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November 18, 2009

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By Hand

Hon. John Gleeson
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ NOV 23 2009 ★
BROOKLYN OFFICE

Re: United States v. Herman Jacobowitz, No. 04-CR-558-JG-1

Dear Judge Gleeson:

My firm has been retained by Herman Jacobowitz with respect to various post-conviction matters. Herman pled guilty before this Court to violating 18 U.S.C. § 371 and 15 U.S.C. §§ 78m(a) and 78ff, and was sentenced on July 31, 2007 principally to 15 years' imprisonment. Herman's brothers, Aaron and Jacob, pled guilty to similar crimes arising from the same fraud, and received ten and seven year sentences, respectively.

I am writing to seek the Court's assistance in providing further direction to the Bureau of Prisons ("BOP") to carry out the Court's intentions at sentencing. At Herman's sentencing, the Court recommended that he be incarcerated at Otisville and that the Bureau of Prisons "waive the security designation," as reflected in the sentencing transcript (at pages 77-78). The Court's recommendation is also reflected in the Court's calendar note, which appears on the Court's docket as Docket Entry 157. (Copies of the relevant portion of the sentencing transcript and the calendar note are attached hereto as Exhibits 1 and 2, respectively, for your convenience.) Since Herman was eligible for a "low" security designation, a waiver would have allowed him to serve alongside his brothers, who are housed in Otisville's minimum-security Federal Prison Camp ("FPC").¹

¹ The Court did not specifically recommend a waiver of the security designation in its Judgment of Conviction, but did recommend that Herman be incarcerated at Otisville (*see* Judgment of Conviction at 2), which is consistent with the Court's intention to recommend that the BOP waive the "security designation" that would otherwise prevent the BOP from sending Herman to the minimum-security prison camp at Otisville. A copy of the Judgment of Conviction is attached hereto as Exhibit 3 for the Court's convenience.

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The Bureau of Prisons, however, concluded that Herman was ineligible for placement in a minimum-security facility (such as FPC Otisville) solely because of the length of his sentence. Under BOP policy, any sentence greater than ten years adds a Public Safety Factor (PSF) to the BOP's incarceration determination, and results in designation to a low-security facility as opposed to a minimum-security facility. BOP policy, however, expressly acknowledges that this PSF may be waived. As BOP program guidance states: "A male inmate with more than ten years remaining to serve will be housed in at least a Low security level institution unless the PSF has been waived." BOP Program Statement P5100.08, ch. 5, p. 9 (emphasis added).

I am writing to ask the Court to enter an order expressly recommending that the BOP waive the Public Safety Factor in designating where Herman will be incarcerated. The BOP has waived its time-based PSF in the past, and we have substantial reason to believe that the BOP will honor this Court's recommendation, if it is made with sufficient specificity.

For example, Sanjay Kumar, the former head of Computer Associates, was sentenced in 2006 to 12 years in prison for a fraudulent scheme that resulted in \$2 billion in losses. At sentencing, Judge Glasser recommended that the BOP designate Mr. Kumar to the minimum-security camp in Fairton, New Jersey. *See United States v. Sanjay Kumar*, 1:04-cr-00846-ILG-1, Docket Entry 284 (E.D.N.Y. Nov. 27, 2006). The BOP initially ignored this request. Two months before Mr. Kumar's incarceration, however, Judge Glasser entered an order, upon the request of counsel, explicitly recommending that the BOP "waive the Public Safety Factor that would otherwise apply as a result of the length of Mr. Kumar's sentence," and send him to the minimum-security camp in Fairton. *See id.*, Docket Entry 345 (E.D.N.Y. June 6, 2007). The BOP then adopted Judge Glasser's recommendation in full.

Similarly, in the WorldCom case, Judge Barbara Jones recommended that the BOP "waive the Public Safety Factor that would otherwise apply due to the length of Mr. Ebbers' sentence, based on the Court's determination that there is no need for Mr. Ebbers to be designated to a facility with greater than a low security designation." *See United States v. Ebbers*, 1:02-cr-01144-BSJ-3, Docket Entry 305 (S.D.N.Y. July 18, 2005). Although Mr. Ebbers' sentence was 25 years, which normally would require designation to a medium-security facility, BOP designated Mr. Ebbers to a low-security facility.

The reason for the disparate treatment between Messrs. Kumar and Ebbers, on the one hand, and Mr. Jacobowitz, on the other hand, is the language used by the sentencing courts. Apparently, the BOP will only waive the PSF when a sentencing court expressly recommends such a waiver. Thus, BOP has not effectuated this Court's recommendation that Herman Jacobowitz be designated to FPC Otisville because the Court at sentencing did not use the precise language to which the BOP responds -- *i.e.*, the Court did not specifically recommend that BOP "waive the Public Safety Factor." As a result, Mr. Jacobowitz is currently incarcerated at the low-security facility at Fort Dix, New Jersey.

We believe that BOP would consider and accept this Court's recommendation if the Court entered an Order containing language specifically recommending that BOP waive the

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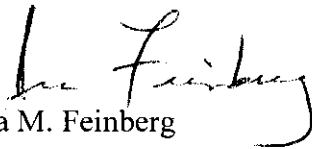
Public Safety Factor. Under 18 U.S.C. § 3621(b), the BOP has the authority to consider “at any time” any statement “by the court that imposed the sentence recommending a type of penal or correctional facility as appropriate.” (Emphasis added.)

According to prison staff, Herman has been a model prisoner, and our goal is simply to unite him with his brothers. Having the three brothers together in one facility would further the BOP’s commendable policy of attempting to keep families together when possible, and would enable the brothers’ very elderly mother to visit all three of her sons at once. Currently, she is forced to travel two hours north to visit Aaron and Jacob, and two hours south to visit Herman, an onerous trip that she makes almost every week. It would provide her significant relief if she could visit all three sons at once. Finally, having Herman at FPC Otisville would greatly ease the burden on Herman’s wife and eight children, who would be able to share travel time and costs with Jacob’s and Aaron’s wives and children.

Attached is a proposed Order that includes the key language, which we respectfully request the Court to sign. As the lead prosecutor on this case, AUSA Richard Faughnan, has left the United States Attorney’s Office, we have consulted with another Assistant United States Attorney who worked on the case, AUSA Kathleen Nandan, who is Chief of the U.S. Attorney’s Office’s Asset Forfeiture Unit. She reviewed the proposed Order, shared it with others in the Criminal Division, and has informed us that the Government does not oppose this request.

I would be pleased to provide any further information that the Court may require.

Respectfully submitted,


Ira M. Feinberg

Attachments

cc: AUSA Kathleen Nandan

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 ----- X

4 UNITED STATES OF AMERICA, : 04-CR-00558
5 :
6 -against- : United States Courthouse
7 : Brooklyn, New York

8 HERMAN JACOBOWITZ,
9 Defendant. : July 31, 2007
10 : Ten o'clock a.m.

----- X

11 TRANSCRIPT OF SENTENCING
12 BEFORE THE HONORABLE JOHN GLEESON
13 UNITED STATES DISTRICT JUDGE

14 ATTORNEYS FOR GOVERNMENT:
15 ROSALYNN M. MAUSKOPF
16 United States Attorney
17 BY: RICHARD FAUGHNAN
18 KATHLEEN A. NANDAN
19 Assistant United States Attorneys
20 225 Cadman Plaza East
21 Brooklyn, New York 11201

22 ATTORNEY FOR DEFENDANT:
23 LAWRENCE S. GOLDMAN, ESQ.
24 CARMEN D. HERNANDEZ, ESQ.

25 BENJAMIN F. BRAFMAN, ESQ.
KAREN NEWIRTH, ESQ.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.
230 Park Avenue
New York, New York 10169-0075
BY: RICHARD G. HADDAD, ESQ.

Court Reporter:
24 Marsha Diamond
25 225 Cadman Plaza East
Brooklyn, New York
TEL: (718) 613-2489 FAX: (718) 613-2369

1 plea agreement?

2 MR. FAUGHNAN: It was waived.

3 MS. HERNANDEZ: It was waived in the plea agreement,
4 Judge.

5 THE COURT: I take it your client wishes to report
6 directly to a facility directed by the Bureau of Prisons.

7 MS. HERNANDEZ: Yes.

8 THE COURT: Is there any place you want me to
9 recommend?

10 MS. HERNANDEZ: Your Honor, Otisville. Your Honor,
11 could we ask the Court also to recommend to the Bureau of
12 Prisons to waive the security designation that is imposed at a
13 sentence of above ten years? I know that's the order that, I
14 believe, the judge who sentenced in the Computer Associates
15 case because, otherwise, he may not be eligible for Otisville
16 which is the best facility given his religious restrictions.

17 THE COURT: Do you want to be heard?

18 MR. FAUGHNAN: Judge, I will leave that to your
19 discretion.

20 THE COURT: I can't imagine they will actually abide
21 by that, but I will go along with that. Do you want me to
22 waive the camp designation guideline?

23 MS. HERNANDEZ: Request that the Bureau of Prisons
24 waive the security designations that preclude him from being
25 sent to Otisville.

1 THE COURT: All right. I take it you want a report
2 date after the holy days.

3 MS. HERNANDEZ: Yes, Your Honor, please.

4 THE COURT: Pick a date in early October.

5 MS. HERNANDEZ: After the 8th or 9th in October would
6 be --

7 THE COURT: All right. In mid October then.

8 MR. FAUGHNAN: Your Honor, can I be heard on the
9 conditions of his release?

10 THE COURT: Yes. Do you object to the direct
11 surrender?

12 MR. FAUGHNAN: Currently, Your Honor, the
13 defendant's on electronic monitoring but he's essentially
14 permitted to be out all day long. I think given how the
15 landscape has shifted, he is facing 15 years in prison at a
16 minimum that the conditions of release should be increased,
17 strengthened. If he is going to be on home detention I would
18 ask that it be on real home detention, that he be required to
19 stay home 24 hours a day with the exception of going to
20 religious services on the Sabbath for a few hours, and
21 medical emergencies, but otherwise, I think he should be
22 restricted to his house.

23 THE COURT: What are the current conditions?

24 MR. FAUGHNAN: The current conditions are he's on
25 electronic monitoring, that he's permitted to be out of the

Criminal Calendar: Sentencing

Before: Judge John Gleeson, U.S.D.J.

Date: 7/31/07

Time: 10:00Am - 12:35pm

DOCKET NUMBER: 04-CR-558

DEFENDANT'S NAME: Herman Jacobowitz
 Present Not Present In Custody Bail

DEFENSE COUNSEL: Carmen D. Hernandez, Lawrence S. Goldman
Probation: Jamie Turton Legal Aid CJA Retained

AUSA: Richard Faughnan Deputy Clerk: Ilene Tzou

INTERPRETER: _____ (Language) _____

COURT REPORTER/RSR Marsha Diamond

Case Called.

Defendant is given the opportunity to speak on his/her behalf.

_____ The Courts finds that there is a factual basis supporting the deft's guilty plea offered before Magistrate Judge _____ on _____. The guilty plea is accepted.

The Pre-sentence Report is adopted without change.

Defendant is sentenced to 15 years ~~months imprisonment~~ and 3 years of supervised release. Count 1s : 5yrs (60mths) to run consecutively

Count 2s : 10yrs (120 mths) to run concurrently | Supervised Release is to run concurrently on both counts.

Special conditions of Supervision are as follows: Totaling : 180 months.
No firearms or ammunitions. - Compliance to the payments set forth in the forfeiture order and restitution order.
Full financial disclosure

Defendant is ordered to pay restitution in the amount of \$ 176,550,000⁰⁰/_{xx}.

_____ Defendant is ordered to pay a fine in the amount of \$ _____

Defendant is ordered to pay a special assessment of ~~\$100.00~~ \$200.00 (NO FINE)

Monetary penalties are due as follows: Restitution to be paid at 20% of net monthly income after release. (See judgment for pymnt instructions.)

_____ The Court recommends to the U.S. Bureau of Prisons that the deft be incarcerated at a facility in the _____ region, close to _____

The Court recommends: Ofisville and a waiver of the security designation.

_____ The deft is remanded to the custody of U.S.M.S.

_____ The deft shall surrender to the U.S.M.S. for the Eastern District of N.Y. on _____ @ _____

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

before 2:00pm on 10/15/07 (NOON) as notified by USMS or as notified by P.O.

Open count(s) Underlying Indictment is/are dismissed on motion of the government. and all open counts.

Case 1:04-cr-00558-JG Document 157 Filed 07/31/07 Page 2 of 2
- Defendant's bail is modified to include:

Home detention except for Sabbath, religious holidays and visits to defendant's attorney with prior notice to the supervising officer.

UNITED STATES DISTRICT COURT

EASTERN

District of

NEW YORK, BROOKLYN

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

HERMAN JACOBOWITZ

FILED

Case Number:

04-CR-558(S-1)-01 (JG) ✓

IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.

USM Number:

70273-053

★ AUG 7 2007 ★

Carmen D. Hernandez, Esq. (202) 628-0090

BROOKLYN OFFICE

717 D Street, N.W., Suite 310, Washington, DC 20004
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One and Two of a three-count superseding indictment on 11/22/2005.

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

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 371	Conspiracy to commit bank, securities and mail fraud.	8/12/2003	ONE
15 U.S.C. §§ 78m(a) and 78ff	False statements in reports to the securities and exchange commission.	8/12/2003	TWO

The defendant is sentenced as provided in pages 2 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) (All open counts) is are dismissed on the motion of the United States.

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

July 31, 2007
Date of Imposition of Judgment

Signature of Judge

John Gleeson
Name of Judge

U.S.D.J.
Title of Judge

8-3-07
Date

DEFENDANT: HERMAN JACOBOWITZ
CASE NUMBER: 04-CR-558(S-1)-01 (JG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Count One: five (5) years; Count Two: ten (10) years, to run consecutively totaling one-hundred and eighty (180) months incarceration.

The court makes the following recommendations to the Bureau of Prisons:
Incarceration at Otisville, New York.

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

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

by 12:00 a.m. p.m. on 10/15/2007

as notified by the United States Marshal.

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

before 2 p.m. _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: HERMAN JACOBOWITZ
CASE NUMBER: 04-CR-558(S-1)-01 (JG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Three (3) years to run concurrently on each count.

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C — Supervised Release

Judgment—Page 4 of 6

DEFENDANT: HERMAN JACOBOWITZ
CASE NUMBER: 04-CR-558(S-1)-01 (JG)

SPECIAL CONDITIONS OF SUPERVISION

- Full financial disclosure.
- Compliance to the payment terms of the Restitution and Forfeiture Order.

DEFENDANT: HERMAN JACOBOWITZ
 CASE NUMBER: 04-CR-558(S-1)-01 (JG)

Judgment — Page 5 of 6

CRIMINAL MONETARY PENALTIES

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

TOTALS	<u>Assessment</u> \$ 200.00	<u>Fine</u> \$	<u>Restitution</u> \$ 176,550,000.00
---------------	---------------------------------------	--------------------------	--

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Congress Financial Group (Payable to: Richard G. Hadad, Esq.)		122,000,000.00	
RFE Investment Partners (Payable to: David S. Elkind, Esq.)		15,000,000.00	
Various Insurance Companies:			
—Travelers (Payable to: Joseph Carey, Esq.)		5,000,000.00	
—Seneca (Payable to: Kenneth McGuire, Esq.)		4,150,000.00	
—Zurich (Payable to: Jon Quint, Esq.)		100,000.00	
—Chubb (Payable to: Jon Quint, Esq.)		300,000.00	
Securities (Shareholders) Fraud Victims (Payable to: Stephen T. Rodd, Esq.)		30,000,000.00	
TOTALS	\$ 0	\$ 176550000	

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:

DEFENDANT: HERMAN JACOBOWITZ
CASE NUMBER: 04-CR-558(S-1)-01 (JG)

SCHEDULE OF PAYMENTS

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

- A Lump sum payment of \$ 200.00 due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

-Restitution shall be paid at 20% of the defendant's net monthly income immediately after release from custody. All payments shall be made out to The Clerk of Court who will disburse the payments accordingly.

-Forfeiture shall be paid as set forth in the attached order. Payments will be made out to The Clerk of Court who will disburse the payments accordingly.

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

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

Joint and Several

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

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

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