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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

LISA ROWBERRY,

Defendant.

**DEFENDANT'S SENTENCING
MEMORANDUM**

Case No. 2:20-CR-214

The Honorable Robert J. Shelby

LISA ROWBERRY, through her attorney GREGORY N. FERBRACHE, Ferbrache Law, P.L.L.C. hereby provides the following sentencing memorandum in consideration for the Court's consideration at the sentencing hearing.

DEFENDANT'S REQUEST FOR APPROVAL OF THE 11(C)(1)(c):

The defendant requests that the Court approve the 11(c)(1)(c) plea and sentencing recommendation for 12 months and a day. Defendant has no criminal history, suffers from heart failure, type II insulin supported diabetes and obstructive sleep apnea, is the caretaker of her

disabled husband who was recently hospitalized for complication due to his disability, mother and caretaker of an 11 year old child, grandmother to seven grandchildren, and importantly received no personal benefit from the Paycheck Protection Program (hereinafter PPP) loan proceeds. Ms. Rowberry has been cooperative throughout the criminal process. Through Counsel, Ms. Rowberry notified AUSA Cy Castle of her intent to cooperate on July 7, 2020 and proffered on July 13, 2020 to the government that “(a) Rowberry made Ugarte generally aware of the PPP applications that were being submitted, which were several; (b) Rowberry completed the PPP application questions without the assistance of Ugarte, who was not in the office but driving load for the business; [and] (c) Rowberry deposited the insurance check.”

With that said, the application of USSG 3C1.1 requires supplemental information to rebut unsupported inferences asserted within the provided government reports that cause a negative inference toward Ms. Rowberry. Ms. Rowberry further asserts a misapplication of USSG 2B1.1(b)(1)(F) as she did not obstruct justice. Ms. Rowberry now files her sentencing memorandum to supplement the facts and ensure a complete and accurate report for proper consideration of the relevant facts, both for the purpose of mitigation at sentencing and because the Bureau of Prisons determination will rely on the sentencing guideline calculation for prison security designation.

**USSG 3C1.1 RELATING TO PARAGRAPH 15-17 OF THE PRESENTENCE
INVESTIGATION REPORT SHOULD NOT BE APPLIED:**

To be applicable to a sentencing calculation, Section 3C1.1 requires the defendant to “[1)] willfully obstruct or impede, or attempt to obstruct or impede, the administration of justice

with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense.”

First, the obstruction of justice conduct alleged against Ms. Rowberry relates to a forfeiture action not related to the instant offense. On or about November 14, 2019, the Court issued a seizure warrant authorizing the United States to seize forty-one of Hubert Ivan Ugarte's semi-tractors located within the District of Utah, including a 2016 Freightliner Cascadia, VIN: 3AKJGLD51GSGZ9235 (hereafter referred to as the subject semi-tractor), to be seized as being subject to forfeiture. In Warrant to Seize Property Subject to Forfeiture, the property described was limited to “41 Freightliner Tractors” with attachment that provided VIN numbers including the one cited herein.

Ms. Rowberry was neither a co-defendant of Mr. Ugarte, nor was Ms. Rowberry an employee of Mr. Ugarte during said conduct as alleged in the Indictment, case no. 19-CR-393, and the alleged insurance check was not “listed” within the Warrant to Seize Property Subject to Forfeiture issued November 14, 2019. Should this Court nevertheless find the conduct relevant, Ms. Rowberry attempted to assist the government despite the government's failure to properly seek a court order to attach a seizure demand to insurance proceeds.

Emails known to the government and from Ms. Rowberry's email account show AUSA Cy Castle was included in a discussion wherein it was declared and agreed, that the subject insurance settlement check would be deposited into a Frisbu account by Lisa Rowberry, and

then, under that verbal only agreement, only those funds left over after paying associated costs would be subsequently given to the FBI. The emails show AUSA Cy Castle was aware of the agreement and did not object to the process being proposed. The record further demonstrates there was no Order in place to seize the insurance proceeds related to the rolled truck.

Consequently, AUSA Cy Castle would be an important witness to examine regarding his acceptance of that agreement and whether these funds would be placed into the Frisbu account. AUSA Castle's role as it relates to Ms. Rowberry has particular significance as it relates to whether Ms. Rowberry obstructed the government in taking proceeds that were not covered under a lawful seizure order.

Specifically, as it relates to Ms. Rowberry's conduct, on February 3, 2020, Ms. Rowberry exchanged emails with a representative of Frisbu insurance provider (**Stacy DeLee**, Protective Insurance), wherein Ms. Rowberry mentioned there would be 3 or 4 claims to be filed. On February 4, 2020, **Allison Scholfield** from Protective Insurance emailed Ms. Rowberry requesting a copy of the POA for **Ivan Ugarte** regarding a claim IL36462, a rolled truck. Allison also requested photos of the rolled truck and a police report.

On February 6, 2020, Ms. Rowberry sent an email to SA **Trent Pedersen** introducing herself at the request of Ugarte's attorney, **Kyle Ovard**. She mentions the two missing trucks and the rollover truck and how she has begun to work on insurance claims. Ms. Rowberry advised Trent that, "...a lot of our information was removed with the previous business manager, **Wayne Hales**, I am hoping you have access to provide answers for their questions below." Regarding the rollover truck Ms. Rowberry wrote:

“For the rollover claim IL-36462 /truck VIN 3AKJGLD51GSGZ9235, we will need the name and phone number of the tow yard where the truck is currently at and also any damage pictures you have to confirm that it’s a total loss. I need to set the expectation upfront if the truck has been accumulating daily storage charges at the yard since the date of the incident, then we will most likely have to deduct those excessive charges from the total loss settlement in some way. Also - we will either also need a copy of the police report itself, or else the police department name/case # info so we can order a copy here. We need this report to confirm what happened and also the date of the loss as being before the policy with us was cancelled on 10/28/19. Once that information is received, I will review for the next steps of how we will handle this claim.”

On February 11, 2020, Ms. Rowberry forwarded information she had received from Agent **Trent Pedersen**, to **Allison Scholfield** at the insurance company. The information from Pedersen appears to be cut and pasted into the email and states:

*“Unit # 135686, 3AKJGLD51GSGZ9235 – This tractor was involved in an accident in I-80 in Nevada on 10/15/2019. I have enclosed the Nevada Highway Patrol police report related to this accident to assist you in filing your insurance claim related to this tractor. The best information I have is that this tractor was towed to lot in Wells, Nevada (allegedly there is only one or two tractor towing entities in eastern NV). **Bryan Harkness** was the driver and he should be able to confirm where the tractor was towed to after the accident. You could also contact the NV Highway Patrol and they should have dispatch records confirming the entity that was hired to tow the tractor.”*

Based on Agent Pedersen’s information, on February 11, 2020, Ms. Rowberry contacted the NV Highway Patrol and in response received an email from the Nevada Department of

Public Safety with an attached police report regarding the rolled truck for the insurance company. She forwarded this report to the **Allison Scholfield** at the insurance company. Also on this date, Ms. Rowberry provided the involved towing company name and phone (Roadway Towing), as well as the NVHP case number to Allison. On February 12, 2020, Allison sent an email to Ms. Rowberry asking her to call Roadway Towing and authorize release of the rolled truck to the insurance company.

On February 25, 2020, Special Agent **Trent Pedersen** emailed Ugarte's attorney **Kyler Ovard**, with a cc to **Cy Castle**, **Mark Woolf**, and **Ms. Rowberry Rowberry** which states:

"There were 3 additional tractors that were outside of your agreement with the government that were subject to seizure, but are either missing, wrecked, and/or possibly sold. Your Controller, Ms. Rowberry, advised that a claim with Protective Insurance has now been filed for the fourth tractor that was subject to seizure and she agreed to provide the FBI with the insurance proceeds from this tractor in the event there is any money left after paying for storage fees associated with the wrecked tractor."

On March 12, 2020, Ms. Rowberry received an email from Protective Insurance with notice the rolled truck is a total loss and the settlement amount will be \$60,857.82. On March 16, 2020, the first check was mailed to Frisbu.

On March 26, 2020, in emails between Ms. Rowberry and **Allison Schofield** at Protective Insurance, it is determined that check #1 had been sent to an old address no longer affiliated with Frisbu and that a stop payment and reissue of the check was necessary. The correct address was provided. On March 27, 2020 Ms. Rowberry received an email from **Laura Rice** from Protective Insurance stating a new (2nd) check should go out this day. On April 2, 2020, Ms. Rowberry inquired about check #2 because she has not received it. The mailing address is confirmed.

On April 3, 2020, Laura Rice responded to Ms. Rowberry that the check had been mailed on Wednesday. On April 9, 2020, Ms. Rowberry sent an email to **Allison Scholfield** and **Laura Rice** at Protective Insurance advising her that the bank had returned the check because it was made out to Ugarte Ent which was closed as of November 1, 2019. Ms. Rowberry then asks if the funds can be wired at her expense.

On April 9, 2020, Laura Rice responds that they cannot wire the funds or send overnight at the present time. On April 10, 2020, Ms. Rowberry gets an email from **Emily Burton** at Protective Insurance Accounting Department who needs a TIN before she can cut the check. Ms. Rowberry sent an email to **Emily Burton** and **Laura Rice** at Protective Insurance declaring that check #2 showed up today and wants to cancel the stop payment on check #2 if it is not too late. **Laura Rice** replied that the stop payment cannot be lifted and that a new check will be sent and a tracking number will be provided.

On April 13, 2020, Ms. Rowberry received an email from Protective Accounting with a Fedex tracking number. On April 14, 2020, Ms. Rowberry verified the tracking number, as the package had yet to be picked up from Protective Insurance so she emailed **Laura Rice** and asked again about a possible cancelation of the stop payment on check #2. On April 15, 2020, Ms. Rowberry again requested an intervention, asking whether a manager can do something to cancel the stop payment on check #2.

Laura replied that checks are only printed twice a week and that the check should go out today and Ms. Rowberry should have it tomorrow. On April 16, 2020 Ms. Rowberry received an email from Fedex tracking updates indicating check #3 had been delivered at 3:00 pm on April 16, 2020.

As the check had been issued to Frisbu Trucking, bank records show that Ms. Rowberry deposited the insurance proceeds check into American First Credit Union Account 3973674-9, Frisbu's Checking Account. It is important to note that the Protective Insurance could only authorize a check to be issued to an Ugarte entity and not directly to a third party such as SA Trent Pedersen without court order.

Upon deposit of the insurance proceed check on April 16, 2020, account 3674 has a balance of \$28,867.82. As is normal banking procedure, the bank transferred \$28,857.82 of the \$60,857.82 to a holding account and made \$32,000 available in the checking account. Also on this date payroll was automatically withdrawn in the amount of \$20,801.53.

There are no facts demonstrating Ms. Rowberry willfully impeded the government. She did not interfere with any orders for seizure of the insurance proceeds. In fact, she spent considerable time and energy in an attempt to gain the insurance proceeds while communicating with the government. When she finally received the check, she deposited the check in the Frisbu checking account and that was consumed in commingled funds and automatic withdrawals by a struggling business that she was merely an employee of.

Lastly, the government had already been on notice that the insurance proceeds were to first be directed to expenses relating to storage of the freightliner tractor. Equally important was the freightliner tractor was located outside of Utah and therefore not within the Warrant to Seize Property Subject to Forfeiture, which was limited to property within the District of Utah.

Simply put, the government had the means and time to lawfully seize the insurance proceeds as they did with the initial Warrant To Seize Property Subject to Forfeiture, dated November 14, 2019. Ms. Rowberry did not impede or obstruct the government's ability to seek a lawful warrant for the proceeds. Equally important are that Ms. Rowberry nor did impede the government's ability to seek a subsequent Warrant to Seize Property Subject to Forfeiture, seizing from Frisbu's bank account the insurance proceeds that remained within the Frisbu bank account. Based on the aforementioned, Ms. Rowberry respectfully request the adjustment for obstruction of justice not be applied.

SUPPLEMENT TO USSG 2B1.1(b)(1)(F) RELATING TO PARAGRAPH 18-26 OF THE PRESENTENCE INVESTIGATION REPORT:

Lisa Rowberry acknowledges her false statement in the PPP loan application influenced the bank to approve the PPP loan application. There is no dispute the PPP funding was

emergency funding provided through the Coronavirus Aid, Relief and Economic Security Act (CARES Act) and that government funding was passed through Transportation Alliance Bank.

Ms. Rowberry agrees with paragraph 18 which provides that the PPP loan is designed to provide a direct incentive for small businesses to keep their workers on the payroll. Ms. Rowberry understood the loan would be forgiven in its entirety if all employees were kept on the payroll for eight weeks and 75 percent of the loan is used for payroll, rent, mortgage, interest, or utilities. Otherwise, the applicant must repay the loan at a time the government determines the economy and small business had the opportunity to recover economically. In this case, the PPP loan was not required to initiate repayment until August, 2021.

Ms. Rowberry acknowledges that the PPP loan was automatically deposited into the same Frisbu checking account and became commingled with the accounts current funds, and funds that were deposited prior to the overdue May 16, 2020 equipment payment of \$13,300 and the overdue May 18, 2020 equipment payment of \$126,965.27, from the Frisbu checking account to Kenworth and for the purpose to avoid repossession of the trucking equipment by the lender. Avoiding repossession of the equipment provided the means for the employees of Frisbu Trucking to remain employed for the long term and not just a single pay period. To date, Frisbu Trucking is still operating with the equipment.

Due to the commingling of the existing funds within the Frisbu checking account, and subsequent deposits, Ms. Rowberry asserts that the government had not properly determined whether the PPP loan would be in fact be forgivable under its terms. Regardless, the issue of how the PPP loan was spent only goes to a determination of whether the loan is forgiven or whether the PPP loan requires repayment and is not relevant conduct toward criminality.

Importantly, what is clear is that all the proceeds went to operation expenses to include payroll and equipment and to ensure ongoing, long term employment for the many families of Frisbu Trucking during the COVID-19 Pandemic. There is no dispute that Ms. Rowberry received no personal gain from the PPP loan or its proceeds. Nor is there a dispute that the

manner in which the PPP loan was spent by Frisbu trucking was unlawful, rather the manner in which the PPP loan was spent went to whether the PPP loan would be forgiven.

Based on the aforementioned, Ms. Rowberry asks this Court to enter the agreement as proposed to the Court under the 11(C)(1)(c) agreement.

CONCLUSION

Ms. Rowberry respectfully requests this Court not apply the 2 level adjustment for obstruction of justice and to supplement the facts to ensure a complete and accurate report for proper consideration for the purpose of Sentencing and for the purpose of the Bureau of Prisons determination, who will rely on the sentencing guideline calculation for prison security designation.

Dated this 24 day of June, 2021 .

/s/ Gregory N. Ferbrache
Gregory N. Ferbrache
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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