistent with GreenPoint's shareholder's interests?

appraisals. Most mortgage fraud schemes involve the artificial inflation of collateral value to support a larger loan and to allow more cash to be diverted by the fraud. If you are going to sign your own confession to bank fraud why not maximize your "equity" and pull additional cash out of your fraud? You are in no more trouble if you arrange a kick back by artificially inflating the value of the collateral.

There is no evidence at all in this case that the value of the collateral had been manipulated. At least as to the value of the collateral, the banks got exactly what they bargained for.

If the banks bargained at least in part based on the value of the collateral and that collateral was legitimately valued, then why should the risk of loss caused by force majeure be entirely on the borrower as opposed to the lender? There is no question that the banks conduct caused the very downturn in the market that caused the losses here. The banks may have been defrauded in terms of the borrower's qualifications but not in terms of the value of the collateral. That has to factor into how the court considers the Guideline, which, of course, does not consider this at all.

The Guideline also fails to account for the absence of evidence concerning Mr. Ovist's motive. At some point, the jury apparently found he decided to throw away his hundreds of legitimate customers to commit fraud with a group of people for nothing more than a discounted fee and a modest yield spread premium. The absence of looting at the back end of these transactions by Mr. Ovist further makes the loss table and the fraud Guideline unhelpful here.

With the caveat that it would be appropriate for the court to entirely reject the notion of "loss" by these victims, and instead focus on Mr. Ovist's fees as a more accurate measure of his culpability in this case, what follows are Mr. Ovist's estimate as to the appropriate proven actual losses of the lenders from the indictment summarized by count.

In sum, the Guideline "loss" figure is $676,256.60 if the court included acquitted conduct. This triggers a 14 level increase under U.S.S.G. §2B1.1(b)(1)(H).[12]

Count 1

Property: Fox Hollow Sequim, WA
Borrower: Sheri McClanahan
Original Lender: PNC Bank

Loss Issues:

- The PSR suggests that the property was appraised for $164,500 at the time the bank took control of the property. *See PSR* ¶19. That is the value of the collateral that should be used for calculating loss.

- The undeveloped parcel of land was sold by bank for $12,000 to someone at Opal Franklin's address of 21 Mussel Beach when appraised

[12] This has very little to do, however, with an accurate evaluation of Mr. Ovist's culpability under 18 USC §3553(a).

for $164,500. There is no explanation for why this asset was sold for a fraction of its value.

- The fact that the restitution figure and loss figure diverge by more than $150,000 reveals the basic flaw in the loss analysis.

- No evidence was provided to the court regarding whether this loan was packaged and sold and if so for how much or to whom. If it was sold then this lender's proven loss is $0. *United States v. James,* 592 F.3d 1109, 1114-1117 (10th Cir. 2010).

Loss Amount: $8031.92

- $172,531.92 (unpaid principal) - $164,500 (appraisal)

- Mr. Ovist disagrees with the probation report's limitation of the analysis of *United States v. Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) to the restitution as opposed to the loss generally. The measure of loss should be the fair market value of the collateral at the time it returns to the lender's control per the Guideline. There is no logical reason that *Yeung* analysis should be limited to restitution.

<u>Count 2</u>

Property: 12450 SW Aspen Ridge
Borrower: Jake Shoop
Lender: Chase

Loss Issues:

- There is no evidence that this property was ever foreclosed upon or that the lender made any effort to recoup its security interest in the property. If there is a reason why not, it was not proven by the government. If there has not been a foreclosure attempt loss cannot be calculated.

- This was a HELOC of which $70,000 went to pay off a Wells Fargo loan that had nothing to with Mr. Ovist. Jake Shoop took $38,561in cash and Mr. Ovist received $2000 for brokering the loan. *See HUD* attached as Exhibit 4.

- No evidence has been provided to the court about if this loan was packaged and sold and if so, for how much or to whom. If it was sold then this lender's loss is $0.

Loss Amount: $0

Count 3

Property: 1415 Walnut Hillsboro, OR
Borrower: Carly Godden
Lender: Wells Fargo

Loss Issues:

- According to the lender, Godden loan was sold to Federal Home Loan Mortgage Corporation ("FHLMC") on or about May 14, 2008. Therefore there is no loss as to this lender. *See Response of Wells Fargo to Subpoena Duces Tecum* attached as Exhibit 5 at 2; *United States v. James,* 592 F.3d 1109, 1114-1117 (10th Cir. 2010). No evidence that it was reasonable foreseeable to Mr. Ovist that it would be sold and that FHLMC might suffer a loss (which has not been proven).

- No appraisal was offered proving the value of the collateral at the time the lender took control of it.

- The lender received $170,000 at a foreclosure sale. *See Trust Deed* showing consideration of $170,000 attached as Exhibit 6. It is unclear how probation was able to calculate a loss figure but unable to calculate a restitution figure for this count. *See PSR ¶26.*

Loss Amount: $26,786

- \$196,786 (unpaid balance) - \$170,000 (proceeds of sale)

Count 4

Property: 6825 SW 153rd Beaverton, OR
Borrower: Brandon Barnett
Lender: GreenPoint

Loss Issues:

- GreenPoint, for reasons unexplained, claims no loss or any restitution in this matter. The Court should respect its wishes.

- In addition, GreenPoint's fraudulent conduct is an intervening cause that offsets Mr. Ovist's responsibility for this loss.

- PSR ignores a foreclosure appraisal of \$345,000. *See Foreclosure Appraisal* attached as Exhibit 7.

- Based on information subpoenaed by the defense, GreenPoint sold this loan to Goldman Sachs for \$360,157.79 on January 2, 2007. *See Declaration of Lynn Graham, Vice President for GreenPoint Mortgage Funding* attached as Exhibit 8 at 2

- The property was sold in a foreclosure sale that apparently benefited Bank of America for \$310,500. Exhibit 7 at 2.

Loss Amount: \$ 35,143.21

- \$395,301 (unpaid balance) – \$360,157.79 (amount received upon sale of loan) - *See United States v. James,* 592 F.3d 1109, 1114-1117 (10th Cir. 2010).

Count 5

Property: 14140 SW Stickney Hillsboro, OR

Borrower: Brandon Barnett
Lender: GreenPoint

Loss Issues:

- GreenPoint sold all beneficial rights to this loan to Aurora Bank for $437,812.39 and amount greater than the principle amount of $424,000. This loan was then placed into a securitized pool. There is no evidence that it was reasonably foreseeable to Mr. Ovist that this would become part of a securitized pool of loans. *See Exhibit 7* at 2. The loan was never repurchased by GreenPoint therefore its losses are $0.

- Aurora has not provided any evidence of its loss.

- The property appraised for $370,000 while under the bank's control. *See Broker Price Option* ("BPO") attached as Exhibit 9

Loss Amount: $50,000

- $420,000 (original loan amount) – $370,000(appraisal)

Count 6

Property: 17080 SW Vincent Ct
Borrower: Jake Shoop
Lender: Countrywide

Loss Issues:

- No details on sale of loan to investors. No proof of how much it was sold for or to whom.

- The property appraised at $200,000 while in the control of the bank. *See Appraisal* attached as Exhibit 10.

- This was a Countrywide loan, one of the worst of the mortgage lenders whose conduct contributed directly to the claimed loss here. Its own culpability offsets any loss caused by these defendants. This is true of all of the Countrywide loans attributed to Mr. Ovist. *See Argument Concerning Application of §5K2.10* infra.

Loss Amount: $65,295

- $265,295 (unpaid balance) - $200,000 (appraisal)

Count 7

Property: Union Mills Rd
Borrower: Jake Shoop
Lender: GreenPoint

GreenPoint does not claim any losses nor seek any restitution. Given its conduct that is appropriate. It does also underscore the fact loss is not necessarily an accurate measure of culpability.

Further, the government's spreadsheet indicates that the property was sold and the loan was paid in full. This fraud effectively does not count for the purposes of the Guideline except to show that loss is a poor proxy for culpability.

Loss Amount: $0

Count 8

Property: 13915 SE Tenino
Borrower: Jake Shoop
Lender: Wells Fargo

Loss Issues:

- Wells Fargo reports as follows concerning the loan: "The Shoop loan was originated by American Mortgage Network ("Amnet") and sold to Wachovia Bank before Wachovia Bank was acquired by Wells Fargo. The Shoop loan was not sold to an investor, but instead was held by Wells Fargo as a portfolio loan until foreclosure. Accordingly, Wells Fargo is not in possession of documents or information responsive to this

Request. The property securing the Shoop loan was purchased by Wachovia Mortgage Corp. for $409,400 at a trustee's sale on or about July 3, 2008." *See Exhibit 5* at 4. The unanswered question here is if Wachovia Bank bought the Shoop loan why it is that it also bought the property securing the loan? There is insufficient evidence that this lender actually suffered a loss.

- The property was sold for $380,522.26 on or about June 22, 2009.

- No appraisals or valuation at time of foreclosure.

Loss Amount: $28,877.74

- $409,400 (amount Wachovia/Wells paid for the property) - $380,522.26 (amount Wachovia/Wells received at sale)

Count 9

Property: 13924 SE Fircrest
Borrower: Sherrie Inouye
Lender: Countrywide

Count 9 and Count 10 were acquittals and while they *can* be considered by the court, the Court should not consider them. Defendant acknowledges that the 9th Circuit permits the district court to consider acquitted conduct applying a preponderance of the evidence standard. *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007). That *Mercado* permits it does not mean that the court *must* apply that burden of proof. *United States v. Pimental*, 367 F.Supp.2d 143, 154 (D.Mass. 2005)(district court applied beyond reasonable doubt standard). To consider acquitted conduct trivializes "legal guilt" or "legal innocence" - which is what a jury decides - in a way that is inconsistent with the tenor of the recent case law. See Gertner, *Circumventing Juries*, 32 Suffolk U.L.Rev. at 436; *Id.* In *Pimental*, Judge Gertner explains in detail the logical inconsistency between the Supreme Court's 6^{Th} amendment jurisprudence and the idea of a judge casting aside the jury's verdict to consider acquitted conduct.

Given this court's respect for the jury system and the wisdom of juries, it should respect its verdict and not consider any of the acquitted conduct in sentencing Mr. Ovist.

There are other reasons to reject these counts. The trial testimony of Rick Shoop and Sherrie Inouye was inconsistent with the trial testimony of Don Kazlauskas. Both Shoop and Inouye claimed to have only received $5000 in return for the property they bought and Kazlauskas testified that they received more money for those transactions. They received very favorable treatment from the government in exchange for their testimony.

Loss Issues:

- The government has incorrectly calculated the unpaid balance on the loans. The unpaid balance on the first should be $529,473.65. *See Government Exhibit 8* to Phase I Sentencing Memorandum. The unpaid balance on second should be $105,042.[13] *See Loan Summary* attached as Exhibit 11.

- The broker price estimate at the time of the bank taking control of the property was $549,000. *See BPO* attached as Exhibit 12.

[13] *See* loan summary document attached as Exhibit 11.

Loss Amount: $85,515.65

- $634,515.65- (correct unpaid balance) - $549,000 (BPO)

Count 10

Property: 14002 SE Fircrest
Borrower: Rick Shoop
Lender: Countrywide

This was also an acquitted count so it should not be considered by the court.

Loss Issues:

- This was a Countrywide loan, one of the worst of the mortgage lenders. This victim's conduct contributed directly to the claimed loss here. Its culpability offsets any loss caused by these defendants. This is true of all of the Countrywide loans attributed to Mr. Ovist. *See Argument Concerning Application of §5K2.10* infra.

- No details have been provided about the securitization of this loan and how that impacts this lender's actual loss.

- Appraised 7/17/08 for $420,000

Loss Amount: $168,905

- $588,905 (unpaid balance) - $420,000 (appraised value)

Count 11

Property: 8327 SE Pineridge
Borrower: Linda Beachell
Lender: Countrywide

Loss Issues:

- Documents indicate that this property was sold at foreclosure for $497,000. See Exhibit 13 at 2.

- This was a Countrywide loan, one of the worst of the mortgage lenders. This victim's conduct contributed directly to the claimed loss here. Its culpability offsets any loss caused by these defendants. This is true of all of the Countrywide loans attributed to Mr. Ovist. *See Argument Concerning Application of §5K2.10* infra.

- No details have been provided about the securitization of this loan and how that impacts this lender's actual loss.

Loss Amount: $152,000

- $649,000 (unpaid balance) - $497,000(foreclosure sale)

Count 12

Property: 3611 NE 88th
Borrower: Jake Shoop
Lender: GreenPoint

Loss Issues:

- GreenPoint contributed to its own losses through fraudulent conduct directed at a third part, Fannie Mae. It further induced the conduct at issue here through marketing stated income loan products that it knew involved borrowers providing false information.

- This is what GreenPoint reports concerning this loan:

"Loan No. 92524727 was made to Jacob Shoop. The property address was 3611 NE 88th Avenue, Portland, Oregon. The loan originated on August 25, 2007 with the original principal balance of $229,500. All beneficial rights on this loan were sold to Fannie Mae on or about September 12, 2007. The loan was securitized and placed into an

MBS pool 924843 09/07. On or about May 7, 2009 the loan was repurchased for $252,756.08. On or about November 12, 2008 Bank of America, N.A. completed the foreclosure of the property securing the loan. At the trustee's sale the property reverted back to the Bank of America, N.A. for $250,718.76. The appraised/BPO value of the property, obtained as of November 12, 2008, was $199,000." *See Exhibit 8* at 3.

There is no way the court can reasonably calculate loss from that series of transactions.

- This loan was paid in full and there is not outstanding balance.

Loss Amount: $0

Count 14

Property: 7865 SE Theissen Rd
Borrower: Carly Godden
Lender: Countrywide

Loss Issues:

- This loan has been paid in full and there is no loss. The exhibits submitted by the government in support of the loss claim are insufficient.

- No appraisal has been provided justifying the sale amount.

- Countrywide's criminal conduct in marketing stated income loans and then later misrepresenting the quality of these loans when securitized offsets the culpability of the defendant.

- Trust deed shows a transfer of the collateral for $379,534.92.[14]

- How does it make sense for restitution be a higher figure than loss? *See PSR* ¶27

[14] *See* Exhibit 14 at 2.

Loss Amount: $24,215.08

- $403,750(unpaid balance) - $379,534.92(foreclosure transfer)

Count 15

Property: 21 Mussel Beach Sequim, WA
Borrower: Scott Franklin
Lender: Taylor Bean and Whitaker

Loss Issues:

- Lender sold loan and have provided no evidence regarding proceeds received from sale of loan.

- Lender's criminal culpability offsets the defendant's responsibility for the claimed loss.

- The documents offered in support of loss claim are insufficient.

Loss Amount: $31,487.00

- $260,427 (unpaid principal balance) - $228,940(appraised value)

5. Other Loss Issues:

Defendants gain is substantially less than the "loss" figure advocated for by the government and justifies a departure from the Guideline no matter what loss figure the court accepts. Attached as Exhibit 15 is a government spreadsheet that summarizes Mr. Ovist's compensation from the loans at issue here. The total gross compensation he received for all of the loans at issue in this case is $80,909. In terms of a number most directly related to his culpability, this is it. *See Application Note 3(B) to §2B1.1.*

Unlike the borrowers, Mr. Ovist received no interest in any property as a result of his role in this offense. He had no right to further encumber any property or to sell any of the properties at issue. The notion that Mr. Ovist is so much more culpable than the borrowers is not supported by the very nature of the transaction.

The banks testified at trial that what was material was the information concerning the borrower, the credit report and score, and the collateral. Mr. Ovist's reputation as the broker was utterly meaningless. He did not control the credit report and none of the transactions involved the use of fraudulent appraisals. His role was to fill out forms based on the information from the borrowers. He was not the beneficiary of the loan nor did he receive any interest in the property. What he did was earn compensation for these loans and that is the most accurate measure of the harm he caused.

The amounts Mr. Ovist received from the proceeds of the sales are not relevant to his culpability for two reasons. First, the $86,560 that came out of Mussel Beach went to Ishwar Uttamchandani as part of Mr. Ovist's effort to extract himself from his brother's business. Second, the appraisals on all of these loans were legitimate and did not exaggerate the value of the property. Irrespective of the borrower's false income, the loan value and therefore the proceeds coming from the transaction were justifiable because of the appraisal.

6. <u>An enhancement under §3C1.1 cannot be justified.</u>[15]

The PSR advocates for a two level enhancement under U.S.S.G. §3C1.1 based on the following:

> "In the instant case, Ovist did not disclose loan documentation that was material for the government to show that he had knowledge of one of the "straw buyers", Linda Beachell's true financial information as he had processed a legitimate loan for her in March 2006. A grand jury subpoena asking for all loan documentation pertaining to Linda Beachell was submitted to Ovist in January 2010. His failure to provide this documentation caused the government to invest extra and unnecessary time and energy to prove that Ovist had knowledge of Beachell's true financial portfolio when he processed the fraudulent loan documentation."
>
> *PSR ¶59*

Even assuming some evidence of intent, none of which the presentence report identifies, this conduct falls short of the kind of obstructive conduct necessary for the court to find that the Mr. Ovist *willfully* hindered the government's investigation. That the government "believes" the enhancement applies is not a substitute for actual evidence of willful obstruction. *See PSR ¶6.*

The Guideline provides:

> If (1) the defendant ***willfully*** obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of

[15] These two levels represent as much as 38 months of incarceration.

> conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.
>
> *U.S.S.G.* §3C1.1(emphasis added)

There are two flaws with probation's advocacy for this enhancement. First, there is no actual *evidence* that Mr. Ovist *willfully* failed to comply with a subpoena. Second, the investigation was not in fact materially obstructed in any way.

Some factual background is appropriate. In January 2010 Mr. Ovist's retained counsel received a grand jury subpoena from FBI Agent Lamonica seeking records relating to a loan for Jacob Shoop and all loans relating to Linda Beachell. At the time, Mr. Ovist was represented by an attorney with no federal criminal experience. The subpoena sought a total of 6 loans (5 for Beachell and 1 for Shoop).

Mr. Ovist did not maintain all of the thousands of loan files from his 2300 clients in his office. They were kept offsite in two different storage lockers. In searching through his storage lockers Mr. Ovist was able to locate 5 of the 6 files, each of which was more than 100 pages. These files were all made available to the government consistent with the subpoena. Although he committed a number of hours to searching, he was simply not able to find one of the Beachell files.[16] He has never been able to find it. This fact was timely reported to the government.

There is no case in the Ninth Circuit that applies this enhancement in these circumstances because §3C1.1 is limited to situations where the defendant's *affirmative* misconduct actually obstructed an investigation. An example is *United States v. Gilchrest*, 658 F.3d 1197 (9th Cir. 2011). When Dwight Gilchrist obtained a job from Wells Fargo under a false name and then added his real name to other's accounts and stole money from them, he could have his sentence enhanced for obstruction when:

- He failed to cooperate with Wells Fargo's internal investigation.
- He filed false fraud claims with Wells.
- He sued Wells civilly for money that he had stolen.
- He lied during a civil deposition repeatedly.
- He admitted in his plea colloquy that he lied during the civil case.

United States v. Gilchrest, 658 F.3d 1197, 1203-1205 (9th Cir. 2011).

Gilchrest's conduct in filing a false claim about money he stole and then lying repeatedly in the civil proceedings provides an apt contrast to the allegedly obstructive conduct at issue here.

The absence, in this instance, of any affirmatively false information being provided pursuant to the subpoena or any evidence that Mr. Ovist destroyed the

[16] Mr. Ovist acknowledges that Oregon Administrative Rules require a mortgage broker in Oregon to retain files for a period of five years. *OAR* 441-850-0035. Linda Beachell's loan occurred almost 4 years before the subpoena. However, absent some evidence of willful conduct in regards to that file, it is irrelevant that he was required to retain it. That it was lost in the absence of something more is not willful obstructive conduct.

Beachell file forecloses the enhancement. No Ninth Circuit cases support the enhancement when a defendant cannot find a particular file responsive to a subpoena and otherwise complies with the subpoena.

The cases considering this issue all support Mr. Ovist's position. For example, *United States v. Luca*, 183 F.3d 1018 (9th Cir. 1999) provides some useful guidance. When Frank Luca obstructed justice relative to an investigation into his Ponzi scheme, his sentence was properly enhanced because he intentionally submitted false prospectuses in response to an investigative subpoena from Arizona Securities Division of the Arizona Corporations Commission in order to delay the investigation to obtain more money from more victims. *United States v. Luca*, 183 F.3d 1018, 1022 (9th Cir, 1999). *Luca* is clearly distinguishable from Mr. Ovist because Luca *affirmatively* provided false information to the authorities (the prospectuses) in order to continue obtain more investors for his Ponzi scheme (willfulness). Here there is no such evidence. Mr. Ovist did not destroy anything. He did not provide any false information and he otherwise complied with the subpoena.

Another important distinction between this case and *Luca*: Luca's affirmative submission of false prospectuses he created is very different from failing to provide a loan file that cannot be located. Since Luca was the only source of this information it follows that his attempt to obstruct the investigation was willful and material. Mr. Ovist, in contrast, was well aware that the contents of his loan files were easily available from either the lender or the title company. He was not the only source of this information and he provided nothing false to the government.

Furthermore his inability to locate this file does not amount to *material* obstruction when the government has to obtain the loan files from the lenders or title companies anyway. The government could not have proceeded with this case on the basis of files obtained from Mr. Ovist alone. They had to, and did in fact, subpoena loan and title company files in order to have admissible evidence for trial.

Another case, *United States v. Yip*, 592 F.3d 1035 (9th Cir. 2009) similarly indicates that affirmative and willful conduct is necessary for an enhancement under §3C1.1. In *Yip*, the defendant was audited by the IRS. He was later prosecuted for tax crimes. *Id.* at 1036. The conduct justifying the obstruction enhancement was four phony promissory notes and a false bank deposit analysis that Mr. Yip ginned up and supplied to the IRS civil agent during the audit. Again, the distinction between this case and *Yip* is clear. It was Yip's affirmative conduct including making false documents and like *Luca* he was the only source for that information so the obstruction was clear. Here we lack any affirmative conduct evidencing willful obstruction.

Similarly, in *United States v. Tehin*, 05-10328, 2007 WL 836713 (9th Cir. 2007), Judge Graber upholds an enhancement under §3C1.1 because Tehin "submitted false backdated check requests to the California State Bar during its investigation of him for his misconduct in the Ferry case." Again the conduct underlying the enhancement is *false* information *affirmatively* provided by the defendant.

Cases in other circuits addressing the issue similarly indicate that affirmative conduct by the defendant is necessary in order to sustain this enhancement. *See e.g. United States v. Upton*, 91 F.3d 677, 686-688 (5th Cir. 1996)(defendant failed to produce documents under a grand jury subpoena, lied under oath to the grand jury about it, and then later admitted both the lie to the grand jury and the fact that he possessed additional records under the subpoena); *United States v. Thorsen*, 633 F.3d 312, 321 (4th Cir. 2011)(defendant created and then provided false document in response to grand jury subpoena).

In surveying the cases interpreting §3C1.1 application note 4(D), the only one similar to this one is from the Seventh Circuit: *United States v. Powell*, 576, F.3d 482, 498 (7th Cir. 2009). In *Powell*, the court of appeals found that district court did not clearly err in finding that §3C1.1 applied to defendant:

> "Harris's obstruction enhancement was based on his failure to comply with a grand jury subpoena requesting copies of tax returns and accounting schedules used to prepare the returns. In September 2006, FBI agents served Harris's law firm with the subpoena. In a signed

> statement, Harris responded to the subpoena by claiming that the law firm did not have the accounting schedules due to a "computer crash." However, on March 31, 2007, one week after the grand jury returned a superseding indictment adding a tax count against Harris, Harris's wife, who was the law firm's accountant, printed out the accounting schedules. At trial, she testified that Harris never gave her the subpoena and that she did not know that the grand jury had subpoenaed the law firm's accounting schedules until after the indictment.
>
> According to the commentary to the obstruction enhancement, "concealing ... evidence that is material to an official investigation" is obstruction. U.S.S.G. § 3C1.1 application note 4(d) (2007). The district court concluded that Harris's behavior was just that. We agree. At the very least, it was obstructive for Harris to fail to tell the one person in his law firm who had control over the subpoenaed documents—his wife—about what documents the subpoena requested, since those documents were material to the investigation. Moreover, the computers' fortuitous recovery in time for Harris to use the accounting schedules in his own defense strongly suggests that Harris's "computer crash" excuse was unworthy of belief. The district court did not commit clear error in applying the obstruction enhancement."
>
> *United States v. Powell*, 576, F.3d 482, 498 (7th Cir. 2009)

Several important facts found in *Powell* distinguish it from Mr. Ovist's case. First, in *Powell* there was evidence developed at trial that the defendant in fact possessed information responsive to the subpoena. Second, defendant's accountant who was access to the materials was never told of the subpoena. Third, the defendant's excuse that the computer system crashed was contradicted by his later ability to access the materials to support his defense at trial. Finally, the obstruction was material because the only place the information existed was in defendant's computer.

In this case there has been no evidence whatsoever that the Linda Beachell loan file was in fact in Mr. Ovist's possession at the time of the subpoena. Second, there is no independent individual verifying the existence of the material sought by the subpoena as there was in *Powell*. Third, Mr. Ovist never used any documents from Ms. Beachell's file to defend himself at trial after denying that he could access the file.

Furthermore, the government has not provided any evidence of how its investigation was materially hindered. Linda Beachell testified at trial. All of her loan documents including the loan application were entered into evidence. It did not ultimately serve a search warrant on Mr. Ovist seeking the same documents. If the government was obstructed it is unclear how.

Given the evidence, or lack thereof, this enhancement is inappropriate and should not be applied to determine Mr. Ovist's Guideline range.

7. <u>An Abuse of Trust Enhancement under §3B1.3 does not apply here.</u>

Mr. Ovist was not in a position of trust relative to the mortgage lenders in this matter even though he was a licensed mortgage broker.[17] No particular special skill was necessary to perform his job. The educational and licensure requirements

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[17] A much stronger case can be made that he was in a position of trust as to his customers but they were not victims. *See, e.g. United States v. Morris*, 286 F.3d 1291, 1295-1300 (11th Cir. 2002).

are basic and readily attainable by nearly anyone who is literate. *See* OAR 441-860-0020 et seq. The lenders themselves had massive underwriting apparatuses capable to verifying any piece of information provided regarding the borrower. The mortgage broker's role was not to verify the correctness of information but rather to *transmit* that information to the lender so it could apply its internal risk management processes to the transaction.

Applying the enhancement requires a two-part inquiry: First, did the defendant hold a "position of public or private trust" within the meaning of the Guidelines? Second, if so, did the position "significantly facilitate" the commission of the crime? *United States v. Hoskins*, 282 F.3d 772, 778 (9th Cir.2002).

The issue before the court, then, is whether Mr. Ovist enjoyed a "position of public or private trust." The commentary to the Guideline provides some idea:

> *"Definition of "Public or Private Trust".—"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference).*

See §3B1.3 commentary at 1.

Simply put, Mr. Ovist had no supervisory or managerial discretion over anything other than his employees who are not alleged to be part of this fraud. He was effectively a salesperson for a variety of large mortgage entities, all of which maintained thousands of personnel specifically dedicated to risk management. The applications he filed on behalf of his customers were vetted by numerous people within the lender organizations and were supported by credit reports that had nothing to do with Mr. Ovist. He could not apply for credit on anyone's behalf. Ovist could not extend or deny credit to anyone. The only entity with supervisory authority over the lender's money was the lender and its employees. His "word" as a mortgage broker meant nothing to the lender. No lender made it decision because it "trusted" the mortgage broker. That was the testimony at trial.

There is a circuit split over whether an enhancement is appropriate in these circumstances and the Ninth has yet to weigh in. In *United States v. Fuchs*, 635 F.3d 929, 936 (7th Cir. 2011) the Seventh Circuit held that the mortgage broker, as a middleman between lenders and borrowers, did not warrant an enhancement under §3B1.3:

> "In Fuchs's situation the information before the district court was unremarkable. His fraud convictions do not themselves justify the application of § 3B1.3. He did take advantage of the lenders, but their reliance (or for that matter, his success) was not an element necessary to convict him of mail or wire fraud. *Bridge v. Phoenix Bond* & Indem. Co., 553 U.S. 639, 648–49, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); *Neder v. United States*, 527 U.S. 1, 24–25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *see* also *United States v. Rosby*, 454 F.3d 670, 674 (7th Cir.2006). Fuchs's position as a middleman between the borrowers and lenders does not imply a special relationship with the lenders."
>
> *United States v. Fuchs*, 635 F.3d 929, 936 (7th Cir. 2011)

The Seventh Circuit further explained that the application of this enhancement should not be confused with "lax supervision or the victim's abdication of his own duties." *Id* at 935*; see also United States v. Pardo*, 25 F.3d 1187, 1192 (3d Cir.1994) (overturning increase under § 3B1.3 where defendant's commission of bank fraud was made possible by lack of "routine precautions" rather than his position). In this case, there is substantial reason to believe that the lenders were lax in their risk management and utterly failed to take routine precautions like verifying income or residency. Those failures cannot be attributed to any particular position of trust Mr. Ovist supposedly attained.

In *Fuchs* the Seventh Circuit went on to disclaim the per se rule that the Fifth and Eight Circuits appear to have adopted.[18] According to the Seventh Circuit, it is a fact specific inquiry that must be made on a case by case basis and a per se rule that the enhancement applies to every mortgage broker was inappropriate:

> Neither *Wright* nor *Septon* identifies any factor apart from the general "structure" of the commercial relationship between mortgage broker and lender to justify applying § 3B1.3. The workings of the mortgage industry may cultivate a heightened degree of trust between mortgage brokers and lenders in a particular case, e.g., where the same broker deals repeatedly with the same lenders, but neither *Wright* nor *Septon* discusses whether the defendants in those cases actually enjoyed this special trust. The Fifth Circuit recognized that the question was a "close call," *Wright*, 496 F.3d at 377, but in the end appears to have

[18] *United States v. Sept*on, 557 F.3d 934, 937–38 (8th Cir.2009); *United States v. Wright*, 496 F.3d 371, 375-77 (5th Cir.2007)

> fashioned a per se rule that mortgage brokers always occupy a position of trust with lenders based on reliance flowing "from the structure of the mortgage industry itself," *Id*. at 375–77. To the extent that the Fifth Circuit adopted a per se approach (and the Eighth Circuit followed suit), we respectfully disagree.
>
> *United States v. Fuchs*, 635 F.3d 929, 937 (7^{th} Cir. 2011)

In this case, like *Fuchs*, we have no specific evidence that David Ovist held a position of trust such that the enhancement should apply in this case. There was evidence throughout the trial that the representations of the borrower were material to the bank but none that the reputation or trustworthiness of the broker had any impact on the lender's decision. Furthermore, as is discussed below in regards to a departure under §5K2.10, the banks were not victims; they were criminal co-conspirators whose mendacity mitigates any claimed trust extended to Mr. Ovist.

8. Guideline Calculations Before Departure:

Under the defendant's proposed calculation, the base offense level is 7. There are no other enhancements that should apply. That calls for a range of 0-6 months.

If the court finds that a loss was proven, the loss should be between $400,000 and $1 million, which produces a total offense level of 21 and a Guideline Range in Category I of 37-41 months prison.

9. The Court should depart under U.S.S.G §5K2.10.[19]

The Guidelines contemplate a situation where the conduct of the victim may contribute significantly to the offense such a downward departure from the Guidelines is warranted. This is one of those rare situations where the victim of a non-violent crime contributed so substantially to the offense that a reduction in the Guideline offense level is appropriate.

§5K2.10 is a policy statement concerning the "Victim's Conduct" that is mainly directed at assessing imperfect self-defense claims in assault and homicide cases. It is not limited, however, to violent offenses:

> ",…this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense."
>
> §5K2.10.

A departure under this Guideline policy statement is rare but not unprecedented. *See e.g. United States v. Birch*, 57 F.3d 1078 (1995)(affirming district court's power to depart in a fraud case under §5K2.10). That such departures are infrequent does not mean it should not be considered here.

The victim malfeasance in this case had macro-economic implications for millions if not billions of people. Generations from now history books will refer to

[19] The defendant also adopts the arguments advanced in support of his arguments under 18 USC §3553 as additional ground for departure under the Guidelines.

the unregulated lending practices from the period of this indictment as the time of the stated income loan. While Mr. Ovist and his co-defendants and everyone else prosecuted by Operation Stolen Dreams played a tiny role in contributing to this catastrophe it was the very "victims" in this case that created thousands of David Ovists, and literally millions of Rick Shoops and Sheri Inouyes. The court must acknowledge that this offsets the culpability of those like Mr. Ovist that were caught up in the fraud marketed by the victims at issue here. The victims' fraud, selling these bogus mortgages as investment grade securities, depended on the defendants to supply it currency: home mortgages.

A. These victims were the genesis of the economic crisis.

Since the beginning of 2007, the United States and the world have experienced an economic contraction unlike anything since the Great Depression. 26 million people in the United States lost jobs and more than millions remain out of work today. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished. Retirement accounts and life savings swept away.

Who caused this? According to the Federal Housing Finance Agency, the SEC, and the Financial Crisis Inquiry Commission it was the risk taking, greed, and outright fraud engaged in by some of the very financial institutions, including JP

Morgan Chase (Count 2 of the Indictment), Wells Fargo (Count 3 of the Indictment), GreenPoint Mortgage (Counts 4, 5, 7, and 12), and Countrywide (Counts 6,9,10, 11 and 14) listed as victims in this case.[20]

Through the machinations of these 'victims' trillions of dollars in risky mortgages became embedded throughout the financial system, as mortgage-related securities were packaged, repackaged, and sold to investors around the world. When the housing bubble burst, hundreds of billions of dollars in losses in mortgages and mortgage-related securities shook markets as well as financial institutions that had significant exposures to those mortgages and had borrowed heavily against them. This happened not just in the United States but around the world. The losses were magnified by derivatives these "victims" invented such as synthetic securities.

At the same time as these huge, risky bets were being made, the role these financial institutions, including some of those listed as victims in this indictment, played in the economy had changed dramatically. From 1978 to 2007, the amount of debt held by the financial sector soared from $3 trillion to $36 trillion, more than doubling as a share of gross domestic product. The very nature of many Wall Street firms changed—from relatively staid private partnerships to publicly traded corporations taking greater and more diverse kinds of risks. By 2005, the 10 largest

[20] The principals of TBW (Count 15 relating to 21 Mussel Beach) were prosecuted and are serving prison sentences.

U.S. commercial banks held 55% of the industry's assets, more than double the level held in 1990. On the eve of the crisis in 2006, financial sector profits constituted 27% of all corporate profits in the United States, up from 15% in 1980.[21]

According to the government, the "victims" in this case like Citigroup, Bank of America, JPMorgan Chase, Wells Fargo, Countrywide, GreenPoint, and others acted recklessly, taking on too much risk, with too little capital, and with too much dependence on short-term funding. This reflected a fundamental change in these institutions, particularly the large investment banks and bank holding companies, which focused their activities increasingly on risky trading activities that produced hefty profits. They took on enormous exposures in acquiring and supporting subprime lenders and creating, packaging, repackaging, and selling trillions of dollars in mortgage-related securities, including synthetic financial products. According to the government's filings the dramatic failures of corporate governance and risk management at many systemically important financial institutions were a key cause of this catastrophe.

[21] This section is generally taken from the following government publications: *Conclusion*: Final report of the Financial Crisis Inquiry Commission submitted January 2011 and found at: http://www.gpo.gov/fdsys/pkg/GPO-FCIC/content-detail.html; *See also FHFA v. Bank of America (Countrywide)* and *FHFA v. JP Morgan Chase* and *FHFA v. Citigroup* all found at: http://www.fhfa.gov/Default.aspx?Page=110 and *SEC v. Countrywide* found at: http://www.sec.gov/news/press/2009/2009-129.htm

B. The Government's sworn statements alleging massive fraud by Countrywide, JPMorgan Chase, Wells Fargo, and GreenPoint justify a downward departure.

The SEC initiated the first government action against Countrywide with the filing of a complaint on June 4, 2009; roughly one year after Bank of America had acquired Countrywide and dissolved it. The SEC moved against the directors of Countrywide alleging what was a massive fraud on the investors who had bought the mortgage backed securities that Countrywide had sold. A central theme of the SEC complaint is that while executives of Countrywide were touting to the public the strength of the firm's risk management and underwriting, they also knew that Countrywide had effectively abandoned all underwriting. Id. The complaint resulted in the largest single settlement involving an individual when Countrywide CEO Angelo Mozilo agreed to a lifetime ban and to pay $22.5 million to settle these claims.

The SEC was not the only government agency to take action against the alleged victims in this indictment. The Federal Housing Finance Agency (FHFA) was created on July 30, 2008, when the President signed into law the Housing and Economic Recovery Act of 2008. The Act gave FHFA the authorities necessary to oversee vital components of our country's secondary mortgage markets – Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. According to its website, FHFA's mission is to provide effective supervision, regulation and housing mission oversight of Fannie Mae, Freddie Mac and the Federal Home Loan Banks to promote their safety and soundness, support housing finance and affordable housing, and support a stable and liquid mortgage market.

On September 2, 2011 the FHFA in its capacity as government overseer for Fannie Mae, Freddie Mac and the Federal Home Loan Banks filed 17 lawsuits against major financial institutions alleging that beginning in 2005 and ending around the Spring of 2008 these firms affirmatively lied in the registration statements relating to the mortgage backed securities they were selling to investors, including the government. The crux of that lie was that the institutions had adhered to legitimate underwriting involving the loans that were later securitized and sold. This claim, with respect to each of these lenders, turned out to be absolutely false according to the government.

1. SEC v. Countrywide:

The lender in Counts 6, 9, 10, 11 and 14 was Countrywide Home Mortgage. Countrywide originated, sold, and serviced mortgage loans. By 2005, Countrywide was the largest mortgage lender in the United States, originating over $490 billion in mortgage loans in 2005, over $450 billion in 2006, and over $408 billion in 2007. In 2008 it was purchased and taken over by Bank of America which ultimately dissolved it and paid nearly $9 billion dollars to settle various claims against Countrywide.

The government's complaint against Countrywide presents a firm of astonishing rapacity whose desire for market share led it to forgo all of the traditional underwriting systems until it had no underwriting at all. It depicts a shady organization so thoroughly corrupt it appears to have been run as a criminal syndicate. For example, the SEC characterizes Countrywide and its CEO Angelo Mozilo as the embodiment of fraud: one day appearing tan and impeccably dressed on a national business show to proclaim the soundness of Countrywide's underwriting and risk management to investors while the very next day internally sending a round of panicked emails acknowledging that they were driving Countrywide off a cliff.

The SEC also annexed to court filings the deposition testimony given by Countrywide's former executives in the civil action. In the testimony, Countrywide's top executives conceded that Countrywide stopped ensuring compliance with underwriting Guidelines as a consequence of attempting to out-do its competitors in increasing its volume of mortgage-backed securitizations. In other words, nothing on an application was material; all that mattered was whether it could generate another loan it could sell as a security.

The government's sworn statements concerning the flaws in Countrywide's business model are numerous and directly relate to the element of materiality in this case:

- “Countrywide developed what was referred to as a "supermarket" strategy, where it attempted to offer any product that was offered by any competitor. By the end of 2006, Countrywide's underwriting Guidelines were as wide as they had ever been, and Countrywide was writing riskier and riskier loans. Even these expansive underwriting Guidelines were not sufficient to support Countrywide's desired growth, so Countrywide wrote an increasing number of loans as "exceptions" that failed to meet its already wide underwriting Guidelines even though exception loans had a higher rate of default.” SEC Complaint at 3.

- In 2003, United States residential mortgage production reached a record level of $3.8 trillion. In 2004, in a market where originations were declining overall, Countrywide maintained net earnings of $2.1 billion, and increased its market share from 11.4% to 12.7%. Countrywide achieved this result in large part by moving away from its historical core business of prime mortgage underwriting to aggressively matching loan programs being offered by other lenders, even monoline subprime lenders. As a result, as reported in Countrywide's periodic filings …, in 2004, 2005, and 2006, Countrywide wrote more nonconforming, subprime, and home equity loans than in any prior period.” SEC Complaint at 7-8.

- “While Countrywide boasted to investors that its market share was increasing, company executives did not disclose that its market share increase came at the expense of prudent underwriting Guidelines.” SEC Complaint at 10-11.

- Indeed, from January 2003 until well into 2006, Countrywide's credit risk management department ("Risk Management") spent approximately 90% of its time processing requests for expansions of Countrywide's underwriting Guidelines.” SEC Complaint at 11.

- Countrywide's Forms 10-K for 2005, 2006, and 2007 stated that Countrywide "manage[d] credit risk through credit policy, underwriting, quality control and surveillance activities" and touted the Company's

> "proprietary underwriting systems ...that improve the consistency of underwriting standards, assess collateral adequacy and help to prevent fraud." These statements were false, because defendants knew that a significant portion of Countrywide's loans were being made as exceptions to Countrywide's already extremely broad underwriting Guidelines." SEC Complaint at 34.

These are not the claims of a disgruntled investor; this is the official word of the United States Government as represented by attorneys of the Securities and Exchange Commission. As such, these allegations, which go to the very core of what has always been understood about the mortgage industry, have to be considered when weighing Mr. Ovist's culpability relative to that of his "victims."

2. FHFA v. Countrywide et al:

The government's claims against Countrywide are further illuminated in the FHFA complaint which reveals additional details about a corrupt organization without any risk management that would approve all loans. The FHFA complaint presents a astonishing abandonment of the traditional mechanisms by which a financial institution would manage risk. It portrays a corporate culture obsessed with market share and the quick profits generated by selling these mortgage securities on the secondary market. See *FHFA v. Countrywide Complaint* at 40, 108. According to the FHFA, it was this shift away from traditional risk management to a business model based on the salability of the loan that allowed Countrywide to become one of the primary drivers of the economic collapse. *Id*.

Again, the image is of a firm acting not as a bank but as a criminal syndicate, using market share to extort and strong arm bankers into ignoring basic due diligence. Countrywide exploited the demand for mortgage based securities to intimidate the investment banks into less and less due diligence regarding the underlying loans with the threat of excluding them from the market. *FHFA v. Countrywide* Complaint at 119.

The FHFA makes numerous statements in its complaint against Countrywide relevant to this court's exercise of sentencing discretion in this case.

- "Countrywide Home Loans systematically disregarded its underwriting Guidelines during the relevant period in order to increase production and profits derived from its mortgage lending businesses. FHFA v. Countrywide Complaint at 77.

- "Numerous government reports and investigations have described rampant underwriting failures at Countrywide throughout the period of the Securitizations. In addition, in the case of Countrywide, those reports and investigations have led to disclosures of admissions and acknowledgments made by top Countrywide executives of the abandonment of adherence to underwriting Guidelines." FHFA v. Countrywide Complaint at 78.

- "In November 2008, the Office of the Comptroller of the Currency, an office within the United States Department of the Treasury, issued a report identifying Countrywide as one of the "Worst Ten" mortgage originators in the "Worst Ten" metropolitan areas. The worst originators were defined as those with the largest number of non-prime mortgage foreclosures for 2005-2007 originations." Id.

- "The "matching strategy" described in the Court's decision in the SEC action, by which Countrywide mixed and matched the least demanding

Guideline requirements of other lenders, led Countrywide to deliberately abandon its Guidelines and instead to apply the most lax underwriting Guidelines in the market." Id at 81.

- "The SEC action established that it was openly known at Countrywide that loans were being approved for securitization based solely on Countrywide's ability to sell the loan in the market, rather than on compliance with underwriting criteria. Countrywide's high-volume computer system, called the "Exception Processing System," was known to approve virtually every borrower and loan profile, albeit with a pricing add-on by which Countrywide charged the borrowers extra points and fees. The Exception Processing System was known within Countrywide as the "Price Any Loan" system. Through the Exception Processing System, Countrywide was able not only to generate enormous profits from these higher fees, but also routinely approve loans that did not satisfy even its weakened theoretical underwriting criteria." Id at 82.

- "The monoline insurers hired by Countrywide to provide financial guaranty insurance for Countrywide-sponsored securitizations are among those suing Countrywide and Bank of America, its successor. MBIA Insurance Corporation ("MBIA") and Syncora Insurance Company ("Syncora") have alleged that Countrywide and Bank of America induced them to provide insurance for the securitizations based on false representations and warranties about the quality of the loans originated by Countrywide, and in particular, Countrywide's adherence to its own underwriting Guidelines." Id at 94.

- "Due to strong demand, originators such as Countrywide gained bargaining power over investment banks seeking to purchase mortgage loans and sponsor securitizations. One way originators exercised this bargaining power was to insist that investment banks limit their due diligence to smaller percentages of loan pools prior to purchase. If an investment bank chose to kick out a large number of loans from a pool (e.g., because the loans failed to conform to the mortgage originator's Guidelines or did not contain adequate documentation), it risked being excluded from future loan purchases. As a result, investment banks performed increasingly cursory due diligence on the loans they securitized." Id at 119.

- Ultimately, Countrywide's exception policy was designed to ensure that all loans were approved." Id at 86.

The government's statements all reflect the reality of the Countrywide business model during the relevant time period: nothing was material to Countrywide's funding decision except its ability to sell the loan to someone else. Every loan was approved. According to the government this 'victim' orchestrated a fraud of an almost inconceivable scope, at least hundreds of billions of dollars, probably trillions, that directly relates to the element of materiality at issue in this case. This is one of those very unusual cases where departure under §5K2.10 is warranted.

3. FHFA v. JP Morgan Chase (GreenPoint):

Another large originator of residential mortgages was GreenPoint. GreenPoint is the 'victim' in Counts 4, 5, 7, and 12 of the Indictment. Like fellow predator Countrywide, GreenPoint found itself with the ignominious distinction of appearing on the 2008 Comptroller of Currency's "Worst Ten in the Worst Ten" report of the lenders with the most foreclosures in the markets with the highest foreclosure rates. It continued its disastrous run through communities like Las Vegas and Stockton, California by appearing even higher on the list in 2009 before it was finally shuttered by parent Capital One Financial amidst an $850 million write-down. See *FHFA v. JPMorgan Chase* at 147 -148.

Here too the government has made clear that it believes that GreenPoint approved any loan as part of the broader effort to sell securitized packages of loans on the secondary market:

- "GreenPoint systematically disregarded its underwriting standards, granted exceptions in the absence of compensating factors, required less documentation, and granted no documentation or limited-documentation loans to individuals without sound credit histories. In November 2008, Business Week Magazine reported that GreenPoint's employees and independent mortgage brokers targeted borrowers who were less able to afford the loan payments they were required to make, and many had no realistic ability to pay back the loans." Id.

- GreenPoint's pervasive disregard of underwriting standards resulted in its inclusion among the worst ten originators in the 2008 "Worst Ten in the Worst Ten" Report. Id.

The government's complaint further accuses GreenPoint of ignoring its own risk management policies:

- The investigation found that GreenPoint loans suffered from serious defects including: Violations of GreenPoint's own underwriting Guidelines and prudent mortgage lending practices, including loans made to borrowers (i) who made unreasonable claims as to their income, (ii) with multiple, unverified social security numbers, (iii) with credit scores below the required minimum, (iv) with debt-to-income and/or loan-to-value ratios above the allowed maximum or (v) with relationships to GreenPoint or other non-arm's-length relationships. Id at 148.

As with Countrywide, the government's allegations are astonishing and should trouble the court when asked to measure Mr. Ovist's culpability in this case as well as the victim's responsibility for the offense. In one forum the government paints GreenPoint as a fraudulent enterprise singularly focused on generating bogus loans to sell to the Plumber's and Pipefitter's Local 187 Retirement Fund in the form of AAA synthetic derivatives. Then in another forum, this forum, the government claims GreenPoint was the diligent lender which, if only told the truth by these unsophisticated borrowers and this mortgage broker, would never have funded the loan.

This victim conduct contextualizes mortgage offenses from this period of time as uniquely aberrant and isolated to the period of 2005 to 2008; another relevant fact not accounted for by the Guidelines. These crimes could have never occurred in the prior history of the mortgage industry. The uniqueness of the lenders efforts to induce this criminal conduct make a departure under §5K2.10 necessary here. This is not a case about protecting Aunt Mae and her retirement fund, this case is about the United States government shilling for a bunch of financial vampires that sucked the economy dry. The Guideline simply does not factor any of this into the equation and is therefore useless.

4. FHFA v. JP Morgan Chase:

JPMorgan Chase is listed as the 'victim' in Count 2 of the indictment. Chase played a unique role in the genesis of the economic collapse. It is mentioned 180 times in the Financial Crisis Inquiry Commission's Final Report. JP Morgan developed the first "Value at Risk" model (VaR), and the industry soon adopted different versions. These models purported to predict with at least 95% certainty how much a firm could lose if market prices changed. But, according to the FCIC models relied on assumptions based on limited historical data; for mortgage-backed securities, the models would turn out to be woefully inadequate.

According to the government, JPMorgan was involved at all levels of the securitization and marketing process for these securities.

- Unlike typical arms' length securitizations, the JPMorgan Securitizations involved various J.P. Morgan subsidiaries and affiliates at virtually each step in the chain. With respect to all 27 of the JPMorgan Securitizations, the sponsor was J.P. Morgan Acquisition, the depositor was J.P. Morgan Acceptance, and the lead underwriter was J.P. Morgan Securities. See *FHFA v. JPMorgan Chase* at 63.

JPMorgan was fraudulently profiting at every level of the transaction. According to the government, JP Morgan Chase sold more than $33 billion in mortgage backed securities to Fannie Mae and Freddie Mac between September 7, 2005 and September 19, 2007. See *FHFA v. JPMorgan Chase* at 9. It did so fraudulently based on false representations concerning the underwriting and risk management applied to these loans:

- The Registration Statements contained statements about the origination and underwriting practices used to make and approve the loans. Such statements were material to a reasonable investor's decision to invest in mortgage-backed securities by purchasing the Certificates. Unbeknownst to Fannie Mae and Freddie Mac, these statements were materially false, as significant percentages of the underlying mortgage loans were not originated in accordance with the represented underwriting standards and origination practices, and had materially poorer credit quality than was represented in the Registration Statements. Id at 15.

The government further makes a compelling case that risk management was abandoned in all forms by JPMorgan because they bore no risk of loss:

- Defendants had enormous financial incentives to complete as many offerings as quickly as possible without regard to ensuring the accuracy or completeness of the Registration Statements, or conducting adequate and reasonable due diligence. Moreover, because none of the Defendants assumed the credit risk of the underlying mortgage loans becoming delinquent or otherwise defaulting, there was little incentive to conduct full, complete, and meaningful due diligence of the statements in the Registration Statements relating to the underlying mortgage loans. Id at 82.

JPMorgan Chase's failures were particularly egregious because it had a multi-layered responsibility as many of the mortgage loans it securitized and sold through its securities and investment bank divisions were originated by Chase's own mortgage group:

- Many of the mortgage loans underlying the J.P. Morgan-sponsored and –deposited Securitizations were originated by non-party Chase Home Finance LLC ("CHF"), the home mortgage division of Defendant JPMorgan Bank. CHF originated far more of the mortgage loans underlying the JPMorgan Securitizations than any other originator. Id at 84.

This was a vertically integrated fraud factory, where subsidiary Chase Home Finance was writing bad loans without any risk management and then selling them to JPMorgan Chase who transferred them to subsidiary JPMorgan Chase Securities which then falsely claimed both that it had applied meaningful underwriting standards to the original loans and then that it had scrutinized the packages of loans before it sold them as securities and confirmed that the loans were indeed properly underwritten. It then sold these securities to institutional customers based on these false statements about the underwriting.

After analyzing 1000 loans as a representative sample, the government found that JPMorgan had made material misrepresentations about the underwriting and certain key elements of the loan packages:

- Owner occupancy data was false. Id at 122.

- Loan to value date was materially false. Id at 135.

- The Originators including Chase Home Finance systematically disregarded their underwriting Guidelines. The Registration Statements contained material misstatements and omissions regarding compliance with underwriting Guidelines. Indeed, the originators for the loans underlying the Securitizations systematically disregarded their respective underwriting Guidelines in order to increase production and profits derived from their mortgage lending businesses. Id at 134-135.

- The abandonment of underwriting Guidelines is further confirmed by several government reports and investigations that have described rampant underwriting failures throughout the period of the Securitizations, and, more specifically, have described underwriting failures by the very originators [including Chase Home Finance] whose loans were included by [JPMorgan Chase] in the Securitizations. Id at 135.

The government goes on to state that JPMorgan Chase absolutely knew that the statements it was making concerning adherence to underwriting were false. As with the other lenders addressed in this motion the government is making inconsistent claims: According to the FHFA, JPMorgan Chase abandoned all risk management and yet in this case, the government now claims JPMorgan Chase was defrauded by virtue of statements that the government elsewhere swears were not material.

5. FHFA v. Citigroup (Wells Fargo):

Wells Fargo is listed as the victim in Count 3 of the indictment. It too has been sued by the FHFA based on false statements Wells made in selling mortgage backed securities. As with the other lenders addressed by this motion, Wells Fargo systematically and deliberately abandoned risk management and underwriting to increase the volume of mortgage backed securities it could sell:

- "[V]ariance from the stated [underwriting] standards was essentially [Wells Fargo's] norm" and that this conduct "infected the entire underwriting process." FHFA v. Citigroup Complaint at 51.

The court is being asked to sentence Mr. Ovist to prison because he defrauded a bank that had no underwriting standards through a scheme that required little more than the transmission of a single signed form. His culpability cannot be assessed in terms of broader frauds that target the elderly or the unsophisticated. He cannot be compared to those that prey on the retirement nest eggs of those naively believing in 7% returns per month. He cannot be compared to the identity thief who trashes an unsuspecting teen's nascent credit. Mr. Ovist defrauded a fraud and that must factor into the court's assessment of blameworthiness.

Wells Fargo's own underwriting and fraud analyst employee confirmed that there was no risk management and all loans were approved.

- "The FCIC interviewed Darcy Parmer, a former employee of Wells Fargo, who worked as an underwriter and a quality assurance analyst from 2001 until 2007. Ms. Parmer confirmed that, during her tenure, Wells Fargo's underwriting standards were loosening, adding that they were being applied "on the fly" and that "[p]eople were making it up as they went." She also told the FCIC that 99 percent of the loans she would review in a day would get approved, and that, even though she later became a "fraud analyst," she never received any training in detecting fraud. The FCIC's January 2011 Report described how "hundreds and hundreds and hundreds of fraud cases" that Ms. Palmer knew were identified within Wells Fargo's home equity loan division were not reported to the Financial Crimes Enforcement Network. In addition, according to Ms. Palmer, at least half the loans she flagged for fraud were nevertheless funded, over her objections." Id at 52.

Wells Fargo created and fostered a corporate environment that included creating incentives for employees to falsify loan documents and ignore risk management:

- In July 2011, the Federal Reserve Board issued a consent cease and desist order and assessed an $85 million civil money penalty against Wells Fargo & Co. and Wells Fargo Financial, Inc. According to the Federal Reserve's press release, the order addressed in part allegations that "Wells Fargo Financial sales personnel falsified information about borrowers' incomes to make it appear that the borrowers qualified for loans when they would not have qualified based on their actual incomes." The Federal Reserve Board also found that the poor practices of Wells Fargo were fostered by Wells Fargo Financial's incentive compensation and sales quota programs, and the lack of adequate controls to manage the risks resulting from these programs. Id at 52-53.

Just like the other lenders covered by this indictment, the FHFA, the SEC and the Department of Justice have submitted substantial evidence that Wells Fargo abandoned risk management and underwriting to join JP Morgan, Countrywide, GreenPoint and the others in a race to the bottom that must be considered in sentencing Mr. Ovist.

10. <u>Conclusion:</u>

§2B1.1 is not an effective measure of David Ovist's culpability in this matter. He respectfully requests for all the reasons above that the court adopt the Guideline calculations he has proposed, that it reject the application of the Guideline here, and that he then be sentenced under 18 USC §3553 to one day in jail followed by probation and community service.

Respectfully submitted June 10, 2012,

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