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U.S. DISTRICT COU
N.D. OF ALABAM

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**2:18-CR-166-KOB-JEO**
	)	
DONALD V. WATKINS, SR., and	**)**	
DONALD V. WATKINS, JR.	**)**	

SENTENCING MEMORANDUM OF DONALD V. WATKINS, SR.

Mr. Donald V. Watkins, Sr. comes before the Court for sentencing on July 16, 2019 after having been found guilty of one count of "conspiracy against the United States," seven counts of wire fraud, and two counts of bank fraud. Mr. Watkins submits this sentencing memorandum to aid the Court in determining an appropriate sentence under 18 U.S.C. § 3553(a).

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<u>Exhibits to Memorandum</u>:

A. Declaration of Olayinka Arowolo, dated July 4, 2019

B. Nabirm Operating Agreement, dated August 11, 2011

C. Letters of Support

D. Email from Watkins to Economic Participants, dated June 28, 2014

E. Declaration of Jessica A. Findley, dated July 11, 2019

I. Introduction

Mr. Watkins received a draft of the Presentence Report ("PSR") on June 11, 2019 and the revised PSR ("Revised PSR") on July 9, 2019. He disputes the factual findings and improbable Guidelines analysis in the original and Revised PSR. On June 25, 2019, Mr. Watkins filed his written objections to the draft PSR. While he does not repeat all of his arguments and objections to the draft PSR herein, Mr. Watkins hereby incorporates those objections and arguments in this Memorandum.

In the Revised PSR, the U.S. Probation Office ("USPO") used the U.S. Sentencing Guidelines (the "Guidelines") to calculate a sentencing range of 168 months (or 14 years) to 210 months (or 17.5 years) in prison. On July 10, 2019, the Government filed a sentencing memorandum (Doc. 200) that asked the Court to impose the maximum Guidelines sentence of 210 months in prison.

As discussed in greater detail in the "Sentencing Disparities" section of this Memorandum, the sentence requested by the Government for Mr. Watkins is more than double the ***96-month prison term*** imposed by the sentencing judge in the infamous HealthSouth accounting/wire fraud/investor fraud case where: (a) a jury found one of the defendants guilty of both conspiracy to commit securities fraud and making false statements to auditors; (b) the victims included thousands of HealthSouth shareholders and bondholders; (c) the court found that the defendant was a "leader" of the conspiracy and was aware of his own fraudulent conduct, as well as the fraudulent conduct of other HealthSouth co-conspirators; (d) considered the sentences imposed on numerous other HealthSouth co-conspirators, as well as upon a host of defendants in other

accounting/investor/wire fraud cases; and (e) and set the forfeiture amount at ***$1,398,250.00***.

Furthermore, the sentence recommended by USPO and requested by the Government for Mr. Watkins exceeds the 2018 national average for (a) drug possession and environmental offenses (3 months); (b) drug trafficking (76 months), and (c) fraud, theft or embezzlement (23 months). Interestingly, the national average sentence for murder is 291, just 81 months more than the maximum sentence requested by the Government for Mr. Watkins. The sentence requested for Mr. Watkins would place him in the 12.8 percent of federal prisoners who receive sentences of ten years or longer (excluding life sentences).

For Mr. Watkins, who turns 71-years-old in September, the Revised PSR calculates an effective Guidelines sentence of "life" – a sentence that is not only unreasonable and unjust under the facts and circumstances of this case, but so draconian as to reveal the fundamental and fatal flaws that lie at the very heart of the Guidelines.

Neither the USPO, nor the Government, has offered any rational basis for why Mr. Watkins' sentence should be more than double the longest prison sentence handed down in the HealthSouth case, which was one of the largest corporate fraud cases in U.S. history.

The proposed Guideline range is erroneous and substantially inflated in several ways. First, the calculated loss amount, which raises the base offense level by 20 levels, is inflated by at least $13,475,000 (for a maximum loss of at most of $2.5 million) -- if the identified "victims" suffered any loss at all as a result of Mr. Watkins' conduct. The purchasers of economic participation interests in Mr. Watkins' Masada and Nabirm have

not suffered loss on their investments because each still owns an economic interest in ongoing businesses that hold significant value.

Moreover, the loss[1] of investment (economic interest purchase) money, if any, is not attributable to fraud, as opposed to the inherent risks of the investment, which were disclosed in writing to each investor before his or her economic interest purchase was executed. And, as to the counts alleging fraud based on the use of either invested (i.e., the purchases of economic interests) or loaned (i.e., the loans by C.B.) funds for other than business purposes, the loss amount, if any, also is subject to an offset and reduction to the extent the funds *were* used for legitimate business purposes, as defined in the applicable operating agreements for Masada and Nabirm.

In addition, Alamerica Bank did not suffer a $1,125,000 loss because the bank did not lose any money, but in fact made a healthy profit, on the "nominee" loans made the basis of the bank fraud counts. The loans were repaid in full according to the loan terms, with contractual interest and fees.

Second, with respect to the Guideline range, none of the five (5) proposed enhancements in the PSR – which collectively increase the base offense level by ten (10) levels – is supported by the evidence or law.

Furthermore, apart from the errors in the Guidelines range calculation, Mr. Watkins, Sr. seeks imposition of a non-Guidelines sentence well below the range recommended by the USPO and the 210 months requested by the Government based on several factors. As an overarching matter, the Government's theory of prosecution was novel in multiple regards. The Government prosecuted the Watkins defendants for wire fraud on arms-

[1] "Loss" in the sense of no monetary return on investment to date.

length commercial transactions between Mr. Watkins, Sr. and the investors/"victims" that the Government contended were fraudulently induced. But, the proof of each act of "fraud" was totally divorced from the plain language of the contractual agreements and corporate operating agreements that governed the business relationship between Mr. Watkins, Sr. and the "victims," and Mr. Watkins, Sr.'s authority as a designated Manager of the businesses.

Further, the Government's "fraud in the inducement" theory effectively nullified in an unprecedented way the typical "due diligence" phase applicable to commercial transactions such as these, which each investor/"victim" performed – in most cases, through their own professional financial advisors -- to some degree, and which Mr. Watkins did not impede or discourage in any way.

The Government's theory likewise was novel for a criminal fraud or economic crimes case in prosecuting a defendant for using "investor money" for personal (and not business-related) expenditures, without any reference or even a nod to the relevant contractual documents and operating agreements that governed the business relationship between the investors/"victims" and the defendant (Mr. Watkins, Sr.). The Government's focus on the end use of the money ignored the issues of (a) whether Mr. Watkins, Sr., as a matter of law, owned the proceeds from the sale of Watkins Pencor economic participation interests (about which no ruling has yet been made regarding the purchase agreements at issue); (b) what categories of Masada business expenditures, as a matter of contract construction, were authorized in the applicable operating agreements; (c) whether Mr. Watkins, Sr. acted within the line and scope of those operating agreements, to which each investor/"victim" agreed in entering his/her own individual purchase agreement; and (d)

the relevance, as a matter of law, to the crimes charged of the full body of warranties and representations Mr. Watkins, Sr. and the purchasers/"victims" made to each other in their purchase agreements.

Indeed, the Government employed an unprecedented *de facto* contract reformation theory to effectively convert Mr. Watkins' sale of a percentage of his personal economic interests (akin to a profits interest) in the Masada family of companies into a sale of Masada shares itself, effectively (and erroneously) transforming Watkins Pencor economic interest purchasers into Masada shareholders. In so doing, the Government arrogated to itself the authority to determine what were "business purposes" for the funds, again without reference to any of the governing corporate documents that formed the business relationship between the investors/'victims" and Mr. Watkins, Sr. – unprecedented in any published criminal fraud case Mr. Watkins has found --, as opposed to Mr. Watkins' authority to decide what were appropriate uses of money belonging to him.

As to the bank fraud charges, Mr. Watkins, Sr. has found no published case in which the Government has prosecuted a criminal charge against a defendant who: (a) claimed the "safe harbor" protections afforded him/her as an insider under OCC's Regulation O, 12 C.F.R. § 215.3(f)(2)((i) and (ii); and (b) ***did not participate in the preparation of the borrower's loan application and/or the bank's lending decision***. With respect to the nature of the offense, the novelty in these various ways of the Government's theories of prosecution -- even if the novelty is deemed insufficient to violate Mr. Watkins, Sr.'s due process rights for lack of notice of conduct within the scope of the wire and bank fraud statutes -- does bear on the appropriate level of punishment and supports a non-Guidelines sentence here.

Also supporting the imposition of a below-Guidelines sentence for Mr. Watkins, Sr. are his own background and personal characteristics, including an unblemished record, a long history of service to his communities, a demonstrated professional and personal commitment to racial and economic justice, and well-established devotion to his family. Further, given Mr. Watkins, Sr.'s age, a Guidelines-range sentence would be tantamount to a life sentence, and subject him to other detriments established as disproportionately affecting "senior" prisoners.

In Mr. Watkins' case, even a well-below-Guidelines sentence will have severe collateral consequences, regulatory and otherwise, such as disbarment from law practice and prohibition from participation in the banking industry, which will severely impair his ability to make a living and meet his financial obligations (including payment of any restitution and forfeiture amounts). In light of these collateral consequences and other factors, a Guideline-range sentence would be much "greater than necessary … to comply" with the statutory purposes of sentencing, including but not limited to being excessive to achieve specific and general deterrence.

In addition, reliance on the Guidelines-range, especially the loss amount calculation, overstates the seriousness of the offenses of which Mr. Watkins, Sr. has been convicted, especially in relation to other federal crimes with similar offense levels. As other courts, including judges in this Court, have recognized, imposition of anything even approaching a Guidelines-range sentence would be excessive compared to sentences entered for similar offenders, for example, the defendants responsible for the much-greater-loss HealthSouth fraud. Subject to the Court's rulings on his various unresolved objections to the Guidelines-

range calculation specifically and the PSR generally, Mr. Watkins, Sr. accordingly seeks, and believes to be warranted, a sentence well below the calculated Guidelines range.

II. The Applicable Legal Standard and Case Law

While the Court is required to consider the Sentencing Guidelines in sentencing a defendant, it is not bound by them. *United States v. Booker*, 543 U.S. 220, 264 (2005); see also, *Rita v. United States*, 551 U.S. 338, 351 (2007) (a district court should begin sentencing proceedings by correctly calculating the applicable Guidelines range).

Even though the Court must determine the appropriate Guidelines range as a starting point, it "must consider all of the factors set forth in [18 U.S.C.] §3553(a) to guide its discretion at sentencing." *Peugh v. United States*, 569 U.S. 530, 536 (2013). It is within the court's discretion to decide how much weight to give each of those individual factors. See *United States v. Williams*, 526 F.3d 1312, 1323 (11th Cir. 2008); *United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007).

For the reasons set forth in this Sentencing Memorandum, Defendant Donald V. Watkins asserts that the United States Sentencing Guidelines (the "Sentencing Guidelines" or the "Guidelines") should not be used to determine his sentence in this case, and respectfully requests that this Court impose a non-Guidelines sentence that is fair, and well below any sentence suggested by the Guidelines. Indeed, after determining the Guidelines range, the sentencing court must "then make an independent sentencing determination, taking into account the 'nature and circumstances of the offense and the history and characteristics of the defendant,' and all of the statutory factors." *United States v. Singh*, 877 F.3d 107, 116 (2d Cir. 2017).

The Supreme Court has also instructed sentencing courts that the Guidelines are not only just advisory, but that they are not even to be presumed reasonable. *Nelson v. United States*, 555 U.S. 350, 352 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts, they are also not to be *presumed* reasonable.") (Emphasis added); see, *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (courts can vary from the Guidelines based solely on policy considerations, including disagreement with the Guidelines).

Under 18 U.S.C. § 3553(a), a sentencing court must "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing set forth in the second paragraph of the statute. In undertaking its analysis, the Court considers the advisory sentencing range recommended by the Guidelines and any relevant Guideline policy statements, as well as other traditional sentencing factors, such as:

(1) the nature of the offense and history and characteristics of the defendant;

(2) the purpose of sentencing;

(3) the kinds of sentences available;

(4) the Sentencing Guidelines;

(5) pertinent policy statements issued by the Sentencing Commission;

(6) the need to avoid unwarranted disparities among similar offenders; and

(7) the need to provide restitution to victims.

18 U.S.C. § 3553(a).

The Guidelines are no longer "the only consideration" at sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). Rather, the Guidelines merely provide a "starting point" for the Court's sentencing considerations. *Id.*; *accord Cunningham v. California*, 549 U.S. 270 (2007). The Court is to impose its sentence after "mak[ing] an individualized assessment

based on the facts presented" in each particular case. *Id.* The Court need *not* find "extraordinary circumstances to justify a sentence outside of the Guidelines range." *Id.* at 47.

The Supreme Court's decisions in *Gall*, *Cunningham*, and *Kimbrough* significantly broadened the Court's discretion to impose a less stringent sentence than the one suggested by the Guidelines. In this case, the Court should exercise its broad discretion and impose a sentence well below the Guidelines range for the reasons set forth in this Memorandum.

A. The Nature and Circumstances of the Offense

1. Offense Conduct

The jury found Mr. Watkins guilty of one count of conspiracy, seven counts of wire fraud, and two counts of bank fraud. In grading the seriousness of these offenses, the criminal law customarily considers two factors: (a) the harm caused by the offense and (b) the defendant's individual blameworthiness. Joshua Dressler, Understanding Criminal Law, 112-113, 140 (7th ed. 2015); Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 Ind. L. Rev. 5, 77 (2001) (" act, mental state, cause, and harm – are relevant both to the threshold question of criminal liability and to assessing offense seriousness for purposes of assigning appropriate punishment … criminal law is preeminently concerned with blameworthiness.").

The primary factor in grading individual blameworthiness is a defendant's state of mind. See, e.g., Singh, 877 F.3d at 120 (remanding for resentencing and holding that "a defendant's motivation for engaging in criminal conduct is unquestionably a proper consideration at sentencing."); Rita, 551 U.S. at 364 (describing sentencing as a "unique

study" into "human failings"). The simplest example of the importance of state of mind to the determination of the seriousness of the offense is American homicide law, which is subdivided into multiple degrees of culpability, from first degree murder to criminally negligent homicide, based on the differences in the defendant's state of mind. For crimes like wire fraud and bank fraud, the relation of a defendant's state of mind to his blameworthiness, and thus to the seriousness of his offense, is more subtle because the statutes governing these offenses do not make formal distinctions between differing states of mind. Nonetheless, the defendant's mental state remains an important consideration in determining his blameworthiness, and thus the seriousness of the offense.

In this case, the Court should consider the following factors that bear on Mr. Watkins' state of mind and mitigate his individual blameworthiness:

1. At the time of the Watkins Pencor purchase transactions in Counts 2-8, Mr. Watkins documented the transactions in accordance with Alabama contract law. In Mr. Watkins' mind, the written purchase agreement embodied all of the warranties and representations made between Mr. Watkins and the "victims." As a matter of Alabama contract law, the written representations in the purchase agreements superseded and negated any prior oral representations Mr. Watkins made to the "victims." This is especially true in light of the fact that some degree of transactional due diligence was performed on the part of each purchaser before his/her purchase agreement was executed. See, *Farmers Ins. Exch. v. Morris*, 228 So. 3d 971 (Ala. 2016)(*Farmers,* which is a "fraud in the inducement" case, cites a litany of similar Alabama Supreme Court cases dating back to Oakwood Mobile Home, Inc. v. Burger, 773 So 2d. 454, 459, that stand for the proposition that one cannot reasonably rely

on oral representations, as required for civil fraud, if these representations are contradicted/negated in a contract or other contemporaneous writing).[2]

2. After his appointment as Masada's Manager on December 29, 2005 and continuing to the present, Mr. Watkins never took the salary authorized in the Masada-related Operating Agreements for the Manager's position. As evidenced in Defendants Exhibits 3, 4, 5, and 6, the Manager's compensation ranged from $7,500 to $15,000 per month for each market development location. During his tenure as Manager, Masada developed a market presence in 47 locations.
3. Masada's prior Manager (Daryl Harms) executed a 10-year lease agreement with Mr. Watkins' real estate company (First Highland Group, LLC) which required Masada to pay Mr. Watkins $17,000 per month. Even though he was entitled to the office rental payments by contract, Mr. Watkins deferred all of the monthly rental payments due him throughout his tenure as Manager.
4. As reflected in his Passport (Defendants Exhibit 228), Mr. Watkins traveled the world over a ten-year period to develop Masada's market development opportunities. To the extent practicable, Mr. Watkins deferred the expense reimbursements to which he was entitled so that he could grow Masada into an industry leader in the waste-to-fuel space.

[2] Mr. Watkins' absence of a criminal history, together with his demonstrated track record of complying with domestic and international criminal laws, negates any inference at the sentencing hearing that his conduct in regarding the Watkins Pencor purchase transactions was motivated by any criminal intent.

5. Mr. Watkins diluted his personal economic interests in Masada and used the proceeds of the sales transactions, which belonged to him as a matter of Alabama contract law, to drive the company's undisputed international growth.
6. There was no evidence of any misrepresentation of material facts that Mr. Watkins made in connection with the two 2012 sales of a portion of his economic interests in Nabirm to "C.B." The Government acknowledged in its sentencing memorandum, at page 16, that it knows of no such misrepresentations. Furthermore, the only representations made about the Nabirm transactions were contained in the introductory emails, which did not specify a "use of proceeds."
7. No economic participation agreement contained a use of proceeds provision and no funds were wired to Masada or Nabirm. Instead, they were wired to Mr. Watkins, as he was the "seller" of a portion of his economic interests in these companies.
8. There was no evidence that Mr. Watkins used the proceeds from the sale of his personal economic interests in the Masada family of companies to finance a lavish personal lifestyle. The Government introduced evidence that Mr. Watkins owned a private airplane from 2003 to 2011 (which he purchased in 2003 with his own funds), but there was no evidence that this airplane was used for anything other than business trips related to Masada and its affiliate entities.
9. Mr. Watkins has a spotless track record of growing Masada in international markets where his conduct is governed by the U.S. Foreign Corrupt Practices Act of 1977, as amended. 15 U.S.C. §§ 78dd-1, et seq. This was accomplished by forming 19 international partnerships for market development in 47 markets.

10. When Mr. Watkins was confronted by Detroit Pension Fund Trustees with "pay-to-play" demands in 2008 regarding Masada's aviation affiliate, he rejected those illegal kickback demands and voluntarily reported them to a federal grand jury in Detroit. The trustees who were involved in the "pay-to-play" scheme were eventually charged, tried and convicted of various federal criminal offenses arising from this conduct.

The totality of these factors demonstrate that Mr. Watkins' state of mind during the period covered by the indictment was to achieve the following goals: (a) comply with all applicable domestic and international laws governing his personal and professional conduct; (b) exercise the powers and authority conferred upon the Manager under all applicable Masada and Nabirm-related operating agreements; and (c) grow Masada and Nabirm for the benefit of all stakeholders, including the "victims."

With respect to the first goal, Mr. Watkins lost business opportunities for Masada because he would not engage in kickbacks to Detroit Pension Fund Trustees and would not bribe foreign government officials.

With respect to the second goal, Mr. Watkins adhered to the terms and conditions in the corporate governance documents that defined his business relationship with the "victims." The Government produced no evidence of an ultra vires act by Mr. Watkins.

With respect to the third goal, Mr. Watkins deferred his contractual entitlement to salary, office rental payments, and expense reimbursements in order to drive Masada growth from 2006 to 2017. At Mr. Watkins' request, his family members, business associates, and personal friends used their money and individual creditworthiness to aid in

Masada's asset diversification and international growth. This is why the company survived the Great Recession of 2008.

These factors, individually and collectively, evidence Mr. Watkins' desire to advance and protect the economic interests of Masada stakeholders, including the "victims" in this case.

2. The History and Characteristics of the Defendant

Donald Watkins was born in Parsons, Kansas on September 8, 1948 to Dr. Levi Watkins, Sr. (1911–1994) and Mrs. Lillian Bernice Varnado Watkins (1917–2013). He is the fifth of six children born to Levi and Lillian Watkins. Dr. Watkins was president of Alabama State University from 1962-1981. Mrs. Watkins was an educator by training and certification.

Watkins attended Southern Illinois University from 1966 to 1970. In September 1970, Watkins was one of two black students to desegregate The University of Alabama School of Law. Three black law students broke the color barrier at the law school the prior academic year.

Watkins attended the three-year law school program on a Herbert Lehman Scholarship awarded by the NAACP Legal Defense and Education Fund in New York City. Lehman Scholarships were awarded to young African-American students in the 1970s who demonstrable an interest in advancing the cause of civil rights and/or serving the public interest.

After graduation from law school, Watkins started his law practice in Montgomery, Alabama. In 1979, he became the youngest person ever elected to the Montgomery City Council where he served as a council member from 1979 to 1983.

In 1985, Watkins expanded his law practice into Birmingham, Alabama, and became a confidant of and Special Counsel to Birmingham Mayor Richard Arrington, Jr., the City's first African-American mayor. Watkins served as Mayor Arrington's Special Counsel until 1998.

a. Legal Career

During his legal career in Alabama, Watkins handled a record number of landmark cases, including the following nationally recognized cases:

1. **Clarence Norris, the last known surviving "Scottsboro Boy:"** On November 26, 1976, Watkins won a full and unconditional pardon from the state of Alabama for Clarence Norris, the last known surviving "Scottsboro Boy". The nine Scottsboro Boys were falsely accused in 1931 of raping two white girls on a train running through Paint Rock, Alabama. All were arrested, tried, convicted of rape, and sentenced to death on multiple occasions. The U.S. Supreme Court saved the Scottsboro Boys on three occasions within hours of their scheduled execution. The Clarence Norris pardon was based upon a finding of "innocence" of the criminal charge of rape, as proclaimed by the Alabama Pardons and Parole Board. This was the first pardon ever granted by the state to a person who was originally sentenced to death and who was later declared innocent of the charges for which he was convicted.
2. **The Estate of Bernard Whitehurst v. The City of Montgomery, Alabama, et al.**: In December 1975, Watkins represented the Estate of Bernard Whitehurst in a wrongful death case against the Montgomery police department. Whitehurst was an unarmed black man who was fatally shot by Montgomery police officer Donnie

Foster. The police initially claimed that Whitehurst was a fleeing felon who shot at Foster while on the run. Watkins' investigation, which included exhuming Whitehurst's body, revealed that Whitehurst was shot in the back, and that the gun found beside his body was "planted" by police after his death.

The Whitehurst case evolved into a nationally recognized scandal that resulted in the resignations of Montgomery's mayor and police commissioner, the indictment of three police officers, and the firing or resignation of eight others. During this period, the Whitehurst case grew into the largest police scandal in Alabama's history. This scandal was headlined in the April 3, 1977, edition of the Washington Post as "Alabama's Watergate." More recently, this shooting was featured in a December 19, 2015, edition of the New York Daily News in an article titled, "Innocent Alabama man murdered by cops 40 years ago, police officers were heard saying 'We done shot the wrong n-----'".

In April 2013, the City of Montgomery erected a marker at police headquarters formally acknowledging that, "Whitehurst, 32, did not match the robbery suspect's description; that he was unarmed, despite police claims that they returned fire after being fired upon; that the gun found by his body had been confiscated by police in a drug investigation a year earlier, and was placed at the scene as part of a police cover-up."

3. **Allen, et al. v. Alabama State Board of Education**: In 1981, Watkins represented a group of black teachers and teacher applicants who successfully challenged the constitutionality of Alabama's newly instituted teacher testing program. In 1985, Watkins won an unprecedented settlement in the case when the State Board of

Education agreed to halt the testing program due to widespread psychometric defects in all of the subject-matter tests. Teacher testing resumed in Alabama twenty years later with Watkins' consent.

4. **SCLC v. The City of Gadsden, Alabama**: Beginning in 1978, Watkins filed a series of civil rights lawsuits on behalf of the SCLC against the City of Gadsden, Alabama seeking to desegregate its fire, police and civil service departments. Gadsden's city hall, fire and police departments were all white at the time. All of the cases were successful and resulted in the full integration of City Hall and the fire, police, and civil service departments.

5. **Sidney Williams v. The City of Montgomery, Alabama**: In 1975, Watkins represented black police corporal Sidney Williams, who sought a promotion to sergeant in the Montgomery police department. His promotion was blocked because the department was using racially biased promotional tests that had not been validated in accordance with EEOC Guidelines. Watkins won the case and the tests were scrapped. This victory cleared the way for a host of black officers to rise through the ranks of the department all the way up to the rank of police chief.

   Williams retired as a major in the department. After his retirement, Williams became the chairman of the Alabama Pardons and Parole Board, where he served as a board member with distinction for eight years.

6. **U.S. v. U.W. Clemon**: In 1996, federal prosecutors in Los Angeles formally notified U.S. District Judge U.W. Clemon (in Birmingham, Alabama) of their intent to indict him on various fraud-related charges arising from his sister's operation of a non-profit school in Los Angeles. Watkins represented the lead political group

responsible for Judge Clemon's appointment to the federal bench in 1980. Watkins immediately launched an investigation into allegations of prosecutorial misconduct in the case.

Watkins' investigation produced a comprehensive report to the U.S. Attorney General on the prosecutorial misconduct. Based upon the Watkins report, the Department of Justice terminated the criminal investigation of Judge Clemon with no charges filed.

Judge Clemon went on to become the chief judge of the federal bench in Birmingham where he served with distinction for ten years until his retirement in 2009.

In August 2013, Judge Clemon received the American Bar Association's highest award - the 2013 John H. Pickering Award - for his outstanding legal ability and his distinguished record of service to the profession and community. Ironically, this award was presented to Judge Clemon thirty-three years after the ABA vigorously opposed his 1980 nomination by President Jimmy Carter for a federal judgeship. At the time, the ABA said publicly, repeatedly and loudly that Judge Clemon was "unqualified" for the position. The Pickering award was an incredible but fitting end to Judge Clemon's judicial career.

7. **U.S. v. Richard Scrushy**: In 2003, Watkins represented Richard M. Scrushy, the former CEO of HealthSouth. Mr. Scrushy was originally indicted on 85 felony counts of Sarbanes-Oxley and related accounting fraud charges. If convicted on all charges, he would have faced up to 650 years in prison. Mr. Scrushy was the first CEO in the nation charged with violating Sarbanes-Oxley. In 2005, Mr. Scrushy won an acquittal

on all charges in his case. To Mr. Watkins' knowledge, no white-collar criminal defendant before or since the Scrushy case has defeated 85 felony charges in an individual case.

8. Watkins' landmark civil rights cases in Alabama: (a) desegregated residential housing in Montgomery, Alabama; (b) changed the method for selecting members to the Alabama State Board of Education from at-large to district elections in 1984;(d) desegregated Alabama's junior colleges and technical schools in the 1970s; (e) desegregated the faculty and staffs within 67 of Alabama's 128 public school systems in the 1970s; and (f) desegregated Alabama's 32 four-year public colleges and universities and resulted in court-ordered doctoral and new academic programs, as well as nearly $600 million in new funding (beyond the regular state appropriations) and endowment money for Alabama State University and Alabama A&M University.

Mr. Watkins' legal career and landmark cases subjected his family and him to decades of death threats from those who opposed positive changes in racial landscape of Alabama.

b. Business Career

In his business career, Mr. Watkins has achieved historic milestones. For example, in 2000, Watkins co-founded Alamerica Bank (www.alamericabank.com), a state-chartered bank headquartered in Birmingham, Alabama, USA. This was the first and only bank charter issued by the State of Alabama to an African American-owned financial services institution.

Watkins is the Bank's largest shareholder. Alamerica Bank is one of only 23 black-owned banks in America. The Bank never sought or received federal "bailout" money during the Great Recession of 2008 to 2011. It enjoys one of the best Tier 1 capital ratios among banks in Alabama.

In 2011, Mr. Watkins co-founded Nabirm Energy Services (Pty) Ltd. (www.nabirm.com) in Windhoek, Namibia. He is a principal shareholder in Nabirm and serves on the company's board of directors. Nabirm explores and develops oil, natural gas, and uranium resources. On November 10, 2015, Nabirm publicly announced that its offshore Namibian oil block contains an "unrisked recoverable resources" of over 520 million barrels of oil. In 2012, Nabirm worked directly with the U.S. State Department to successfully compete against the Iranian government for valuable uranium mining concessions in Namibia. The company's historic success in Namibia is discussed in detail in the July 4, 2019 Declaration of Olayinka O. Arowolo, which is attached hereto as **Exhibit A**. A certified copy of Nabirm's Operating Agreement is attached as **Exhibit B**.

After Mr. Watkins became Manager/CEO of Masada, the company grew from one abandoned project in upstate New York into an industry leader in the waste-to-energy technology space. In recent years, Masada has received third-party recognition of its position as a leader in the waste-to-energy industry. In 2015, Masada was one of the recipients of the Governor's Trade Excellence Award, which recognizes Alabama companies for excellence in exporting goods or services. In 2012, Masada's Polyfuels licensing and distribution transaction with Sustainable Technologies & Environmental Projects Pvt. Ltd. ("STEPS") in Mumbai, India, resulted in Masada winning the Alabama International Business Award's 2012 International Deal of the Year (Large Deal Category).

Masada has participated in the World Bio Markets conferences in Rotterdam and Amsterdam as both a presenter and attendee. Based on Masada's participation in this conference, Mr. Watkins was one of two Masada executives who were invited to join the inaugural World Bio Markets Advisory Board in 2013.

Masada enjoys a stellar reputation in the international waste-to-energy industry. This reputation is evidenced by a feature article on Masada and its waste-to-energy work in Sub-Saharan Africa in the July 2014 edition of the London-based *International Finance and Legal Review*, a prestigious subscription publication for European and African business leaders, and a February 9, 2012, featured guest appearance on CNBC for Africa.

In 2008, Mr. Watkins' constellation of Masada-related assets qualified him as a potential purchaser for the St. Louis Rams NFL football team, as evidenced by: (1) his completion and submission of an Owner Background Form furnished to him by the NFL; (2) Goldman Sachs' July 28, 2009 invitation to Mr. Watkins to make a non-binding offer to purchase the Rams; and (3) Goldman Sachs' October 12, 2009 invitation to Mr. Watkins to make a final, written binding offer to purchase the Rams. Government witness Lupe Rodriguez confirmed Watkins' status as a bidder for the Rams transaction. At trial, the Government did not challenge this undisputed fact.

c. Personal Life

Throughout Mr. Watkins' adult life, he has broken down color barriers in Alabama society and in the business world. His service to humanity is evidenced in letters of support that are addressed to the Court from the following individuals:

1. Shederick Abner, family friend;
2. Annie Marie Garraway, Watkins' sister (two letters);

3. Doristine Watkins Minott, Watkins' sister;
4. Arthur Boone, Jr., family friend;
5. Rev. Willie Welch, III, family friend;
6. Monte Watkins-Boone, Watkins' first cousin;
7. Dr. Isla P. Garraway, MD-PhD, Watkins' niece;
8. Dr. James A. Watkins, MD, Watkins' brother;
9. David L. Minott, Watkins' nephew;
10. Dr. Frank Franklin, MD, MPH, PhD, Professor Emeritus of Public Health, UAB;
11. Angela Leslie, girlfriend and Logistics Manager, Department of Defense;
12. Elizabeth Dickens, animal welfare advocate
13. Lisa Swoboda, animal welfare advocate
14. Claudia Rose Watkins, daughter

These letters are attached hereto as **Exhibit C**.

The letters of support from Mr. Watkins' family and friends dispel the public's mistaken impression of Mr. Watkins. He is a loyal and compassionate man upon whom his immediate family, his extended family, and his friends have relied for decades for support and guidance. The fact that these individuals are willing to submit letters of support for Mr. Watkins under the circumstances of this high-profile case—which has received negative media attention beyond compare—is a testament to just how much Mr. Watkins is admired by those who *truly* know him. There are many others who support Mr. Watkins and hope that his current situation will end soon, however, they were not comfortable publicly expressing their thoughts about and experiences with Mr. Watkins out of fear that they will be subjected to harassment and ridicule. In fact, Mr. Watkins himself has expressly asked

that some individuals not include a letter of support out of concern for the potential impact a public filing may have on their personal and/or professional lives.

d. Mr. Watkins' Age

At 70-years-old, Mr. Watkins' age alone suggests that a lengthy sentence of imprisonment would be particularly deleterious. On September 8th, Mr. Watkins will turn 71-years-old. A study commissioned by the DOJ's National Institute of Corrections concluded that imprisonment is especially problematic for older inmates like Mr. Watkins, finding that "several important factors seem to speed the aging process for those in prison" and identifying numerous management problems associated with older inmates. *See* National Institute of Corrections, U.S. Department of Justice, *Correctional Health Care* (2004) at 8-9.[3] This study noted that older inmates are uniquely vulnerable to abuse and predation, that they experience difficulty in establishing social relationships, that they often need special physical accommodations in a relatively inflexible physical environment, and that many need special programs in a setting where special privileges are disdained. *Id.* at 11. The study found that older first-time offenders "are frequently severely maladjusted and especially at risk for suicide, explosiveness, and other manifestations of mental disorder." *Id.* Moreover, "[s]ince their behaviors are not well tolerated by other inmates, their victimization potential is high." *Id.*

At nearly 71-years of age, the calculated Guidelines sentence range in the Revised PSR of 168 months to 210 months (or 17.5 years) in prison amounts to a life sentence for Mr. Watkins.

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[3] *Available at*: https://info.nicic.gov/nicrp/system/files/018735.pdf 25

B. The Purpose of Sentencing

Pursuant to the sentencing statute, a defendant's sentence should be designed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). *United States v. Brown*, 526 F.3d 691, 708 n.18 (11th Cir. 2008).

In Mr. Watkins' case, a below-Guidelines sentence meets these standards. A sentence of incarceration in prison is simply not necessary to further these goals.

Mr. Watkins' life, as he knew it before March 8, 2019, is over. His business career lies in ruins. His income has come to a complete halt. Furthermore, Mr. Watkins has lost the means to financially support and sustain the business growth of Masada, Watkins Pencor, Nabirm, and his law practice. The criminal investigation and jury verdicts have depressed the fair market value of his Masada and Nabirm-related assets.

Upon the entry of a certificate of conviction, Mr. Watkins will be automatically barred by the Federal Reserve Board from participating in the banking industry as an officer or shareholder. See, 12 U.S.C. §1829. He will also be disbarred as a lawyer.

Furthermore, Mr. Watkins' son, Donald V. Watkins, Jr., was ensnared in the criminal case for carrying out largely ministerial backroom office management activities under Mr. Watkins' supervision and direction. This is true even though there was no evidence that

Watkins, Jr., ever directed Mr. Watkins to misrepresent any material fact to any "victim" at any time.

Plainly, Mr. Watkins will never be in a position to commit another crime relating to the issuance of securities in a company or banking transactions. Prior to his publicly announced indictment, Mr. Watkins was a highly respected member of the global waste-to-fuel industry, the banking community in Birmingham, and the oil and gas industry in Namibia. His prior record of business transactions and public service is unblemished; he has never been charged with a crime or discipline by a regulator.[4] That has all changed; his reputation is in tatters, and he is being kicked out of the banking industry.

The destruction of a defendant's livelihood is an element to be considered in determining whether the defendant is entitled to a downward departure under the Sentencing Guidelines. See, *United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y.) (downward departure where defendant EPA tester's livelihood was destroyed and he could not re-enter the testing profession, preventing him from possibly engaging in additional criminal activity). The *Gaind* court further declared in a pre-*Booker* decision that:

[4] The Government's sentencing memorandum, at page 20, notes that an administrative law judge ("ALJ") selected by the FDIC issued a ruling in favor of the FDIC on February 27, 2019 (during the midst of Mr. Watkins' criminal trial) with respect to the "R.A." loans that formed the basis of Counts 9 and 10. Under 12 C.F.R. § 308.38, the ALJ's ruling is simply a recommendation to the Board of Directors of the FDIC, which may adopt, modify, or reject his ruling. On June 20, 2019, Mr. Watkins filed a timely Objection to the ALJ's findings of a Regulation O violation on his part because these findings were clearly erroneous and were made before Mr. Watkins had access to cooperating Government witnesses Richard Arrington, Jr, Robert Matthew Rockett and Larry Tate. These witnesses gave testimony on cross-examination that directly contradicted the factual premise used by the ALJ in granting a summary disposition on Loans A, B, and C in favor of the FDIC. Additionally, the ALJ refused to grant Mr. Watkins' motion to stay the FDIC enforcement proceedings pending the outcome of this criminal case. Such motions are routinely granted in civil and enforcement proceedings where there is a parallel criminal case.

"Because of the destruction of the defendant's …. Business, the necessity for achieving the purposes of sentencing through sentencing itself [i.e., prison time] has been reduced."

Post-*Booker*, many of the factors that used to be possible grounds for departure under the Guidelines can now be considered by the Court, with greater latitude, under 18 U.S.C. §3553(a). See, e.g., *United States v. McBride*, 434 F.3d 470, 476-77 (6th Circ. 2006); *United States v. Mickelson*, 433 F.3d 1050, 1055 (8th Cir. 2006).

Section 3553(a)(2)(B) requires that a sentence adequately deter criminal conduct. A below-Guidelines range sentence would still satisfy the considerations of specific and general deterrence.

It is important to note here that Mr. Watkins sold a total of 30 economic participations in Watkins Pencor from January 18, 2001 to September 1, 2010. All of the economic participants are highly intelligent individuals. They include: Mr. Watkins' brother; several life-long friends; two professional athletes with degrees from Georgia Tech and Notre Dame who were senior management executives in Masada's waste-to-energy companies; a former Alabama circuit court and appellate court judge; three trial lawyers; the chief executive officers of national and international businesses; a top executive of a major public utility company; two doctors; experienced businessmen/women, and other highly intelligent individuals who believed in Mr. Watkins' business acumen, work ethic, and integrity.

Only fifteen Watkins Pencor economic participation conveyances occurred between January 1, 2005 and the present. No Watkins Pencor sales transaction occurred after September 1, 2010 because Mr. Watkins made an executive decision that he would not dilute his economic interest in Watkins Pencor below 50%.

These fifteen economic participants since 2005 including Mr. Ralph Malone, who is (i) a former NFL player, (ii) a Georgia Tech alumnus, (iii) a member of Georgia Tech's School of Engineering Hall of Fame, (iv) Masada's Vice President for Program Management, and a two-term member of the Alabama Judicial Inquiry Commission. Mr. Malone testified as a defense witness in this case.

Of the 30 Watkins Pencor economic participants since 2001, only eight testified for the Government at the trial. All 30 of the economic participants executed Watkins Pencor purchase agreements that were substantially similar in terms and conditions. None of these agreements contained a "use of proceeds" provision, as the "seller" was Mr. Watkins and not Masada.

C. The Kinds of Sentences Available Include a Lenient, Non-Guidelines Sentence

The Court has the authority and discretion to impose a wide range of alternatives to the lengthy term of incarceration contemplated by the Guidelines or the maximum penalty authorized under the relevant statutes. *See* 18 U.S.C. §§ 3553(a)(3) and 3561(a)(1). As set forth above, this Court is able to fashion any sentence it concludes is reasonable if it performs the appropriate analysis: (a) determine the appropriate Guidelines range, and (2) analyze and apply the §3553(a) factors. There are no mandatory minimums for these offenses. The Court has no restrictions which would prevent a non-Guidelines sentence for the reasons discussed above.

A sentence significantly below the Guidelines range is appropriate in this case in light of following factors: (a) the novel theories used by the Government in the prosecution of conspiracy, wire fraud, and bank fraud charges against Mr. Watkins; (b) the fact that Mr.

Watkins acted within the line and scope of the written authority conferred upon him by the "victims" in the (i) Masada and Nabirm-related Operating Agreement, (ii) Watkins Pencor and Nabirm-related economic participation purchase agreements, (iii) Masada-related promissory notes, and (iv) codified exceptions to Federal Reserve Board Regulation O; (c) the general public has been deterred from engaging in similar conduct in light of the punishment Mr. Watkins has already suffered and the widespread media attention this case has garnered; (d) Mr. Watkins' age; (e) the financial devastation Mr. Watkins has experienced as a result of his prosecution; (f) the detrimental effect of the prosecution on Mr. Watkins' family; (g) Mr. Watkins' spotless record of complying with the U.S. Foreign Corrupt Practices Act in all 47 international markets where Masada developed waste-to-fuel partnerships and business opportunities; (h) Mr. Watkins' documented record of rejecting "pay-to-play" demands from Detroit City Pension Board Trustees in 2008 and reporting this criminal conduct to a federal grand jury in Detroit; and, as explained below, the types of sentences imposed for similar conduct.

There are many types of sentences available to the Court, including home detention followed by a period of supervised release, that are suitable in this case.

D. The Sentencing Guidelines

Section 3553(a)(4) requires that the Court consider the appropriate Guidelines range, and Mr. Watkins has already discussed this issue above. He submits that a non-Guidelines sentence is the only appropriate sentence in this case, particularly when considering the other §3553(a) factors.

E. Pertinent Policy Statements Issued by the Sentencing Commission

Mr. Watkins is unaware of any such policy statements.

F. Sentencing Disparities

Section 3553(a)(6) requires a court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

The most infamous white-collar fraud case in the Northern District of Alabama was the $2.7 billion HealthSouth conspiracy, mail fraud, wire fraud, and accounting fraud case. At the time, the HealthSouth case was one of the largest corporate fraud cases in U.S. history. All five of HealthSouth's chief financial officers (i.e., Aaron Beam, Michael Martin, Bill Owens, Weston Smith, and Malcolm McVay) presided over the fraud scheme while serving in that corporate office. All of them eventually pleaded guilty to the largest fraud scheme in corporate history in 2003. All five of them received sentences ranging from home detention (which were reserved on appeal) to 5 years in prison.

Hannibal Sonny Crumpler, another HealthSouth executive who participated in the accounting fraud scheme, was charged with conspiracy to commit securities fraud and making false statements to auditors, pursuant to 15 U.S.C. §§ 78j(b), 78ff, 78m(a) & (b)(2), 18 U.S.C. §§ 2, 371, and 17 C.F.R. §§ 240.10b-5, 240.13b2-1, 240.13b2-2(a), and for forfeiture, under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). The Eleventh Circuit summarized that scheme as follows:

> At some point in the early to mid-1990s, HealthSouth officials realized that HealthSouth's financial results were failing to produce sufficient earnings-per-share to meet the expectations of Wall Street analysts. Various HealthSouth officials ... became aware that the earnings shortfall created a substantial risk that, unless the earnings-per-share were artificially inflated, the earnings would fail to meet analyst expectations, and the market price of HealthSouth's securities would decline.
>
> Therefore, from at least 1994 until March 2003, a group of HealthSouth officials "conspired to artificially inflate HealthSouth's reported earnings and earnings per share, and to falsify reports about HealthSouth's overall financial condition." [*United*

> *States v. Martin*, 455 F.3d 1227, 1230 (11th Cir. 2006)]. The officials "made, and directed accounting personnel to make, false and fraudulent entries in HealthSouth's books and records for the purpose of falsely reporting HealthSouth's assets, revenues, and earnings per share and in order to defraud investors, banks, and lenders." Id.

United States v. Livesay, 525 F.3d 1081, 1085 (11th Cir. 2008); see also *United States v. Owens*, 464 F.3d 1252 (11th Cir. 2006); Martin, 455 F.3d at 1230-31; *United States v. McVay*, 447 F.3d 1348, 1349-40 (11th Cir. 2006).

Crumpler pled "not guilty" to the charges against him, and the case went to trial in *United States v. Hannibal Sonny Crumpler, 2:04*-cr-0502-VEH-JEO in the Northern District of Alabama, beginning on November 7, 2005.

On November 18, 2005, the jury found the Crumpler guilty of both conspiracy to commit securities fraud and making false statements to auditors, and it subsequently returned a forfeiture verdict in the amount of ***$1,398,250.00***.

After receiving the Presentence Investigation Report (CR Doc. 134), as well as briefs and documentary evidence relevant to sentencing issues from both the defendant and the government (See, CR Docs. 131, 132, and 133), the Court held a sentencing hearing on June 15, 2006. (See, CR Doc. 142). At that hearing, the Government presented an expert witness who testified that the total loss to HealthSouth's stockholders and bondholders resulting from the fraudulent scheme was approximately ***$7 billion***. (CR Doc. 142 at 29; Emphasis added). At the hearing, the Court accepted the methodology employed by the Government's expert as reasonable, and concluded that the total loss could be ascribed to Mr. Crumpler for purposes of the Sentencing Guidelines because such loss was foreseeable to the Mr. Crumpler insofar as he was aware not only of his own fraudulent conduct but also that of his co-conspirators who were likewise engaged in creating false revenue

numbers in their respective divisions within HealthSouth. (Id. at 81- 85). The Court determined that the Guidelines specified a sentence of imprisonment of 180 months, or 15 years, for the two counts upon which the jury convicted Mr. Crumpler. (CR Doc. 142 at 105). Ultimately, however, the court recognized that, post-*Booker*, the Guidelines are now advisory only, and the Court sentenced Mr. Crumpler to a term of imprisonment of 96 months, or eight years.[5] In so doing, the Court considered each of the sentencing factors set forth at 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The Court recognized that numerous people were involved in the fraudulent conspiracy at HealthSouth and that Mr. Crumpler was not "the most culpable person." (CR Doc. 142 at 89). Indeed, the Court acknowledged that "the defendant was not the leader or even in the second or third tier of leadership." (Id. at 88). Nonetheless, the Court found that Mr. Crumpler was "a leader" and was "actively involved" in the conspiracy for many years and that "the scope of criminal activity undertaken by him was significant," that is, more than "minor" as that term is used in the Guidelines. (Id. at 88-89). The Court also specifically considered and discussed the sentences imposed upon numerous other HealthSouth co-conspirators[6] as well as upon a host of defendants convicted in other

[5] The court entered an order of judgment formalizing the sentence on June 21, 2006. (CR Doc. 136).

[6] Other defendants involved in the HealthSouth conspiracy whose cases were considered by the Court at the Mr. Crumpler's sentencing hearing included the following: William Owens, Weston Smith, Michael Martin, Malcolm McVay, Aaron Beam, Kenneth Livesay, Emery Harris, Cathy Edwards, Rebecca K. Morgan, Angela Ayers, Virginia Valentine, Jason Brown, Will Hicks, Richard Botts, and Catherine Fowler. (See CR Doc. 142 at 100-04).

accounting/investor fraud cases,[7] in light of the legitimate considerations that still may justify sentencing disparities, such as rewards for accepting responsibility for wrongdoing and cooperating with the prosecution. (Id. at 93-104; see also id. at 132).

In Mr. Watkins' case, the final PSR recommends and the Government is requesting a sentence of 168 to 210 months in prison in a case where the PSR calculates the "loss amount" at $15,775,000. The sentencing data from the HealthSouth case demonstrates the disparities that would result from a Guidelines sentence in Mr. Watkins' case.

Based upon the United States Sentencing Commission's June 2019 publication titled, "Fiscal Year 2018 Overview of Federal Criminal Cases," (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf) the sentence recommended for Mr. Watkins exceeds the 2018 national average for (a) drug possession and environmental offense (3 months); (b) drug trafficking (76 months), and (c) fraud, theft or embezzlement (23 months). The national average sentence for murder is 291, just 81 months more than the maximum sentence recommended for Mr. Watkins. According to the Overview, Mr. Watkins' PSR recommended sentence would place him in the 12.8

[7] Defendants in other investor fraud cases mentioned by the Court included the following: in the WorldCom cases, Bernard Ebbers, Scott Sullivan, David F. Myers, Buford Yates, Troy Normand, and Betty Vinson; in the Enron cases, Kenneth Lay, Jeff Skilling, Andrew Fastow, Ken Rice, Ben Glissan, James Brown, and Daniel Bayly; in the Adelphia cases, John Rigas and Timothy Rigas; in the Dynegy cases, Jamie Olis and Gene Foster; in the El Paso Gas Traders case, Todd Geiger; in the Rite Aid cases, Martin Grass, Franklin Brown, Franklyn Bergonzi, Eric Sorkin, and Timothy Noonan; in the Tyco cases, Dennis Kozlowski, and Mark Swartz. The Court also considered the case of Charles Walker, a Georgia state senator sentenced for fraud. (See CR Doc. 142 at 93-100).

percent of federal prisoners who receive sentences of ten years or longer (excluding life sentences).

What is more, the Government prosecuted Mr. Watkins for selling economic participations in Masada and Nabirm, which it says were fraudulently induced. The criminal prosecution followed the May 2017 dismissal, with prejudice, of the Thomas Global Group, LLC's civil lawsuit in federal court that alleged multiples theories of fraudulent conduct regarding this purchase transaction. As discussed below, criminality in this case was based upon novel legal theories for the prosecution that, at this juncture of the legal proceedings, trumped what Mr. Watkins believes are valid and controlling questions of law regarding the Government's novel wire fraud and bank fraud theories.

G. The Need to Provide Restitution to Any Victims of the Offense

Finally, §3553(a)(7) provides that another sentencing factor is the "need to provide restitution to any victims of the offense." Restitution is not an issue in this case, as no "victim" has sustained a loss. Masada and Nabirm are ongoing business enterprises and both have demonstrated value upon a market driven liquidation event. See, Declaration of Arowolo, Exhibit A).

Mr. Watkins objects to the restitution amount of $14,100,000 in Paragraph No. 209 of the PSR. for the reasons stated in Objection Nos. 121, 122, and 123 and the other Objections cited in Doc. 187.

As stated in this Memorandum, the "victims" fell into three categories: (a) Watkins Pencor economic participants, (b) strangers to the Watkins-"AR" loan transaction, and (c) Alamerica Bank.

Alamerica Bank was made whole between the loan payoff and fees and interest earned by the Bank on Richard Arrington's "nominee" loans.

With respect to each Watkins Pencor economic participant who has been identified as a "victim," he/she represented and warranted to Mr. Watkins that he/she acknowledged that his/her purchase of a Watkins Pencor economic participation involved a high degree of risk and was suitable only for persons of substantial means who had no need for liquidity in the investment and who could bear the entire loss of their investment. Because the Masada and Nabirm business are ongoing, despite the New Jersey and Birmingham criminal investigations, despite the criminal charges lodged against Mr. Watkins, and despite the "guilty" jury verdicts, the Watkins Pencor economic participants have experienced no actual or intended loss.

The three loans between Mr. Watkins and "C.B." are a civil contract matter under Alabama law, which "C.B" has not pursued. Furthermore, "C.B." was awarded an increased economic participation in Watkins Pencor, which he holds to this day.

Furthermore, "C.B.'s" economic participation in Nabirm has significant economic value, as described in the Declaration of Olayinka Arowolo. (See, Exhibit A hereto).

Finally, "A.R's" May 2010 loan note was replaced and superseded by a loan promissory note that was executed in 2015 to a non-Masada party (i.e., DeAngelo Hall d/b/a Eugene Holdings, LLC) who was unknown to Mr. Watkins at the time of the Watkins-"A.R." loan transaction. The loan obligation to "A.R." became null and void upon the execution of the 2015 promissory note to Eugene Holdings.

H. Additional Factors in Determining a Below-Guidelines Sentence

1. The Government Used Novel Theories to Establish Wire Fraud and Bank Fraud in Mr. Watkins' Case

The Supreme Court has stated that, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier,* 520 U.S. 259, 266 (1997). As discussed earlier, the Government used novel theories to establish wire fraud and bank fraud in Mr. Watkins' case.

These theories are relevant to the appropriate quantum of punishment. A court should view defendants who are convicted on the basis of novel legal theories never before articulated by the United States as less blameworthy than those who were given unambiguous notice of the criminality of their proposed conduct.

In this case, Mr. Watkins engaged in commercial transactions that the jury concluded were fraudulently induced. These transactions included (a) the sale of several Watkins Pencor economic participation purchase transactions to "victims" and (b) several loans Mr. Watkins made for the benefit of Masada Resource Group, LLC ("Masada"), and its affiliated entities/persons. Mr. Watkins has found no published federal case of wire fraud where oral representations made by the seller of a property interest to a willing purchaser trumped the plain language in the written contract that documented the commercial transaction. As a matter of law, they do not.

Furthermore, every act of "fraud" that was described by the "victims" was completely divorced from the plain language and context of the purchase agreements, promissory notes and applicable corporate operating agreements that governed the business relationship between the "victims" and Mr. Watkins.

For the first time ever, the Government constructed a "fraud in the inducement" theory that rendered the usual and customary "due diligence" phase of a commercial

transaction between a willing seller and interested buyer as an immaterial and irrelevant exercise. The Government's nullification of the "due diligence" phase of commercial transactions is unprecedented in law.

Based upon the testimony at trial, some degree of due diligence was performed by each "victim" in this case who executed Watkins Pencor economic participation purchase agreements. In most of the cases, the due diligence was conducted by the "victim's" financial advisor.

There was no evidence in the trial that Mr. Watkins withheld, concealed, or misrepresented any due diligence information regarding the Masada and Nabirm-related economic participation purchase transactions, or that he discouraged the "victims" and their financial advisors from conducting customary and usual due diligence on the commercial transactions referenced in Counts 2 through 8. As the Court knows, the purpose of "due diligence" in commercial transactions is to clarify and verify the accuracy of representations and information that a seller provides to a potential purchaser.

Mr. Watkins' case also represents the first time ever that the Government has prosecuted an economic crimes case based on a theory that "investor money" was spent on items of a "personal" nature (as opposed to business-related expenditures) without any consideration of or reference to the corporate operating agreements and other pertinent documents that governed the business relationship between the "victims" and Mr. Watkins. Instead, the Government's theory of the case against Mr. Watkins focused on the end-use of the money and not on: (a) who, as a matter of law, owned the proceeds from the sale of Watkins Pencor economic participations; (b) what categories of Masada business expenditures were authorized in the applicable corporate operating agreements; (c)

whether Mr. Watkins acted within the line and scope of the managerial authority the "victims" conferred upon him when they agreed in their purchase agreements that they would be bound by the applicable operating agreements; and (d) whether the total body of warranties and representations Mr. Watkins and the "victims" made to each other in the Watkins Pencor purchase agreements were relevant to the crimes charged.

These are questions of law, to be decided by the Court and not the jury. Alabama contract law governs the interpretation of the Masada Operating Agreement. (See, Defendants Exhibit 3, Section 18.8).

Section 8.3 of the Masada Operating Agreement, which was written years before Mr. Watkins became Masada's Manager, gave him the authority "to do all things necessary or convenient to carry out the business and affairs of the Company…", including the power to: (a) sue and defend lawsuits in the name of the company and its affiliates [Section 8.3(a)]; (b) lease real and personal property, wherever situated [Section 8.3 (b)]; (c) sell, convey, or transfer Masada assets [Section 8.3(c)]; (d) lend money to or otherwise assist Members [Section 8.3(d)]; (e) acquire interests in foreign limited liability companies [Section 8.3(e)]; (f) make contracts, incur liabilities, and borrow money [Section 8.3(f)]; (g) conduct Masada's business and carry on its operations [Section 8.3 (g)] ; (h) hire and appoint Masada's employees and agents, and define their duties and fix their compensation [Section 8.3(h)]; (i) participate in partnership agreements and joint ventures [Section 8.3(i)]; and (j) indemnify any Masada Member, Manager, or employee, or former Member, Manager, or employee of the company as provided in the Operating Agreement [Section 8.3(j)]. Comparable managerial powers appear in Section 7.3 of the Masada OxyNol US-I, LLC, Operating Agreement [See, Defendants Exhibit 4; Section 6.4 of the Pencor Masada OxyNol,

LLC, Operating Agreement [See, Defendants Exhibit 5]; and Section 6.4 of the Masada OxyNol, LLC, Operating Agreement [See, Defendants Exhibit 6].

Section 15.1 of the Masada Operating Agreement (Defendants Exhibit 3) specifies that an assignee of a member "has no right to participate in the management of the business and affairs of the Company or to become a member." Comparable language on this subject is found in Defendants Exhibits 4, 5, and 6.

By disregarding any and all references to the applicable corporate operating agreements, Mr. Watkins' payments to his ex-wife, for example, were deemed to be "personal" in nature, rather than authorized partial payments to a pre-existing Masada creditor. The same is true for payments to Mr. Watkins' ex-girlfriend, Marion Snell. These payments were deemed personal in nature, rather than authorized partial payments to a pre-existing Masada vendor and creditor. When Mr. Watkins partially reimbursed himself for his millions of dollars in unreimbursed expenses Masada owed to him, the Government's focus was on the end use of the money and not whether Mr. Watkins was legally entitled to this money under the applicable operating agreements.

Mr. Watkins has found no published case of wire fraud where a determination of what transactions were business-related was made without reference to the corporate documents that formed the business relationship between the defendant and "victims."

With respect to bank fraud, Mr. Watkins has found no published case where the Government has prosecuted a bank fraud charge against a defendant who: (a) claimed the "safe harbor" protections afforded him/her under 12 C.F.R. § 215.3 (f)(2)(i) & (ii) and (b) ***did not participate in the preparation of the borrower's loan application and/or the***

bank's lending decision. Furthermore, the bank did not lose money on the loan transactions. The loans at issue were repaid and the bank made a healthy profit on them.

Furthermore, the Government based part of its wire fraud theory against Mr. Watkins on forward-looking statements he made regarding potential future business relationships between Masada and Condoleezza Rice and Martin Luther King, III. As a matter of law, Mr. Watkins was authorized to use forward-looking statements in his reports and updates to economic participants. See, 15 U.S.C. §78u-5.

Additionally, Defendants Exhibit 1, in Section 16(g) titled "Risk Inherent in the Projects," advised the "victims" about Masada's "Dependence on Key Personnel" by stating:

> "The Company believes that its future success will depend in large part on each Project's continued ability to attract and retain highly skilled scientific, managerial, manufacturing and *other qualified personnel*….There can be no assurance that any of the Projects will continue to be successful in attracting and retaining such personnel."

(Emphasis added). It is undisputed that Mr. Watkins attempted to establish a professional association between Masada and Ms. Rice and Mr. King, and he was not successful in doing so on terms and conditions that were acceptable to Masada.

Defendants Exhibit 1 was expressly referenced in each Watkins Pencor economic participation agreement.[8] Again, the pertinent Masada-related agreements (Defendants Exhibit Nos. 3, 4, 5, and 6) and confidential investment memorandums (Defendants Exhibit

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[8] Defendants Exhibit 1 related to Masada's New York project and seven other target markets selected by Masada's designated Manager. When Mr. Watkins became Manager of Masada on December 29, 2005, he substituted foreign markets for the seven additional domestic markets identified in Defendants Exhibit 1. On May 12, 2011, Masada abandoned the New York project referenced in Defendants Exhibit 1 after the company receiving an unfavorable arbitration ruling that allowed the City of Middletown, NY to withdraw from its waste management services contract with Masada.

1) were made available to each "victim" prior to the execution of his/her purchase agreement.

Additionally, the Government used an unprecedented contract reformation theory to effectively convert Mr. Watkins' sale of a portion of his personal economic interests in the Masada family of companies into a sale of Masada shares itself. Under this reformation theory, the sales proceeds could be used only for what the Government determined were "business purposes" rather than what Mr. Watkins decided was an appropriate use of his money.

For example, in Government Exhibit 55 (i.e., "C.B.'s" January 18, 2007 Watkins Pencor Economic Participation Agreement), the designated "seller" is "Donald V. Watkins d/b/a Watkins Pencor, LLC ("WP")," and not Masada. Watkins diluted his personal Masada-related economic interests on an irrevocable basis. The "buyer" is "Barkley Enterprises." The Agreement was signed by Glenn H. Guthrie, in his capacity as Vice-President of Barkley Enterprises. Guthrie was also "C.B.'s" financial advisor at Wachovia Securities. The property interest conveyed was "the total economic interests … to which Donald V. Watkins is entitled by virtue of his ownership interests of Pencor Orange Corporation ("Pencor") and Pencor's membership interests in Pencor-Masada OxyNol, LLC ("PMO") and Masada OxyNol US-I, LLC ('MOUS-I')." The purchase agreement noted that "[t]hese economic interests may be received by Donald V. Watkins from Pencor, Vulcan Resources, LLC ('Vulcan'), Controlled Environmental Systems Corp. ('CESC'), Masada Resource Group, LLC ('MRG'), Masada OxyNol, LLC ('MO'), Masada OxyNol US-I, LLC

(“MOUSI’), and OxyNol Solutions, Ltd. (‘OS’).”[9] The Agreement also conveyed “any equity interests Watkins subsequently acquires in Pencor, WP, Vulcan, CESC, MRG, MO, MOUSI, PMO, and OS.” There is no “use of proceeds” provision in this purchase agreement. The Government presented no evidence at trial that Watkins conveyed an interest to any Watkins Pencor economic participant that he did not own.

Instead, the Government presented witnesses who claimed that Watkins represented to them that he owned an interest in Masada. As a matter of law, Mr. Watkins owned such an interest by virtue of his documented December 29, 2005 equity sharing agreement with the Harms Estate. This ownership interest vested on December 29, 2005 and remained in force until Mr. Watkins and the Harms family reached a new and superseding agreement on December 31, 2013 (as amended) relating to his purchase of the Harms equity position in Masada. Additionally, as of August 1998, Mr. Watkins owned a 25% of the Class A equity in Pencor-Masada OxyNol, LLC (Defendants Exhibit 4); 10% of the Class A equity in Masada OxyNol US-I, LLC (Defendants Exhibit 5); and 10% of the Class A equity in Masada OxyNol, LLC (Defendants Exhibit 6).

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[9] At the time of the Watkins-Barkley Enterprises transaction, the Daryl Harms Estate had already entered into a December 29, 2005, agreement with Watkins to equally share their Class A interests in MRG and CESC in exchange for equal capital contributions and Watkins’ assumption of the CEO/Manager’s role going forward.” *See*, Defendants Exhibit 16, at page 1, which was prepared by Ms. Harms’ attorney and signed by her. Mr. Watkins, Sr.’s December 29, 2005 Masada “Manager Designation and Proxy,” which was also signed by Ms. Harms, specifically references this equity interest. (See, Government Exhibit 337). The December 29, 2005 equity sharing agreement was superseded by a December 31, 2013 purchase agreement executed by the parties. (See, Government Exhibit 203). Furthermore, Defendants Exhibit 27, which is specifically referenced in the Barkley Agreement, contains a Masada ownership chart that specifically acknowledged Watkins’ May 2006 purchase agreement with the Terry Johnson family. Barkley’s Watkins Pencor purchase agreement (and others executed after May 2006) noted that Watkins might receive economic benefits from Masada and CESC, in which Barkley would participate.

Despite this evidence and principles of contract law, the Government's theory of fraud effectively reformed the commercial transactions from the one executed between the Watkins Pencor parties into a new and enhanced commercial transaction where the "victims" are now presented as "investors" in Masada. The Government achieved a contract reformation, via a criminal prosecution, that the "victims" could not possibly have achieved in a civil lawsuit for "fraud."[10] In the Government's criminal case, the "victims" have been allowed to disavow the plain language of their purchase agreements because Mr. Watkins presented that he owned an interest in Masada, and the Government says he did not own such an interest. In "C.B.'s" case, the Masada ownership information, as of January 18, 2007, was provided to "C.B." and his financial advisor in a document (i.e., Defendants Exhibit 27) that he acknowledged receiving in his purchase agreement.

2. This Case Presents One Set of Operable Facts

Mr. Watkins is a licensed attorney in Alabama and the District of Columbia who has no prior criminal history. The Government has presented him to the Court as a hardened criminal who brazenly violated the law and deserves no mercy. But this case is not about murder, drug cartels, terrorist cells operating in the U.S., money laundering, organized crime, the Madoff Ponzi scheme, or the collapse of Enron and WorldCom.

Rather, at its core, the ten charges against Mr. Watkins stem from one operable set of facts: Mr. Watkins owned equity positions in two principal entities (i.e., the Masada Resource Group, LLC, and Nabirm Global, LLC, family of companies). Mr. Watkins sold

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[10] TGG brought a New Jersey federal court lawsuit in August 2013 alleging various causes of action for fraud in connection with Bryan Thomas' (d/b/a Thomas Global Group, LLC) purchase of a Watkins Pencor economic particpation. After discovery in the case, the lawsuit was dismissed with prejudice in May 2017.

economic participations in his equity position in these companies to the individuals identified by the Government as "victims." The corporate governance agreements authorized these transactions. The purchase agreements specified the economic interests conveyed on an irrevocable basis to each "victim." With respect to the two bank fraud charges, Mr. Watkins received tangible economic benefits, as permitted under Federal Reserve Board Regulation O, from loans Alamerica Bank made to a 10% economic participant in Watkins Pencor, the entity that holds Mr. Watkins' Masada-related equity interests. Finally, Mr. Watkins executed three "insider" loans totaling $2,150,000 with one economic participant for the benefit of Masada and its affiliated entities/persons.

Without referencing (a) any applicable Masada and Nabirm-related Operating Agreement, or (b) the total body of warranties and representations Mr. Watkins and the "victims" made to each other in the Watkins Pencor purchase agreements, or (c) any Regulation O exception, the Government contends that the sale and loan transactions in Counts 2 through 10 were fraudulent. Mr. Watkins contends that, as a matter of law, these transactions were authorized under the applicable corporate operating agreements, purchase agreements, promissory notes, and banking regulations.

3. This Criminal Case and Defendant Are Unique

This criminal case and this defendant are unique for several reasons. As discussed above, this case represents the first time ever that a defendant has been charged with and convicted of wire fraud in a case: (a) where the "victims" were "accredited investors" who were represented by qualified financial advisors of their choosing at the time of their investment transactions with the defendant, (b) where the seller afforded the "victims" and/or their advisors a meaningful opportunity to conduct the customary and usual due

diligence on the contemplated commercial transaction prior to executing their respective economic participation purchase agreements to acquire a portion of the defendant's economic interest in the Masada and/or Nabirm family of companies at issue; (c) where all of the "victims" and/or their financial advisors engaged in some degree of due diligence prior to executing the purchase agreements in question; (d) where the purchase transactions were authorized under the applicable corporate operating agreements, which were written by corporate lawyers and adopted by shareholders years before the purchase transactions in question -- indeed, years before Mr. Watkins became manager of the Masada entities, and even before his first association with Masada through his initial investment in it; (e) where the purchase agreements defined in plain language the precise economic interests that were acquired from the seller and referenced the risk factors associated with the purchase transaction; (f) where the purchase money was wired to the seller of the economic interests, and not to Masada or Nabirm; (g) where the seller actually grew the international market footprint of the companies in which he held various equity interests; (h) where the purchasers agreed in their purchase agreements to be bound by all of the terms and conditions set forth in the applicable corporate operating agreements; (i) where the expenditures of funds derived from the purchase transactions fell within specific categories of expenditures that are authorized in the corporate operating agreements; (j) where the Government failed to prove any instance in which defendant made an expenditure that was not authorized in the applicable corporate operating agreements; (k) where the purchase agreements in question have never been declared unlawful in any arbitration proceeding or civil lawsuit; (l) where the U.S. Securities and Exchange Commission's voluntarily dropped its civil claims of "securities fraud" against the seller

regarding the same economic participation purchase agreements at issue in the parallel criminal case; (m) where the seller was the first party to initiate litigation (via a AAA arbitration proceeding) regarding the use of proceeds from the purchase transaction involving one of the "victims"; (n) where the economic participation purchase transaction of one "victim" was independently reviewed by the Economic Crimes Division of the U. S. Attorney's Office for the District of New Jersey, which declined a prosecution of the defendant, and (o) where the companies involved in the transactions are ongoing business enterprises that implement their business plan on a daily basis.

In essence, a criminal prosecution has been used in Mr. Watkins, Sr.'s case to override arms-length commercial transactions and contractual relationships between a willing seller and several interested and willing buyers under the unique circumstances set forth above. This criminal prosecution and the jury verdicts in this case are apparently unprecedented (based upon a diligent search to date) in the history of American jurisprudence.

Second, this case (as best as can be determined to date) represents the first time ever that a bank insider/defendant has been charged with and convicted of bank fraud in a case: (a) where the bank insider and borrower enjoyed a bona fide business relationship that preceded the loan transactions at issue by 8 to 10 years (b) where the bank insider did not participate in preparing, completing, reviewing, or submitting the borrower's "nominee" loan applications; (c) where the bank insider did not participate in the evaluating, underwriting, grading, or approving the bank loans at issue: (d) where the loan borrower was qualified for the "nominee" loans based upon his own creditworthiness; (e) where the loan officers and bank CEO who were involved in processing and approving the

borrower's loans were also members of the bank's board of directors; (f) where the borrower testified that the loan officer knew of the bank insider's potential economic interest in a portion of the loan proceeds of the largest loan when the application was made; (g) where the borrower testified that the bank insider never requested him to falsify or omit any relevant information required in connection with his bank loans; (h) where the borrower retired the loans in full with proceeds he obtained from another financial institution; (i) where the bank insider invoked his right to the exceptions to Federal Reserve Board Regulation O that are codified in 12 C.F.R. § 215.3 (f)(2)(i) & (ii); (j) where 12 C.F.R. § 215.3 (f)(2)(i) & (ii) contains no requirement that the insider disclose his receipt of economic benefits from the "nominee" loans; and (j) where neither the Federal Reserve Board, nor the Federal Deposit Insurance Corporation, has issued a final agency ruling that the bank insider's receipt of economic benefits from the loans that form the basis of the bank fraud charges violated Regulation O; and (k) where the defendant has never denied his receipt of tangible economic benefits from the loan.

Furthermore, Mr. Watkins who has been painted as a criminal deferred his receipt of the authorized Masada salary as Manager from December 2005 to the present. The applicable Masada Operating Agreements fixed Mr. Watkins' authorized salary at $7,500 per month to $15,000 per month for each one of Masada's 47 locations where market development activities occurred. Market development includes, but is not limited to, (a) conducting feasibility studies, (a) identifying and vetting suitable waste management partners; (c) entering into mutually agreeable partnership agreements; (d) setting up special purpose corporate entities; and (e) securing waste stream contracts and government concessions. The monthly compensation schedule is codified in Section 6.8 of

Defendants Exhibit 5. The monthly compensation increases to $150,000 per month from the end of the market development period until the commencement of commercial operations or the abandonment of the waste-to-fuel project, whichever occurs first. Defendants Exhibit 5 at Section 6.8(b)(iii).

Mr. Watkins also deferred his receipt of the expense reimbursements, loan repayments and professional services fees due him. Likewise, Mr. Watkins deferred the collection of Masada's $17,000 per month office rent in his building for 10 years. These actions allowed Masada to survive the Great Recession of 2008 and to grow in the international market at a record pace.

These actions are highly relevant on the question of whether Mr. Watkins intended to harm the "victims." They demonstrate Mr. Watkins' propensity to place the interests of his business stakeholders ahead of his own financial interest. These actions are also relevant to the appropriate quantum of punishment

a. The USPO Sentencing Guidelines Calculation

The final PRS calculated a total offense level of **35** and a criminal history category of I. Under USSG §3D1.2, all of the counts of which Mr. Watkins was convicted were grouped for the purpose of calculating the Guideline range. The absence of any criminal history for Mr. Watkins, placed him a criminal history category of 1.

The PSR also recommended a Guideline imprisonment range of **168 months to 210 months**. This calculation was based upon the following factors:

Base Offense Level (USSG §2B1.1(a))	7
Special Offense Characteristics (loss amount) (USSG §2B1.1(b)(1)(K))	+20
Special Offense Characteristics (# of victims) (USSG §2B1.1(b)(2)(A)(i))	+2

Special Offense Characteristics (sophisticated means) (USSG §2B1.1(b)10)(C))	+2
Special Offense Characteristics (nominee loans) (USSG §2B1.1(b)(17)(A)	+0[11]
Adjustment for Role in Offense (abuse of position of trust/use of special skills)	+2
Adjustment for Obstruction of Justice	+2
Total Adjusted Offense Level:	**35**

b. Enhancements in the PSR Beyond the Base Level Offense are Unwarranted and Clearly Erroneous

For the reasons presented in Mr. Watkins, Sr.'s Objection to the draft PSR (Doc. 187), all Guideline enhancements beyond the Base Offense Level are unwarranted and unsupported by the evidence in this case. This is particularly true for (but not limited to) the amount of the loss – erroneously reported in Paragraph 141 of the PSR at $15,775,000 – and the number of victims – erroneously reported in Paragraph 142 of the PSR as 12 or more persons/entities.

Mr. Watkins adopts his Objections to each of the factors identified in the draft PSR (Doc. 187) that would enhance or adjust upward the base offense level, for the purposes of demonstrating that a plethora of material facts were omitted in addressing and refuting the following enhancement factors:

1. Special Offense Characteristics (loss amount) (USSG §2B1.1(b)(1)(K)): *See*, Watkins Objection No. 141 and the numbered objections cited therein.

[11] The USPO, without objection from the Government, has agreed that Mr. Watkins, Sr. derived less than the "more than $1,000,000" in gross receipts from banks required for this enhancement to apply, Addendum to the PSR, at 2, 8-9 (referencing ¶144); and accordingly that "an enhancement under this section [i.e., USSG §2B1.1(b)(17)(a)] is not appropriate in this case." Addendum to the PSR, at 9 (Objection #144).

2. Special Offense Characteristics (10 or more victims) (USSG §2B1.1(b)(2)(A)(i)):

See, Watkins Objection No. 142 and the numbered objections cited therein.

The USPO has recommended a two-level enhancement of the base offense level based on the presence of ten (10) or more victims. The preliminary PSR identified fourteen (14) victims. In response to objections from both parties, the USPO eliminated an inadvertent second counting of T.S., and removed B.J. as a victim, leaving a current count of twelve (12) victims.

There remain various means and unresolved objections through which, individually or in combination, the number of victims is due to be reduced to fewer than ten (10), such that this enhancement does not apply. Some of these grounds for exclusion as victims overlap, i.e., a currently listed victim may be subject to removal from the list of victims on more than one ground. These grounds for removal include, but are not limited to, the following[12]:

(A) Several persons are currently designated as "victims" based on their alleged loss of the purchase price of one or more economic participation interests only, i.e., C.C., C.E., D.M., A.R., T.S., N.T.S., B.T. (or Thomas Global Group, LLC ["TGG"]), D.T., and G.W. Notwithstanding any evidence that any particular investment was induced by any misrepresentations of material fact, each "victim" received and has retained what he or she bargained for, i.e., an economic participation interest in an ongoing business with valuable, tangible assets. Mr. Watkins is offering or intends to offer evidence to support the

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[12] Mr. Watkins does not waive, but to the contrary expressly preserves and re-asserts, each ground for exclusion of any person from the list of victims that Watkins raised in his objections to the PSR but does not re-list above. *See, e.g.,* Watkins Sr. Objection Nos. 119, 142, and numbered objections cited therein.

conclusion that the value of the economic participation interest still owned by each purchaser is greater than or equal to the amount of the purchase price. "Victim" includes "any person who sustained any part of the actual loss determined under" USSG §2B1.1(b)(1). USSG §2B1.1 cmt. n. 1. Mr. Watkins expects the evidence will show that, once the value of the economic interest(s) is factored in, none of these economic interest holders will have sustained any actual loss; and accordingly do not meet the definition of "victim."

(B) For three (3) of the alleged victims, those who did not testify at trial, i.e., C.C., A.R., and D.H., there is no evidence that any alleged loss was induced by any misrepresentation of material fact by Mr. Watkins. Although a victim is one who has sustained "actual loss," "actual loss" is the "reasonably foreseeable pecuniary harm that *resulted from the offense*," i.e., from Mr. Watkins' fraud. USSG §2B1.1 cmt. n. 3(A)(i) (emphasis added). Absent evidence that such person's alleged loss (here, the price paid for his economic participation interest) was caused by misrepresentation(s) of material fact by Mr. Watkins, and thus "resulted from the offense," such person is not a "victim."

(C) Alamerica is listed as a "victim" based on the amount of the nominee loans obtained by Richard Arrington. Dr. Arrington repaid all those loans in accordance with the terms of the loan agreements, with the prescribed interest and fees; and the loans were profitable to Alamerica (a finding not opposed by the Government). *See* Watkins, Sr.'s Objection No. 112(v); Government's Sentencing Memorandum for Watkins, Sr., at 23 (not opposing the statement in paragraph 112(v)). Because Alamerica did not sustain actual loss, Alamerica is not a "victim." *See* USSG §2B1.1 cmt. n. 3(E)(i).

(D) D.M. was a "nominee" holder of an economic participation in Watkins Pencor and Green Horizons/TradeWinds for W.S., who was not disclosed to Watkins at the time of the transaction, and for whom the transaction was a tax avoidance scheme. D.M. did not contribute any money toward the economic participation purchases, did not suffer actual loss, and thus is not a "victim." And, there is no evidence that, taking into account the tax avoidance, W.S. sustained "actual loss; or that W.S.'s entry into and funding the transaction was induced by misrepresentations of material fact by Mr. Watkins, and thus "resulted from the offense. Accordingly, W.S. also is not a "victim."

(E) B.T. and D.T., husband and wife, both are listed as "victims" for a loss amount of $1,000,000 for purchase of an economic participation interest. The economic interest attributed to B.T. and D.T. jointly was actually purchased by Thomas Global Group, LLC ("TGG"), a single-member limited liability company formed to hold B.T.'s investments, in which B.T. is the sole member. The money for this purchase was wired from an account for TGG, not a joint account for B.T. and D.T. As a corporation, TGG is a "person" for the purpose of "victim" status. And, as the "person who sustained … the actual loss," TGG is the victim, and the corporate form should not be disregarded.[13] Having not invested money in the economic participation interest, wife D.T. has not sustained actual loss; is not a victim; and must be excluded from the number of victims.

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[13] Absent disregard of the corporate form, husband and sole member of the LLC B.T. is not a victim. In the alternative, if the corporate form is disregarded, only B.T. should be deemed the "victim," not both B.T. and TTG. And, whether the corporate form is disregarded or not, wife D.T. cannot be deemed a "victim" too. The purchase payment being sourced from a solely-held account and the lack of evidence of a distinct payment or contribution distinguish this case from the "husband and wife" cases cited by the USPO in the Addendum and the Government in its Sentencing Memorandum.

(F) C.C. is listed as a "victim" for a loss amount of $200,000 for purchase of an economic participation interest. The funds for this purchase came from Carter Brothers; there is no evidence that the purchase was induced by any material misrepresentation by Mr. Watkins; and John Carter, acting within the line and scope of his authority as CEO of Carter Brothers, has renounced the Government's theory of the case on fraud in connection with the economic participation interest purchase on multiple occasions, both before and after the trial. Because the actual loss (if any) did not result "from the offense," C.C./Carter Brothers cannot be considered a "victim."

Mr. Watkins believes these objections, both individually and collectively, to the "victim" status of persons currently so designated are well-taken. Upon the proper granting of objections sufficient to remove three (3) or more persons from being designated as "victims," this enhancement cannot be applied in this case.

3. Special Offense Characteristics (10 or more victims) (USSG §2B1.1(b)(2)(A)(i)):

   See, Watkins Objection No. 142 and the numbered objections cited therein.

The Objection discusses the various means by which, individually or in combination, number of victims is reduced to fewer than 10, such that this enhancement does not apply.

4. Special Offense Characteristics (sophisticated means) (USSG §2B1.1(b)10)(C)):

   See, Watkins Objection No. 143 and the numbered objections cited therein.

The USPO and the Government seek to have the Court impose a two-level upward adjustment for a fraud offense that "involved sophisticated means" and where "the defendant intentionally engaged in or caused the conduct constituting sophisticated means." USSG §2B1.1(b)(10)(C). Mr. Watkins opposes the application of such an enhancement as unsupported in law and fact.

As the Guideline definition of "sophisticated means" makes clear, application of a "sophisticated means" adjustment requires both that the defendant engage in "especially complex or especially intricate offense conduct," and that such offense conduct "pertain[] to the execution or concealment of an offense." USSG §2B1.1 cmt. n. 9(B)(definition of "sophisticated means"). But, even viewed in its totality, the offense conduct identified by the USPO and Government is not particularly complex or intricate, especially in this commercial context. And, the more-complex "means and methods" were created by the Masada entities years before Mr. Watkins entered the Masada scene; were adopted and used for legitimate and not fraudulent purposes; and continued to be used by Mr. Watkins for legitimate and not fraudulent purposes, i.e., not to execute or conceal a crime.

What the USPO called a scheme, Mr. Watkins calls adherence to the applicable corporate governance documents for Masada and Nabirm. The Masada-related operating agreements (i.e., Defendants' Exhibits 3, 4, 5, and 6) and the language in the economic participation purchase agreements were written and adopted by the respective corporations years before Mr. Watkins became Masada's manager and CEO. Contrary to the Government's claim, Sentencing Memorandum, at 44, the economic interest purchase agreements and promissory notes – the first two of the alleged "sophisticated means and methods" identified by the Government -- were ***not*** originally drafted by Mr. Watkins, nor intended for use in misleading eventual investors. Indeed, the sale of economic participations is an authorized transaction in the Masada-related operating agreements; and the language in the pre-Watkins economic interest purchase agreement, still in use, meets the requirements imposed by the pre-Watkins operating agreements, unamended since Mr. Watkins assumed the Masada managerial and CEO authority.

As to the "web of corporate entities with varying ownership structures" the Government identifies as another sophisticated means, all the domestic/U.S. entities likewise had been formed before Mr. Watkins joined Masada. The various entities were formed to pursue different projects, markets, or businesses; and established as individual LLCs to isolate each company in order to limit liability (and to prevent the failure of one company from taking down the whole "web"), not to conceal material information.

The Government's puzzling claim that Mr. Watkins used the "web of corporate entities" to "conceal that what he was 'selling' the investor-victims wasn't equity in Masada or CESC (the businesses which held assets and value)," Sentencing Memorandum, at 44, is debunked by the economic interest purchase agreement itself. Rather than concealing the point, the purchase agreement ***showed*** that "what [Mr. Watkins] was selling" was ***not*** equity in those entities. Instead, the purchase agreement identified specific interests, including membership interests, that Mr. Watkins owned; specific sources from which Mr. Watkins might receive revenue as a result of the interests he owned; and the economic interest purchaser's right to receive a specified percentage of whatever revenue Mr. Watkins received from those sources. Stated differently, Mr. Watkins did not use a "web of corporate entities with varying ownership structures," all of which in the U.S. were formed before he joined Masada, to conceal that he was not selling equity interests in Masada or CESC, because he was not concealing – but instead memorializing by contract -- that point.

The Government's related, and equally mistaken, claim that Mr. Watkins used the "web of corporate entities" to conceal that he did not own equity in Masada or CESC is refuted by documentary, contractual evidence that he did own equity in Masada and CESC at all times material to the offense conduct. For example, by virtue of the December 29,

2005 equity sharing agreement with the Daryl Harms Parties and the May 2006 equity purchase agreement with the Terry Johnson Parties, Mr. Watkins, via Watkins Pencor owned 25% of the equity in Masada and CESC and controlled 100% of the voting shares in Masada and CESC. *See, e.g.*, Defendants Exhibits 16 at page 1, and 27 at page 9.

The USPO notes in passing Mr. Watkins' commission of bank fraud to obtain additional funds, by using nominee loans to circumvent bank regulations. Revised PRS, ¶143. But, the Arrington bank loan transactions fell within the exceptions to Regulation O, as codified in 12 C.F.R. § 215.3 (f)(2)(i) & (ii). Specifically, Watkins did not use "nominee loans to circumvent certain banking regulations;" instead, those bank loan transactions complied, Mr. Watkins believed he complied, and he in good faith intended to comply, with an established exception in Regulation O to its general limit on insider transactions.

Notwithstanding diligent searches, Mr. Watkins has found no federal criminal case in America, before his own, that used the criminal justice system to override state contract law and the plain language of purchase agreements, corporate operating agreements, and promissory notes where the purchasers/lenders were represented by qualified independent investment advisors who performed due diligence on the transaction prior to execution of the transactional documents.

Apart from the agreements and the alleged "web of corporate entities," about which there is no evidence such means were used to commit or conceal any of the charged fraud, remain only Mr. Watkins' e-mails, Stakeholder Reports, Special Updates, Year-end Reports, and other similar communications to the "victims"/investors as alleged "sophisticated means" he used pertaining to the execution or concealment of fraud. But, these means and methods are common to routine fraud cases, are not "especially complex," and do not take

this case out of the "heartland" fraud cases as required to justify a sentencing enhancement based on "sophisticated means." *See Barakat*, 130 F.3d at 1456 (requiring comparison between present case and the "routine" case of that type, to determine whether the factor "takes a case out of the heartland thereby justifying a sentencing departure").

In sum, the use of corporate operating agreements, economic participation agreements, and other contractual documents used here; year-end reports, interim reports, and other forms of communication; and other "means and methods" identified in paragraph 143 is not uncommon in a commercial context, particularly for a start-up company of a type such as the Masada and Nabirm entities. Watkins disputes that these "means and methods," individually or collectively, constitute "sophisticated means" in this commercial context.[14] And, these "means and methods" do not qualify as "especially complex or intricate offense conduct," and certainly don't qualify as "especially complex … conduct" that was adopted and employed for purpose of executing or concealing fraud, as required for application of the 2-level "sophisticated means" enhancement of the offense level.

5. <u>Special Offense Characteristics (defendant derived more than $1 million in gross receipts from financial institution(s))</u> (USSG §2B1.1(b)(17)(A):

The USPO, without objection from the Government, has determined that "an enhancement under this section is not appropriate in this case." Addendum to PSR, at 9

[14] Paragraph 143 also omits the material facts that (a) the "letter to the bank containing information to help secure" one of Dr. Arrington's loans from Alamerica Bank was required and requested by the bank for purposes of compliance with Regulation O and other regulatory requirements; and (b) Watkins did not conceal from the bank, and indeed Dr. Arrington disclosed to the bank during the loan application process, Watkins' interest in receiving the proceeds from that loan.

(resolving Watkins Objection no. 144) . If further response is required, *see* Watkins Objection No. 144 and the numbered objections cited therein.

6. Adjustment for Role in Offense (abuse of position of trust and/or use of special skills) (USSG §3B1.3): See generally Watkins Objection No. 146 and the numbered objections cited therein.

More specifically, the USPO has recommended application of this enhancement on three grounds: (a) Mr. Watkins, Sr.'s alleged abuse of a position of trust based on his relationship with investors; (b) his alleged use of special skill, i.e., his skills as a lawyer, to significantly facilitate commission or concealment of the offense; and, as asserted for the first time in the Addendum to the PSR (which the USPO served on Mr. Watkins just two (2) days ago, on July 9), (c) alleged abuse of a position of trust based on Mr. Watkins' alleged breach, in connection with the bank fraud offenses, of fiduciary duty owed to Alamerica Bank.

Mr. Watkins objects to any enhancement for abuse of a position of trust based on an alleged breach of fiduciary duty toward Alamerica Bank. Having been raised for the first time in the Addendum to the PSR[15], assertion of an enhancement on this basis was untimely, and/or should be deemed waived. Independent of those objections, neither theory of abuse of a position of trust nor the claim relating to the use of special skills will support an enhancement as a matter of fact or law.

[15] The Government likewise did not argue in its objections to the PSR for application of an abuse-of-position-of-trust enhancement based on breach of a fiduciary duty toward Alamerica Bank. Instead, the Government first argued for such an enhancement on that basis in its sentencing memorandum filed yesterday, July 10, after the USPO issued the Addendum to the PSR.

In his objections, with respect to the alleged abuse of a position of trust based on his relationship with investors, Mr. Watkins has identified numerous key relevant, material facts that the USPO omitted from the PSR -- all of them supported by evidence offered at trial or to be offered at the sentencing hearing. These omitted facts address, among other things, (a) the arms-length business relationship each "victim"/investor, even those with a pre-existing social friendship (which was not all of them), had with Mr. Watkins; (b) each "victim"/investor's status as a sophisticated or reasonably sophisticated investor, and/or person who had ready access to a sophisticated, retained professional financial advisor (and, in some instances, also retained legal advisor(s)); (c) the nature and extent of the due diligence undertaken (or in some instances, intentionally foregone) by each "victim"/investor before entering into each transaction at issue (whether purchasing an economic participation interest or entering into a loan transaction); (d) the level of information (e.g., specified documents, responses to questions) Mr. Watkins provided or offered to provide in connection with each "victim"/investor's pre-transaction due diligence; (e) Mr. Watkins' encouragement of, and his facilitation and willingness to facilitate, each "victim"/investor's independent pre-transaction due diligence; (f) Mr. Watkins never served, nor offered to serve, as a legal or financial advisor for any of the "victims"/investors regarding any proposed or completed transaction (purchase or loan); and never provided or offered to provide legal or financial advice to any "victim"/investor regarding any such transaction; and (g) Mr. Watkins never undertook any fiduciary role with any investor as to any Watkins Pencor, Masada, or Nabirm-related business.

To support an abuse of position of trust enhancement, the Government must prove both 1) Mr. Watkins held a position of public or private trust placed in him by the

"victim(s)," and 2) he abused that position of trust in a way or way that significantly facilitated commission or concealment of the offense of conviction. *E.g., United States v. Williams*, 527 F.3d 1235, 1250 (11th Cir. 2008)(elements); *United States v. Ward*, 222 F.3d 909, 911 (11th Cir. 2000) (same); *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998)(same); *see, e.g.,* USSG §3B1.3 (same); *United States v. Barakat*, 130 F.3d 1448, 1455 (11th Cir. 1997) (significant facilitation requirement). The determination whether there is a position of trust for purposes of this enhancement is highly fact-specific. *E.g., United States v. Morris*, 286 F.3d 1291, 1296-97 (11th Cir. 2002).

Contrary to the USPO's suggestion, *see* Addendum to PSR, at 10, although a trust relationship need not satisfy the legal definition of a fiduciary, to apply this enhancement "requires more than a mere showing that the victim had confidence in the defendant," i.e., "[s]omething more akin to a fiduciary function." *Id.* at 1299. Because "there is a component of misplaced trust inherent in the concept of fraud," *e.g., United States v. Mullens*, 65 F.3d 1560, 1567 (11th Cir. 1995), the Eleventh Circuit has repeatedly cautioned district courts "not to be overly broad" in imposing the abuse-of-position-of-trust enhancement "or the sentence of virtually every defendant who occupied a position of trust with anyone, victim or otherwise, would receive" such an enhancement." *E.g. Williams*, 527 F.3d at 1250 (quotations omitted). Accordingly, the Government must show the victims "placed a special trust" in Mr. Watkins "beyond ordinary reliance on the defendant's integrity and honesty that underlies every fraud scenario." *E.g., id.* at 1250-51. Stated differently, "[o]ne must hold a position of trust before it can be abused, however. Fraudulently inducing trust in an investor is not the same as abusing a bona fide relationship of trust with that investor." *E.g., Mullens*, 65 F.3d at 1567.

Mr. Watkins did not hold a ***position*** of trust vis-à-vis the investors.[16] He did not occupy a fiduciary position, or something akin to a fiduciary position, with any investor.[17] He did not have an attorney-client relationship with any investor with respect to any proposed or completed transaction; never served, nor offered to serve, as a legal advisor for any investor regarding any proposed or completed transaction; and never provided or offered to provide legal advice to any investor regarding any transaction. *See, e.g., Morris*, 286 F.3d at 1297 (defendant's status as an attorney, even if used to develop the trust of the victims, did not create a position of trust with the victims in the absence of an attorney-client relationship).

Mr. Watkins likewise never served, nor offered to serve as a financial advisor for investor regarding any such transaction; and never provided or offer to provide financial advice to any investor regarding any transaction. *See, e.g., Mullens*, 65 F.3d at 1567 (fraudulently inducing trust in investor does not establish position of trust). And , Mr. Watkins' control and discretion over the victims' funds arose only after each one agreed to invest or loan a sum certain; regardless, even complete control of and discretion over the investors' committed funds do not create a trust relationship as required for application of

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[16] The Government does not argue in its sentencing memorandum that an abuse-of-position-of-trust enhancement applies to Mr. Watkins' conduct toward the investors, instead arguing only for such an enhancement based on Mr. Watkins' alleged breach of fiduciary duty toward Alamerica Bank. But, that argument likewise fails, as shown below.

[17] The USPO has recently argued that this enhancement applies to a defendant who impersonates a person holding a position of trust. Addendum at 10 (citing *United States v. Ghertler*, 605 F.3d 1256 (11th Cir. 2010). But, there is no evidence or argument that Mr. Watkins ever fraudulently enticed any of the "victims" to enter a relationship of trust (e.g., by falsely claiming to be a professional in a fiduciary capacity), and then falsely represented himself as being in a fiduciary position (or something akin to it), and then abused discretionary authority the "victim(s)" conferred on him, as required to support such an enhancement. *Id.* at 1263-64; *see* USSG §3B1.3 cmt. n. 3.

the abuse-of-position-of-trust enhancement. *E.g., Morris*, 286 F.3d at 1296-97; *Mullens*, 65 F.3d at 1566-67 (Mullens, the head and sole stockholder in Omni, represented he was an investment and financial advisor, and indeed a "gifted advisor who the Omni investors could trust"; encouraged investors to put their life savings in Omni; had total control over all funds; sold investment opportunities in various forms, in reality running a Ponzi scheme; held ***not*** to have created a position of trust with his investor victims).

Apart from the lack any relationship of a fiduciary "or something akin to" one between Mr. Watkins and the "victims"/investors, the facts (including those identified by the USPO, see Addendum to PSR, at 10; Revised PSR, ¶146) likewise show that Mr. Watkins did ***not*** create or have a "personal trust relationship" either with any "victim"/investor, within the meaning of USSG §3B1.3.

The USPO cites Mr. Watkins' professional status as a "licensed attorney, banker, prominent businessman in the community," Addendum to PSR, at 10, and owner of the Masada companies, Revised PSR, ¶146; and more generically Mr. Watkins' personal status as a "trusted friend to the victims," Addendum to PSR, at 10, who testified they "trusted the defendant and thus afforded him significant discretion with their investments." *Id*. at 10. The USPO also notes the particular case of C.B., and the amount of funds Mr. Watkins obtained from C.B. ($6,150,000)[18], Revised PSR, ¶67, in several transactions over a period

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[18] The "over $14,000.000" figure cited in the USPO's Addendum to suggest the extent of how Mr. Watkins allegedly misused C.B.'s friendship , Addendum, at 10, grossly overstates (by more than double) the amount Mr. Watkins actually obtained from C.B., as shown elsewhere in the initial and revised PSRs. See, e.g., Revised PSR, ¶67, a loss chart for C.B. that shows a total of $7,150,000, which includes $1,000,000 that Mr. Watkins solicited from C.B., but C.B. did not pay. The "over $14,000,000" amount apparently would include all the economic interest purchases and non-bank loans (from C.B. only) by all of the alleged "victims"/investor. But, nearly all of whom were one-time purchasers, with a couple (e.g., T.S.) being two-time purchasers; and nearly all of whom had no or only a minor social

of about six (6) years, "with literally no return on the investment."[19] Addendum to PSR, at 10.

But, contrary to the USPO's suggestion, *see* Addendum, at 10, and even viewing from a the victims' perspective whether Mr. Watkins occupied a position of trust as required to warrant this enhancement, *e.g., Garrison*, 133 F3d. at 837, the friendship or social relationship any "victim"/investor may have had with Mr. Watkins before investing (or in a couple cases, reinvesting) – as noted above, in most cases non-existent, minimal, or limited – did not in itself create a position of personal trust. *E.g., Mullens*, 65 F.3d at (defendant's exploiting of trust developed through social friendships with fellow country club members, to misrepresent himself and his business, held insufficient to create trust relationship for abuse-of-position-of trust enhancement). Similarly, the "victims'/investors' subjective trust in Mr. Watkins based on his status as attorney, banker, prominent businessman and owner of Masada entities, and "trusted friend" likewise does not suffice to create a position of trust for purposes of this enhancement. *E.g., Morris*, 286 F.3d at 1297 (defendant's status as an attorney, even if used to develop the victims' trust, did not create a position of trust in

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relationship with Mr. Watkins before their purchases -- therefore ***clearly not*** persons properly considered as having a "personal trust relationship" with Mr. Watkins that he allegedly exploited.

[19] The undisputed evidence is that the Masada entities were (and still are) "pre-revenue," as all investors knew; and that revenue (or return on investment) would be generated through either build-out and operation of Masada's technologies (which have not occurred to date and were not pursued during the indictment period, following the halt of the New York demonstration project) or 'liquidation events" (sale of all or some of Masada's assets). The credible evidence shows that each of the economic interest purchasers ("victims"/investors) still owns the percentage economic interest each one purchased. Not permitted to do so previously, Mr. Watkins seeks to offer evidence in connection with the sentencing hearing that is intended to allow calculation of the value of the interest still owned by the economic interest purchasers for both the Masada entities (all investors) and Nabirm (C.B. only).

relation to the victims). As noted above, "fraudulently inducing trust in an investor is not the same as abusing a bona fide relationship of trust with that investor." *E.g., Mullens*, 65 F.3d at 1567.

As to all the economic participation interest transactions, the "victims"/investors and Mr. Watkins operated in a buyer-seller relationship, which is ***not*** a relationship of trust. *E.g., United States v. Stephen*, 440 Fed.Appx. 824, 829 (11th Cir. 2010)(buyer and seller of land not in fiduciary relationship). Indeed, as to all the non-bank transactions (economic interest purchases and non-bank loans), the "victims" and Mr. Watkins were in arms-length commercial relationships[20] "where trust [was] created by [Mr. Watkins'] personality or the victim's credulity – also ***not*** a relationship of trust as needed for application of this enhancement. *E.g., Garrison*, 133 F.3d at 838.

In short, as to all the wire fraud charges, Mr. Watkins did not occupy a position of trust vis-à-vis any of the victims within the meaning of USSG §3B1.3. Absent a position of trust to be abused, an enhancement for abuse of trust cannot be imposed. *E.g., Mullens*, 65 F.3d at 1567 ("One must hold a position of trust before it can be abused, however.").

Still regarding the wire fraud charges, an enhancement for abuse of a position of trust is improper for at least two other reasons too. The USPO notes for the first time in the Addendum that the "victims"/investors "afforded [Mr. Watkins] significant discretion with

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[20] Contrary to the suggestion of the USPO, *see* Addendum to PSR, at 10, that C.B. made investments/purchases in economic interests in the amount of $4 million and loans in the amount of $2,150,000 in several transactions over approximately 6 years, see Revised PSR, ¶67 (C.B. loss chart), "with literally no return on his investment," Addendum, at 10, did not make his business relationship with Mr. Watkins any less arms-length. Instead, the lack of return on investment to date simply bears out the risks of the investment, as set out in the risk report provided to each investor (including C.B.) before his or her entry into the economic interest purchase transaction, and in the risk warnings in the individual purchase agreement itself.

their investments." Addendum to PSR, at 10. Although the extent of professional or managerial discretion is a key determinant as to the existence of a position of trust, *see, e.g.,* USSG §3B1.3 cmt. n. 1, "an abuse-of-trust enhancement applies only where the defendant has abused discretionary authority entrusted to the defendant by the victim," and not by someone else. *E.g., Williams*, 527 F.3d at 1250 (quotations omitted); *Garrison*, 133 F.3d at 837 (quotations omitted). But, the discretionary authority exercised by Mr. Watkins came not from any of the investors, but instead from Masada, rendering the enhancement inapplicable.

As to the matters covered by the wire fraud charges, Mr. Watkins' position or relationship of trust, and his duty of loyalty, was not with the "victims"/investors, *e.g., Mullens*, 65 F.3d at 1566-67 (finding president and sole shareholder of investment company that was a Ponzi scheme not have special or fiduciary relationship with the investors), but with the Masada entities[21] and their equity owners -- which none of the "victims"/investors are. The discretionary authority that Mr. Watkins exercises (as to Masada) was vested in him by the other Class A equity holders in the Masada entities (the Johnson Parties and the Harms Parties), after the death of then-manager (and Class A equity holder) Daryl Harms, as part of an equity purchase and transfer-of-management agreement.

Although as manager of the Masada and Nabirm-related entities Watkins exercises significant discretion in the performance of his business duties, that discretionary authority is conferred on him and constrained by the various relevant operating agreements. Neither

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[21] And in C.B.'s case, both the Masada and Nabirm entities, in light of his purchase of economic participation

the operating agreements nor the standard contractual documents (e.g., economic interest purchase agreements, loan promissory notes) were drafted by Mr. Watkins. All of them pre-dated by several years his assumption of the role of manager, and by years his initial involvement with Masada (through his first investment) as well. Contrary to the PSR's assertion that Mr. Watkins "created" purchase agreements and irrevocable assignments of economic interests[22], Revised PSR, ¶146, those agreements likewise pre-dated by several years Mr. Watkins' assumption of the role as manager; he has functioned under the operating agreements without amendments since his entry into the role of manager.

Put another way, Mr. Watkins' discretionary authority as manager was not conferred on or vested in him by all or any of the "victims"/investors. Mr. Watkins would hold and exercise the same managerial authority if there were no such "victims"/investors.

Instead of entrusting such discretionary managerial authority to Watkins, the investors simply have agreed to accept and be bound by that pre-existing authority, just as Mr. Watkins is, as based in the operating agreements that pre-dated Mr. Watkins' managerial tenure by several years. The investors agreed to that pre-existing authority through the express incorporation of those operating agreements in their economic interest purchase agreements. In turn, that purchase agreement has been the "gateway" into each one's economic participation in Masada-related business, by their buying a percentage "piece" of Mr. Watkins' own economic interest. That purchase is executed through a standard agreement (the irrevocable assignment and purchase agreement) that

[22] Watkins certainly has "executed" such documents to convey certain economic interests or other rights, PSR ¶146, but as drafted and modified by others.

likewise pre-dated Mr. Watkins' managerial tenure by several years, and he continued to use.

Mr. Watkins' discretionary authority is not exercised as part of the decision by the investor whether to purchase the economic participation interest or make the loan (as distinguished from, e.g., the investors in *Mullens* who entrusted funds to defendant to invest, and he made the decision whether to invest and if so, how). Mr. Watkins' discretionary authority (which the indictment charged, and the jury found, he used fraudulently) instead is exercised in the disposition of the funds once they have been received. That discretionary authority comes from Masada equity owners and is governed by the pre-existing operating and other agreements, and does not come from the investors. Even if Mr. Watkins abused that authority fraudulently, its source in someone other than the "victims"/investors is an additional or alternate ground for barring application of the abuse-of-trust enhancement as to the wire fraud charges.

Finally as to the wire fraud charges, even if (a) a position of trust had been created between Mr. Watkins and the "victims"/investors, and (b) the discretionary authority he exercised had come from the "victims"/investors (and not Masada), there is no or insufficient evidence that Watkins specifically used the position of trust, akin to a fiduciary relationship, and used it in a significant way, to facilitate or conceal fraud – as also required for application of this adjustment. *See, e.g., Barakat*, 130 F.3d at 1454-55; USSG §3B1.1.

In addition to the general confidence the individual "victims"/investors placed to Mr. Watkins, whether based on professional status or friendship, the USPO identified for purposes of this proposed enhancement (for the first time, again, in the Addendum) the economic interest purchase agreements, e-mails to the investors, stakeholder reports,

special updates, and year-end reports as the means and methods Mr. Watkins used to perpetrate the fraudulent scheme. Addendum, at 8. But, none of these means and methods became available to him because or by virtue of any position of trust. Or, in other words, Mr. Watkins did not gain an advantage, i.e., the use of these means or methods, that he -- as distinguished from a fraudster with no position of trust – used to commit wire fraud. *E.g., Barakat*, 130 F.3d at 1455-56.

The means and methods are not unique to, or do not at least result from, a position of trust within the meaning of USSG §3B1.3; and could be used by any perpetrator of fraud in an investment-type of scheme, whether there is a position of trust or no position of trust. Even if he had a position of trust vis-à-vis the "victims"/investors, the means Mr. Watkins employed did not use any such position of trust to give him an advantage over a fraudster with no position of trust in the commission or concealment of the offense of conviction; and there was no abuse of a position of trust "in a manner that significantly facilitated the commission or concealment" of the offense of conviction. USSG §3B1.3; *Barakat*, 130 F.3d at 1455-56. Independent or in addition to the other grounds noted above, failure to satisfy the essential element that the abuse of the position of trust must significantly facilitate the commission of concealment of the offense of conviction (here, wire fraud) requires rejection of the abuse-of-a-position-of-trust enhancement as to the wire fraud charges.

Turning to the bank fraud charges, as noted above, the USPO has this week asserted for the first time, Addendum, at 10, followed by the Government, Sentencing Memorandum, at 45-46, an argument that the abuse-of-a-position-of-trust enhancement should be imposed based on a breach of fiduciary duty owed by Mr. Watkins as a bank

insider to Alamerica Bank in connection with the bank fraud offenses on which he was convicted.

Assuming (without conceding) the existence of a fiduciary duty to Alamerica Bank based on his ownership at the time of substantial shares in the holding company that owned Alamerica, Mr. Watkins denies that he breached any such fiduciary duty to the bank, based on the omitted material facts from trial set out in Watkins Sr.'s Objection No. 112.

Alternatively, if the Court were to find that Mr. Watkins breached a fiduciary duty to Alamerica in connection with the bank fraud offenses of conviction, an enhancement based on such a breach still would be clearly erroneous and contrary to law for lack of evidence that Mr. Watkins used/abused his position of trust as a bank insider to significantly facilitate commission or concealment of the offense.

The USPO's generic claim that Mr. Watkins "manipulated banking regulations and his relationships with other bank owners and employees," Addendum, at 10, does not identify the specific conduct in connection with the "nominee loans" the USPO contends warrants the abuse-of-position-of-trust enhancement. In turn, the Government argues only that Mr. Watkins "hid from the [Alamerica] Board his involvement in the nominee loans, even including [his] participation in the Kim Perkins letter." Sentencing Memorandum, at 46.

Evidence shows (some of which the Government apparently concedes, by its lack of objection) that Mr. Watkins did not participate in the application process for any of the nominee loans in question. As the Government implicitly concedes, the uncontradicted evidence is that Mr. Watkins never asked Dr. Arrington to falsify any information on the Alamerica Bank loan application for the $750,000 loan (the only loan for which Mr.

Watkins directed Dr. Arrington to Alamerica, or was aware Dr. Arrington would apply for at Alamerica, as opposed to Dr. Arrington using one of his other banking relationships), omit any material information on the application, or conceal that Mr. Watkins would be entitled to tangible economic benefits from that loan. Further, also as implicitly conceded, Mr. Watkins was not part of the loan application, acceptance, review, underwriting, grading, documentation, or approval process for the three Arrington loans; and did not impact the Bank's lending decisions on those loans. Mr. Watkins did not attend the September 2012 Bank board meeting, and was not involved in any of the discussions or voting on the $750,000 loan during that meeting.

If Mr. Watkins is found to have breached any fiduciary duty as a bank insider to Alamerica, such breach would consist of omissions, i.e., nondisclosures of material information, especially about his anticipated receipt of tangible economic benefits from the $750,000 Alamerica loan to Dr. Arrington, or only possibly his uncredited drafting of the Perkins letter that was requested by Alamerica as a "source of repayment" letter as part of the processing of that loan.

At most, Mr. Watkins' position as a bank insider was a necessary element of the bank fraud offense, i.e., his nondisclosure of his receipt of tangible economic benefits from the nominee loans that the Government charged he could not lawfully receive as an insider. But, Mr. Watkins did not use his position *as a bank insider* (his position of trust vis-à-vis the bank, the identified victim of the bank fraud charges) to participate in – i.e., facilitate commission or concealment of --those alleged bank fraud offenses in any way. For example, he did not deliberate or vote on the loan approval, assist Arrington as the nominee borrower in applying for any of the loans, or direct or pressure the Bank's board

or any officer to take any particular action. And even if his ***status*** as a bank insider was a necessary part of the proof of the bank fraud, Mr. Watkins' alleged fraudulent concealment of his beneficial interest in the loans or his anticipated receipt of tangible benefits/loan proceeds did not use or depend in any way on his occupying that position of trust.[23]

And, Mr. Watkins took no affirmative action to facilitate commission or concealment of the offense made possible by or taking advantage of his position *as a bank insider*. The sole affirmative action identified – his drafting of the letter referencing Nabirm interests as the source of repayment for the $750,000 loan – arose from his position as manager and equity owner in Nabirm, ***not*** his position as an Alamerica Bank insider.

If Mr. Watkins is deemed to have breached a fiduciary duty to Alamerica in connection with the bank fraud offenses, the concealments of material information and his ghost writing of the Nabirm letter under Kim Perkins' signature (or any other affirmative act the Government may identify) are not unique to, or do not at least result from, Mr. Watkins' position as a bank insider to Alamerica, i.e., a position of trust vis-à-vis the bank "victim" of the offense of conviction, within the meaning of USSG §3B1.3. Indeed, those means could be used by either an insider or an outsider in a bank fraud scheme, i.e., whether there is a position of trust or no position of trust.

[23] Suppose someone who is not a bank insider knowingly agrees with an insider to commit bank fraud by procuring an unlawful nominee loan for the tangible benefit of the insider. Concealment by the outsider, as well as by the insider, of the insider's receipt of tangible benefits/loan proceeds under this scenario is necessary for completion of the offense. Just as the outsider's concealment does not use, depend on, or take advantage of a position of trust (because the outsider does not hold one), neither does the insider's concealment use, depend on, or take advantage (as compared to the outsider) of the position of trust the insider does hold.

Assuming Mr. Watkins had a position of trust vis-à-vis the bank victim, his conduct constituting any breach of fiduciary duty did not use Mr. Watkins' position of trust as a bank insider to give him an advantage in the commission or concealment of bank fraud over a bank outsider with no position of trust; and there was no abuse of a position of trust "in a manner that significantly facilitated the commission or concealment" of the offense of conviction. USSG §3B1.3; *Barakat*, 130 F.3d at 1455-56.

As with the abuse-of-position-of-trust argument arising out of the wire fraud offenses, the failure to satisfy the essential element that the abuse of the position of trust significantly facilitated the commission of concealment of the bank fraud offenses bars application of the abuse-of-a-position-of-trust enhancement arising out of those charges too. In short, the proposed enhancement under USSG §3B1.3 cannot be imposed based on abuse of a position of trust, on any theory identified by the USPO or the Government.

As to the alleged use of a "special skill" as a joint or alternate basis for applying the 2-level upward adjustment, the only potential "special skill" identified in the PSR is that of "licensed attorney." Revised PSR, ¶146; *see* USSG §3B1.3 cmt. n. 4 (identifying "lawyers" as example of "a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing"). But, for this enhancement to be applied based on use of special skill, Mr. Watkins must have used that "special skill" to "facilitate significantly the commission or concealment" of the offenses of conviction. USSG §3B1.3 Background; *see* USSG §3B1.3; *Barakat*, 130 F.3d at 1455 (abuse of trust under same Guideline).

As with the alleged abuse of a position of trust, the evidence does not show that Mr. Watkins ever actually "used" his legal skill in connection with any proposed or completed

transaction relating to any of the offenses of commission; nor that his use, if any, of any such skill significantly facilitated the commission or concealment of any of the charged fraud offenses.

As a threshold matter, two types of information cited by both the USPO and the Government, i.e., the victims' knowledge of Mr. Watkins' attorney status/his status as a "well-known attorney," and the "increased level of legitimacy"/"air of legitimacy and validity" that purportedly attached to certain documents or claims because of his attorney status, Addendum to PSR, at 11; Sentencing Memorandum, at 47, are merely passive, status information that do not reflect any activity, as required for "use" of legal skill, or "use" ***by Mr. Watkins*** of legal skill – the first steps in analyzing whether this enhancement can apply. They can provide no support for application of this enhancement and should be ignored.

With respect to the transactions (e.g., loan, purchase) and investments relevant to this case, Watkins never (a) represented any victim/investor as attorney, or formed an attorney-client relationship with any of them, (b) acted in the capacity of attorney toward any victim/investor, nor (c) provided legal advice to any of them.

The "*execution*" by Mr. Watkins of various documents "which the victim investors [allegedly] were required to sign," such as promissory notes, purchase agreements, and progress reports, as cited by the USPO in support of the proposed enhancement, Addendum, at 11, did not involve use of legal skill by Watkins.[24] As to the *drafting* of those

[24] Watkins "executed" the documents acting not as a lawyer but as the owner of economic participation interests and the seller of the interest he was conveying to each investor; and his "execution" did not require legal skill, but only that he use the pre-existing standard contractual documents that were drafted by others and that pre-dated by years his tenure as manager.

and other unspecified documents, contrary to the Government's claim, Sentencing Memorandum, at 47, (a) the form promissory notes and purchase agreements that Mr. Watkins used for loans and all economic interest purchases (not just those involving the identified investor "victims") were drafted by corporate lawyers, ***not*** Mr. Watkins, and thus did not involve use of ***his*** legal skill; (b) those notes and agreements pre-dated Mr. Watkins' tenure as manager of the Masada entities by several years, and even his initial participation (via his initial investment) in Masada by some years; and (c) the progress reports and the reports "regarding critical details regarding the business ventures, including investigations by the [SEC]," Sentencing Memorandum, at 47, were business documents reporting business information, not legal documents or documents intended to provide legal opinions or analysis; and did not mainly invoke or depend on legal skills, as opposed to business judgment or acumen, for their content or analysis. Mr. Watkins' use -- if any -- of his legal skills, in his dealings or communications with the "victims"/investors relating to any proposed or completed transaction at issue was at most incidental.

Not only did Watkins **<u>not</u>** use or only incidentally use his skill as an attorney with respect to any "victim"/investor concerning any relevant transactions or investments, as required for application of the "use of special skills" adjustment; there is no evidence he ever used his skill as attorney, and did so in a significant way, to facilitate commission or concealment of any offense within the scope of the charged conspiracy – as again likewise required to trigger the "special skills" adjustment.

The Government contends that the promissory notes and purchase agreements – which, again, Mr. Watkins did not draft – and progress reports, which were business and

not legal documents, "created a complex web intended to obscure the truth about [Mr. Watkins'] ownership, the interest which was being conveyed, and [unspecified] activities of Masada." Sentencing Memorandum, at 47. The Government also claims generically that Mr. Watkins "was able to use his skill as an attorney to conceal the ownership structure from the investor-victims." *Id.* But, in neither claim does the Government explain how; nor does it elaborate as to why any skill allegedly involved would be legal skill, not business. As a result, the Government cannot show that Mr. Watkins used legal skill to facilitate significantly the commission or concealment of the offense(s) of conviction

In short, neither "abuse of a position of trust" nor "use of special services" – whether together or either one individually -- to significantly facilitate the crime or its concealment can be established, as required to apply the enhancement under USSG §3B1.1. Such an enhancement accordingly must be denied.

7. <u>Adjustment for Obstruction of Justice</u>; *See*, Watkins Objection No. 147.

The USPO and the Government seek, and Mr. Watkins opposes, an upward adjustment based on obstruction of justice with regard to the investigation, prosecution, or sentencing of the offense pursuant to USSG §3C1.1. As the basis for this proposed enhancement, the USPO asserts Mr. Watkins "provided testimony during his trial in which he committed perjury and made statements inconsistent with the jury findings." Revised PSR, ¶ 147.

Mr. Watkins denies that he committed perjury or otherwise obstructed justice during trial. Furthermore, making statements inconsistent with the jury findings does not per se satisfy the requirement for application of this enhancement based on trial testimony.

The enhancement for obstruction of justice based on perjury does not automatically apply any time a testifying defendant is convicted. *See, e.g., United States v. Dunnigan*, 507 U.S. 87, 95 (1993). Where, as here, a defendant objects to a sentence enhancement based on his or her trial testimony, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same." *E.g., id.* These findings are that (1) the defendant gave false testimony under oath (2) concerning a material matter (3) with the willful intent to deceive, rather than as a result of confusion or mistake. *E.g., id*. at 94.

As to the particular testimony of Mr. Watkins that the USPO and/or the Government may contend constituted obstruction of justice, the PSR even as revised identifies no particular testimony, and states only that "[t]he government has indicated that it intends to provide specific examples of the defendant's perjurious statements and other obstructive conduct at or before sentencing." Revised PSR, ¶147. The Government does identify two fairly specific examples of Mr. Watkins' trial testimony it contends constitute perjury, as well as the category of unspecified instances of contradiction between Mr. Watkins' deposition before the SEC and testimony of investor-victims at trial.

Given the lack of sufficient, specific notice of the particular instances of testimony by Mr. Watkins and the conflicting testimony or evidence from other witnesses, Mr. Watkins re-urges his Objection No. 147. Mr. Watkins also anticipates contesting at the hearing whether particular instances of his testimony amount to perjury, and objecting to application of the obstruction of justice enhancement.

Noticeably absent from the PSR were any downward adjustments to the offense level based upon the following "Offender Characteristics:"

1. Mr. Watkins cooperated fully with FDIC and State Banking Department regulators who questioned him in 2013 about the "nominee" loans referenced in Counts 9 and 10 of the Indictment. In doing so, Mr. Watkins never denied his receipt of tangible economic benefits. Instead, Mr. Watkins has repeatedly and consistently asserted his entitlement to the exceptions to Regulation O that are codified in 12 C.F.R. § 215.3 (f)(2)(i) & (ii).
2. On June 17, 2013, Mr. Watkins initiated formal arbitration proceedings against the Thomas Global Group, LLC, before the American Arbitration Association when Bryan Thomas first made allegations of "fraud" in connection with TGG's purchase of a Watkins Pencor economic participation.
3. Beginning in June of 2014 and continuing through August 31, 2016, Mr. Watkins cooperated with SEC investigators who were probing the financial transactions that are referenced in Counts 2 through 8 of the Indictment. Mr. Watkins never invoked his Fifth Amendment right when answering questions about these transactions.
4. On April 4, 2019, the SEC dropped all claims of "fraud" regarding the Watkins Pencor economic participation purchase transactions for the "victims" identified in the criminal case when it filed an Amended Complaint against Mr. Watkins. Its original September 1, 2016 lawsuit asserted fraud claims in connection with these transactions.
5. The SEC did not allege in the original or amended Complaint that Donald V. Watkins, Jr., was a participant in any fraudulent scheme with Mr. Watkins, Sr. to defraud the "victims" in this case.

6. On June 28, 2014, Mr. Watkins sent all of the "victims" (except TGG, which was engaged in litigation with Mr. Watkins at the time) an email regarding the SEC investigation that stated:

> "As a result of an interview with one of the Watkins Pencor economic participants last week, we now have a better understanding of the SEC inquiry referenced in my June 22, 2014 Masada Stakeholder Report. The focus of the interview was whether this particular economic participant (who happens to be a lawyer) knew that a portion of the proceeds from the purchase transactions was used by me for personal expenditures. The SEC is trying to determine whether the economic participation agreement was a "purchase" of a defined portion of my equity interest in the Masada family of companies, or a direct "investment" in Masada. If this was a purchase transaction, then I was free to use the proceeds from the purchase as I saw fit. If this was a direct investment in Masada, then all of the proceeds had to be used by Watkins Pencor for Masada-related expenses.
>
> Fortunately, the plain language of the economic participation agreements and Masada-related operating agreements clearly and definitively answers this question. To assist the SEC in understanding the purchase transaction structure and the material terms and conditions in each purchase agreement, Watkins Pencor provided the Commission with the relevant transactional information specified below.
>
> 1. The Watkins Pencor purchase agreements evidence a purchase transaction. The transaction assigned for a purchase price a defined economic participation interest in Watkins Pencor's equity stake in any Masada company existing as of the date of purchase, or to be formed in the future. This assignment is commonly referred to in the industry as an assignment of a "profits" interest. This term is expressly defined in the Masada-related operating agreements incorporated by reference into each purchase agreement. Watkins Pencor broadened the term " profits" interest to an "economic" interest so that the purchasers of this property interests could benefit from the proceeds of a merger, sale or initial public offering of Masada, and not just the forecasted profits derived by Masada from the operation of waste-to-energy facilities in development.
>
> 2. Watkins Pencor's assignment of an economic interest to the purchasers was irrevocable. The assignment was made "subject to the assignment provisions of any and all operating agreements in force to which Pencor…. [and other listed companies] are parties", including the 1998 operating agreement for Masada Resource Group, LLC. Watkins Pencor also placed restrictions in the economic participation agreement on the purchaser's ability to transfer his/her ownership of the agreement to a

third-party. The relevant operating agreements pre-date all of the purchase transactions.

3. While the purchasers are not Class A or Class B members of Watkins Pencor or any Masada entity, they are the assignees of Watkins Pencor, a Class A member in various Masada entities by virtue of its ownership of Pencor-Orange Corp. The right to sell all or a portion of a Watkins Pencor's economic interest in Masada entities is expressly authorized in the operating agreements referenced in the agreements. The proceeds of the sale belong to the member selling or disposing of a portion of his/her membership interest. The proceeds from the disposition of a membership interest have never belonged to any Masada entity.

4. On the face of each executed purchase agreement, the purchaser agrees to be bound by the terms and conditions of the operating agreements specified in his/her purchase agreement.

5. By the express terms of the operating agreements, assignees of Masada members have no rights to participate in the management of the company, including without limitation, the rights to information and to consent to or approve actions of the company or to bind the company. Notwithstanding these contractual limitations, Watkins Pencor extended unfettered access to the purchasers to Masada-related information during their pre-purchase due diligence period and their post-purchase assignee period. Watkins Pencor also sent out regular stakeholder reports to the purchasers.

6. The transactional structure and material terms and conditions of the Watkins Pencor assignments were specifically discussed with each economic participant prior to the closing of his/her transaction. The purchase agreements memorialize the structure of the purchases, as well as the material terms and conditions of the transactions."

The June 28, 2014 email is attached hereto as **Exhibit D**.

7. After receiving the above-referenced email, no person identified as a "victim" in this case contested the factual information presented in the email until they took the witness stand in this case nearly 5-years later.

8. On December 21, 2015, Mr. Watkins furnished the Department of Justice a 60-page Rule 408 and 410 Memorandum concerning the facts and circumstances

surrounding the Watkins Pencor-TGG economic participation purchase transaction to "assist the Department of Justice and United States Attorney for New Jersey for criminal law enforcement purposes." After receipt of the Memorandum, the U.S. Attorney's Office for New Jersey declined prosecution on any charges related to this transaction.

9. On March 14, 2018, Mr. Watkins furnished the U.S. Attorney for the Northern District of Alabama with a 54-page Rule 408 and 410 Memorandum concerning the facts and circumstances surrounding all of the transactions referenced in Counts 1-10 of the Indictment to "assist the DOJ and the USA-NDA for criminal law enforcement purposes."
10. In April and September 2018, Mr. Watkins voluntarily appeared before the grand jury investigating this case. He answered all questions presented to him by prosecutors and grand jurors in a truthful manner.

Instead of awarding Mr. Watkins a downward adjustment for (a) his enduring efforts to address the facts and circumstancing regarding the challenged financial transactions in a multitude of regulatory venues and judicial tribunals and (b) for protecting the viability of his businesses and the monetary value of his stakeholders' economic interests, the PSR socks Mr. Watkins with a 2-level enhancement for "Obstruction of Justice."

4. There is no "Actual Loss" or "intended Loss" in this Case

"Actual loss" is defined as the "reasonably foreseeable pecuniary harm that resulted from the offense." USSG §2B1.1, app. Note 3(A)(i). "Pecuniary harm" is a harm that is "monetary or that otherwise is readily measurable in money." USSG §2B1.1, n.3(A)(iii). The

Guidelines commentary is clear that "non-economic harm" does not count. USSG §2B1.1, n.3(A)(iii).

Accordingly, in order for a loss enhancement to be assessed, the Government must show, and be able to quantify, an economic harm caused by the wire and bank fraud. The Government has not made such a showing in this case.

Furthermore, the Declaration of Jessica A. Findley demonstrates that Mr. Watkins interest in the Masada family of businesses still has substantial economic value. Ms. Findley Declaration is attached hereto as **Exhibit E.**

a. Alamerica Bank's "Loss"

Indeed, there is no evidence of any "actual loss" of the pecuniary kind for Alamerica Bank. The Bank actually profited from the Arrington loans. Any cost the Bank incurred relating to its compliance with a regulatory order resulted from a multitude of management-level infractions and not Mr. Watkins' alleged Regulation O violation. Indeed, the Bank's CEO has his own Regulation O violation, which was cited by the FDIC in the same examination report that cited Mr. Watkins' alleged violations of Regulation O but was never enforced against the CEO from a regulatory standpoint.

At the time of the "nominee" loans in question, Mr. Watkins was the non-executive chairman of Alamerica Bank. He received no compensation for this role. Watkins was never issued a Bank credit card to use for charging privileges as the Bank's chairman. He has never sought or received reimbursement for his travel, meals, lodging, and time for matters relating to Alamerica Bank. Furthermore, Mr. Watkins is a lawyer with experience in commercial transactions who has donated hundreds of hours of legal services to Alamerica Bank for which he has never sought compensation or tax credits.

Finally, Mr. Watkins used his personal funds to: (a) pay for promotional activities in Alamerica Bank's name that awarded about 30 college scholarships to deserving high school students, (b) give executive producer credit to Alamerica Bank for a widely viewed documentary that aired nationally on PBS, and (c) recognize Alamerica Bank as the title sponsor of the nationally televised "Magic City Classic" football game between Alabama State University and Alabama A&M University. Yet, Mr. Watkins never sought or received a dime from Alamerica Bank as reimbursement for these costly marketing and branding initiatives.

b. "Losses" Attributed to Watkins Pencor Economic Participants

Masada and Nabirm are ongoing business enterprises that are working to implement their business plans. Both companies have potentially valuable assets. Nabirm's assets are described in the Arowolo Declaration, which is attached hereto as Exhibit A.

The Government has attempted to equate the duration of the pre-revenue business activities for Masada and Nabirm with a "loss" of the "victims'" money. They glossed over the Great Recession of 2008-2011 that collapsed over 100 of Masada's competitors and other markets conditions that drive asset liquidation factors. Yet, the Government's theory on "actual losses" ignores the representation that each "victim" made to Watkins in his/her purchase agreement that he/she had no need for liquidity in the investment.

More telling, no "victim" has requested an "abandonment loss" letter from Watkins Pencor or Masada in order to write-off the value of his/her investment on his/her IRS income tax return.

Accordingly, the Court should find that there was no "actual loss" in this case.

c. There Was Never an "Intended Loss" in this Case

The evidence is also clear that there was no "intended loss" in this case. An intended loss can only be found if there is sufficient evidence to show that Mr. Watkins subjectively and purposely intended to cause a specific pecuniary harm. The leading case on this subject is *United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011), in which the court expressly repudiated the notion that intended loss means anything other than "a loss the defendant *purposely* sought to inflict." Id. at 1050 (Emphasis in original). The Tenth Circuit went on to observe that, "'[i]ntended loss' does not mean a result the defendant merely *knew* would result from his scheme or a loss he might have *possibly and potentially* contemplated." Id. (Emphasis in original). Indeed, in its Reason for Amendment, the Commission expressly adopted the Tenth Circuit's approach in Manatau. U.S. Sentencing Guidelines, Amendments to the Guidelines 27 (April 30, 2015). According, the USSG §2B1.1, app. Note 3(A)(iii)(2015). In other words, "intended harm" is limited to economic harm the defendant subjectively desired to cause.

Taking the evidence in the light most favorable to the Government, it can be read to show that Mr. Watkins diluted his economic interests in Masada whenever he needed liquidity to protect the company's assets and fund its growth. Because Mr. Watkins deferred his Masada salary, rental income that Masada owed him, and deferred most of his repayment for loans he made to Masada and expense reimbursements due him from the company, it is clear his intent was not to harm "victims" or anyone else. In fact, every member of Mr. Watkins' family sacrificed his/her financial security to advance and protect the business interests of Masada, Nabirm, and their stakeholders.

Accordingly, the Court should find that there was no "intended loss" in this case in any amount.

III. Conclusion

For all the foregoing reasons, Mr. Watkins, Sr. should be given a below-Guidelines sentence of home detention for 24 months, followed by a term of supervised release of not more than three years.

Respectfully Submitted,

s/ Donald V. Watkins, Sr.
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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2019, I filed the foregoing Memorandum with the Clerk of the Court; and served a copy of this document via email on all counsel of record and the U.S. Probation Office.

/s/ Donald V. Watkins, Sr.
Counsel for Defendant Watkins