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Via Facsimile and Electronically Filed

Honorable Arthur D. Spatt
United States District Judge
1020 Federal Plaza
Central Islip New York 11772

Re: *United States v. Barry Drayer*
02 Cr. 767 (ADS)

Dear Judge Spatt:

Please accept the within letter as the defense objections to the Presentence Report ("PSR") issued by the Probation Department on July 7, 2006. Mr. Drayer is scheduled to be sentenced on December 15, 2006. As detailed below, a *Fatico* hearing may be required prior to the imposition of sentence.

Paragraphs 8 through 34 and 38 through 51 As advanced during the trial, Mr. Drayer objects to the characterization that he knowingly and intentionally committed any fraudulent or illegal act. He maintains his innocence. Mr. Drayer objects to these Paragraphs in total. The recitation of the facts turns a blind eye to the testimony and proof admitted by Mr. Drayer at the trial. Rather, it is a one sided version of events without regard to the evidence in total.

Paragraphs 9 and 99 These Paragraphs report that Mr. Drayer "owned" PLS. This is inaccurate and therefore, must be stricken.

Paragraphs 13 and 21 There is virtually zero evidence that the defendant Adam Drayer defrauded any financial institution, therefore, his name must be removed from these Paragraphs.

Paragraphs 14 through 16 It is clear from the evidence that the lending institutions were aware of the existence of Riteway Health Services, new the purpose of Riteway Health Services, and agreed to the terms of the loans in which Riteway was involved. This is no more apparent than the numerous collateral assignments received in evidence. Therefore, Mr. Drayer objects to the fraudulent characterization of Riteway throughout the PSR.

Paragraphs 17 and 18 It is readily apparent that the lending institutions were not only aware of the lease prepayments, defaults and canceled lease agreements, but also that they acquiesced to PLS maintaining the monthly payments on these accounts. This is most evident, and indeed detailed in writing, as part of the audited financial statements PLS was required to turn over to the lending institutions. Notably, not one of the institutions objected to the over 7.3 million dollars sent through the "Mail Box Etc." accounts. Moreover, it behooved the institutions to continue to maintain business with PLS in this fashion as they received both principal and interest payments without interruption.

As it was firmly established that the lending institutions were aware of PLS' course of conduct, and accepted it for years, Mr. Drayer objects to the characterization that PLS concealed its activities. More importantly, the accounts that PLS maintained mailboxes for represented less than one percent of PLS' business. This is far from the overarching scam these Paragraphs purport.

With regard to altered checks, it is important to highlight that the government never entered into evidence a single altered check. This is true despite the fact that it had full access to all of PLS' records.

Paragraph 19 From what can be garnered from the evidence, there were less than 100 loans that were inadvertently replicated. This represents a fraction of the 12,000 loans PLS maintained. Moreover, approximately 24,000 applications were processed by PLS during its years in business. As Mr. Drayer denies any specific intent to defraud the institutions, he objects to this Paragraph in its entirety.

Paragraphs 20 and 21 Agents inform that the loss in these Paragraphs was calculated by adding the total amount of the outstanding balances for all the "fraudulent" loans that PLS obtained. It appears as if a cut-off date was given and the simple question asked, "what is your outstanding balance with PLS?"

There are several problems with this simplistic calculation. First, it assumes that of the approximately 7,000 to 8,000 loans outstanding when PLS stopped doing business in June 2002, that none of the doctors made good on their loan payments. It was clearly established at the trial that this was not the case. Rather, what simply happened was that the lending institutions stepped into PLS shoes and took over the servicing of the accounts thereby not only collecting the principal of the loans, but the interest as well. This process is still ongoing. So while a loss may have occurred, this simple calculation does not suffice. Indeed, by its terms is woefully inaccurate.

Furthermore, it certainly was not alleged that every PLS loan was "fraudulent." How the banks determined what constituted a "fraudulent" loan is entirely unclear.

Notably, PLS never missed a payment with a lending institution in its twenty-one year history. The standing order was "the banks must get paid." The current calculation gives us no indication as to how much these banks earned during the course of their relationship with PLS and the customers they derived from the PLS relationship. These are important considerations when determining Mr. Drayer's sentence.

In order to proceed to sentence, a much more complete picture must be given, or a *Fatico* hearing is required. At a minimum, current records on these "fraudulent" loans must be provided in order to accurately determine loss and restitution.

Paragraphs 22 through 28 These Paragraphs set forth an alleged scam known as HSMT. As established at the trial, if in fact there was a fraud committed with regard to HSMT, that fraud was executed by Payaddi Shivashankar. He defrauded the doctors he worked with, the lawyers he worked with, the brokers he worked with at Finance Team of America, and representatives at PLS. Mr. Drayer takes objects to the characterization in these Paragraphs holding PLS responsible for Shivashankar's conduct. At no point did Mr. Drayer believe that the loans were for the purpose of funding a hotel. Indeed, upon inquiry and a full investigation by the attorney's at American Express, it was concluded that PLS was a victim of Shivashankar's activities.

Paragraph 24 is completely inaccurate. Shivashankar worked directly with representatives at Finance Team of America.

Paragraph 25 is an extreme deviation from the evidence at trial. There is no indication that Mr. Drayer in Massachusetts knew what Shivashankar was doing in Tennessee.

With regard to the HSMT loss, PLS should at best be held responsible for $1,742,140.15. This represents the total amount less the $600,000.00 sent to Shivashankar. This $600,000.00 the government's witnesses, i.e. the HSMT doctors, acknowledged went to their benefit.

In accepting responsibility for this amount, Mr. Drayer is not conceding any fraudulent intent. Rather, it is acknowledged that through Shivashankar's web of confusion these funds mistakenly entered PLS accounts and, upon discovery, were not returned to the funding institutions.

In PLS defense, however, Albert Crawford, the lending institutions direct representative with PLS, was made aware of the over funding. He stated that he would advise the lending institutions of the situation and then report to PLS on how to proceed. Mr. Crawford never resolved the matter, but rather advised PLS to simply continue making monthly payments until further arrangements had been finalized.

The defense is not asking for a *Fatico* hearing with regard to the $1,742,140.15 HSMT over funding.

Paragraph 29 through 34 Far from being unbeknownst to the financial institutions, the fact that PLS did not maintain escrow accounts was a standard and accepted course of conduct in place

for nearly fourteen years. Not once during that period of time did a single bank ask for an escrow statement. Not once during that time did a single bank object to the funds they received coming from an account other than an escrow account. Therefore, Mr. Drayer objects to these Paragraphs stating that the course of conduct was fraudulent in nature.

Paragraphs 35 through 37 As noted above, it is impossible to determine victim impact without current records from the lending institutions. Accordingly restitution cannot be determined at this juncture.

In determining restitution, however, three additional points must be considered; 1) the amount these institutions received from the $25,000,000.00 settlement with the Bank of New York, 2) any and all insurance proceeds derived from an alleged loss and 3) and any tax benefits that may have been received by the institutions due to a reported loss.

Paragraphs 58, 59, 60, 63 and 66 Without a hearing, or further documentation from the lending institutions, it is impossible to determine whether these enhancements apply. Therefore, the defense objects to the Guideline computation advance in these Paragraphs.

Paragraph 85 Mr. Drayer objects to the inclusion of this information in the PSR. These facts relate to Roger Drayer. With regard to Barry Drayer they are both prejudicial and erroneous. As this information is not supported by any credible evidence, and indeed is contrary to the jury's verdict, it must be stricken.

Paragraph 86 Mr. Drayer objects to the inclusion of his brother's prior crimes in his PSR. At no time did he acknowledge any involvement in this offense. As these facts have no bearing on Mr. Drayer's background or sentence, they must be stricken.

Paragraph 103 This Paragraph inaccurately states the Mr. Drayer was discharged in 1963. It should read 1968. In total Mr. Drayer honorably served his country for a six year period.

Should Your Honor need any further detail, counsel will be happy to supply it. I thank Your Honor for his consideration in these matters.

Respectfully submitted,

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Attorney for the Defendant
Barry Drayer

cc: AUSA Steve Tiscione – Via Facsimile
James J. Fonti, USPO – Via Facsimile