

MAX D. WHEELER (3439)
SAM HARKNESS (9448)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

REBECCA C. HYDE (6409)
9 Exchange Place
Boston Building, Suite 1104
Salt Lake City, UT 84111
Telephone: (801) 531-7444

Attorneys for Defendant Thomas E. Mower

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs .

THOMAS E. MOWER,
LESLIE D. MOWER, and
JAMES THOMPSON,

Defendants.

**DEFENDANT THOMAS E. MOWER'S
SENTENCING MEMORANDUM**

Case No. 2:02-CR-787 DAK

District Judge Dale A. Kimball
Magistrate Judge Samuel Alba

INTRODUCTION

Defendant Thomas E. Mower does not need to be punished further. Based on the totality of the circumstances, a probationary sentence is appropriate. As a result of this case, which has lasted almost ten years from investigation to sentencing, Mr. Mower has endured significant hardships and

difficulties. More significant than the financial impact, including the taxes (most of which have been paid twice), penalties, interest, and imminent fine, Mr. Mower has experienced the public humiliation and embarrassment associated with the charges and conviction. He had to step down from the company he built from the ground up and lost his right to vote and bear arms. Without question, this case has taken an immeasurable toll on Mr. Mower, making a sentence of imprisonment unnecessary.

The government seeks to have Mr. Mower receive a sentence that is overly punitive and not supported by the evidence at trial or the Court's Findings of Fact and Conclusions of Law Relating to Tax Loss. The facts of this case and the nature and circumstances of the offense demonstrate that Mr. Mower should receive a sentence of probation without confinement.

Pursuant to DUCrimR 32-1(b), Mr. Mower, by and through the undersigned counsel, submits this Memorandum addressing issues relevant to his sentencing. The counsel of Mr. Mower conferred in good faith with the probation officer in an attempt to resolve the disputed matters in the Draft Presentence Report. Mr. Mower's Objections to the Draft Presentence Report, which is incorporated by reference into this Memorandum, contain his position on those disputed matters.

I. ADVISORY SENTENCING GUIDELINES

Although the United States Sentencing Guidelines ("Sentencing Guidelines" or "U.S.S.G.") are advisory, they remain "a factor to be considered in imposing a sentence, which means that district courts 'must consult those Guidelines and take them into account when sentencing.'" *United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006) (per curiam) (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)).

A. AS SUGGESTED IN THE DRAFT PRESENTENCE REPORT, THE 1997 UNITED STATES SENTENCING GUIDELINES SHOULD BE USED TO DETERMINE THE ADVISORY GUIDELINE RANGE OF DEFENDANT THOMAS E. MOWER.

Section 1B1.11(a) of the Sentencing Guidelines states the general rule that “[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.” The following exception to this rule applies:

[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

U.S.S.G. § 1B1.11(b)(1) (emphasis in original). “[F]or a law to violate the Ex Post Facto Clause, the law must apply to events occurring before its enactment and must disadvantage the offender affected by it.” *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003). Under this exception, the last date of the offense of conviction is the controlling date for *ex post facto* purposes. *See* U.S.S.G. § 1B1.11 cmt. n. 2.

In the present case, Count One of the Superceding Indictment charged Mr. Mower with conspiracy to commit tax evasion (18 U.S.C. § 371), and Counts Two through Seven charged him with personal tax evasion (26 U.S.C. § 7201) for the years 1992 through 1997. Although Count Seven was for the tax year 1997, the conduct associated with that offense occurred on or about September 28, 1998, when Mr. Mower and Mrs. Mower filed their 1997 Joint Individual Tax Return. *See* First Superceding Indictment at 40.

The Draft Presentence Report (“Draft PSR”) correctly calculated Mr. Mower’s advisory guideline range using the 1997 Sentencing Guidelines, presumably based on two facts: (1) the conduct associated with Count Seven occurred before the 1998 Sentencing Guidelines went into effect; and (2) the tax table of the Sentencing Guidelines was revised on or about November 1, 2001, increasing the base offense level applicable to Mr. Mower from fifteen (15) to sixteen (16). *See* U.S.S.G. § 2T4.1 (2001 ed.).

In response to the government’s objection, the Final Presentence Report (“PSR”) used the 2005 Sentencing Guidelines. The government contends that the filing of corporate tax returns on or about January 11, 2002, constitutes the last date when the offense of conviction was committed, and, therefore, the tax table in effect after the November 2001 revision should apply. This position, however, ignores the Court’s April 7, 2006 Amended Findings of Fact and Conclusions of Law Related to Tax Loss (hereinafter, “April 7, 2006 Tax Loss Decision”), which concluded that any monies reported in these corporate tax returns were not included in the tax loss calculation.

As a result, applying the 2005 Sentencing Guidelines to Mr. Mower violates the *ex post facto* clause of the United States Constitution by increasing his offense level well after he committed the conduct related to the conviction. Therefore, as suggested in the Draft PSR, the Court should use the 1997 Sentencing Guidelines, placing Mr. Mower’s base offense level at fifteen (15).¹

¹ Mr. Mower acknowledges that in his Proposed Findings of Fact and Conclusions of Law Relating to Tax Loss he forecasted the use of 2005 Sentencing Guidelines, but the reference was made in error. Although the Court relied upon the reference in its April 7, 2006 Tax Loss Decision, a complete review of the facts demonstrates that the 1997 Sentencing Guidelines should be used to determine the advisory guideline range of Mr. Mower.

B. DEFENDANT THOMAS E. MOWER'S OFFENSE DID NOT INVOLVE "SOPHISTICATED MEANS" PURSUANT TO U.S.S.G. § 2T1.1(b)(2).

The PSR incorrectly applies a two level enhancement under U.S.S.G. § 2T1.1(b)(2), contending that Mr. Mower's offense involved "sophisticated means." The facts of the case and the Court's April 7, 2006 Tax Loss Decision, however, do not support the application of this enhancement.

"Sophisticated means" includes conduct that is "more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. § 2T1.1 cmt. n. 3 (1997 ed.).² The application of this enhancement is usually reserved for cases where the defendant employed offshore bank accounts, or transactions through corporate shells or fictitious entities. *Id.*

The testimony and evidence at trial established that Mr. Mower was not sophisticated in his business dealings. Instead, he relied upon the advice and counsel of others, such as John Hunter, Karin Lane, Allen Davis, Wade Winegar, and other Neways' employees in operating an international multi-level marketing company. The organization of Neways U.S. and its sister corporations was not set up to facilitate tax evasion. The complex nature of the organization is the result of operating an international corporation and is not the result of an effort to avoid income tax. *See United States v. Stokes*, 998 F. 2d 279, 281-283 (5th Cir. 1993) (the court reversed the trial court's application of enhancement and held that any sophisticated means used in the case were to conceal embezzlement, not to hide tax evasion).

² All references to the Sentencing Guidelines in this Memorandum are to the 1997 Sentencing Guidelines, *see supra* Section I, unless noted otherwise.

The government contends that Mr. Mower used “sophisticated means” in two areas. First, the government argues that “[t]he heart of the concealment of their income was the use of nominee names. . .in Australia and Malaysia.” Gov.’s Sentencing Memo. at 25. That argument is contrary to this Court’s findings.

In its April 7, 2006 Tax Loss Decision, the Court found that the foreign downlines were set up at the suggestion and under the direction of John Hunter in a manner to capture “breakage” for the parent U.S. corporation. In fact, the foreign downlines were in the name of the corporation, leaving no doubt as to the recipient of the monies. Additionally, the Court excluded the foreign commission checks from the tax loss calculation that were not diverted for the personal use and benefit of the Mowers. The organization and use of the nominee names was done for the benefit of Neways U.S. and was not set up to conceal income from the government.

Second, the government argues that Mr. Mower employed “sophisticated means” by creating or causing others to create false and fraudulent documents to conceal their income from the Internal Revenue Service. Gov.’s Sentencing Memo. at 26. Central to this allegation are the false loan document that James Thompson and Allen Davis produced to the government and the subsequent tax returns filed by the Mowers that reported the foreign commissions as corporate income.

With respect to the false loan document, Mr. Mower did not create the document or cause Mr. Thompson and Mr. Davis to create the document. During the time in question, as testified to by Mr. Davis and Mr. Cunningham, Mr. Mower believed that a loan existed between the Mower Family Trust and Neways Australia. Mr. Mower instructed all Neways employees to cooperate with the government’s investigation, and there is no evidence that Mr. Mower obstructed the

government's investigation in any way. In any event, there is nothing sophisticated about a single paragraph document stating that a loan exists.

The amended, corporate tax returns at issue were prepared following an internal audit at Neways U.S. and were filed to account for foreign monies not previously reported. The accountants and lawyers at Neways U.S. advised the Mowers to report the foreign monies on corporate tax returns, which they did. The Court's April 7, 2006 Tax Loss Decision validates that decision, excluding most of the foreign commission income from the tax loss calculation.

Mr. Mower's failure to report all of his personal income for the tax years in question was not assisted by or the result of "sophisticated means." Therefore, the Court should not apply the sophisticated means enhancement to Mr. Mower.

C. DEFENDANT THOMAS E. MOWER WAS NOT AN ORGANIZER, LEADER, MANAGER, OR SUPERVISOR IN ANY CRIMINAL ACTIVITY PURSUANT TO U.S.S.G. § 3B1.1(c).

The PSR also incorrectly applies a two level enhancement under U.S.S.G. § 3B1.1(c), claiming that Mr. Mower was an organizer, leader, manager, or supervisor in any criminal activity. Once again, the facts of the case do not support the application of this enhancement.

To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. U.S.S.G. § 3B1.1 cmt. n. 2. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. U.S.S.G. § 3B1.1 cmt. n. 1.

In support of the application of this enhancement, the PSR relies upon the following:

After numerous meetings between and among Mr. Mower and employees of Neways US and Neways Australia, a decision was made to account for approximately \$800,000 of these funds as a loan, instead of as gross receipts, because a loan would not be taxable. In actuality, there were no loans between Neways US and Neways Australia, only company accounts, which represented the prepayment for product.

PSR at ¶ 18. It is unclear how this paragraph, which does not name any individual(s), demonstrates that Mr. Mower was the organizer and leader of someone who is criminally responsible for the commission of the offense. In fact, the conduct described in the paragraph is not even part of Mr. Mower's tax loss calculation. *See* April 7, 2006 Tax Loss Decision at 15.

It is inappropriate to apply the leader/organizer enhancement based solely on Mr. Mower's position or title. *See* U.S.S.G. § 3B1.1 cmt. n. 4 (stating that "titles such as 'kingpin' or 'boss' are not controlling"); *see also United States v. Schaffer*, 121 F. Supp. 2d 29, 31-32 (D.D.C. 2000) (corporate executive entitled to minor role reduction irrespective of his position and title), vacated on other grounds, 240 F.3d 35 (D.C. Cir. 2001); *United States v. Tagore*, 158 F.3d 1124, 1131 (10th Cir.1998) ("[t]he gravamen of the enhancement is either the exercise of control over other participants or the organization of others *for the purpose of carrying out the crime*") (emphasis added).

Mr. Mower did not exercise control over other participants or organize others for the purpose of carrying out the offense. The government seeks to take advantage of the fact that operating an international multi-level marketing company is a complex organization that requires numerous employees and entities. The complex nature of the industry in and of itself does not justify the

application of the leader/organizer enhancement. Therefore, the Court should not apply the leader/organizer enhancement to Mr. Mower.

The government argues for a leader/organizer enhancement above that recommended by the PSR. The government asserts that Mr. Mower's offense level should be increased four levels because he had an aggravating role in the offense. *See* Gov.'s Sentencing Memo. at 27. Applying this enhancement at any level, however, would be inconsistent with the evidence and the government's theory of the case.

The government has continually claimed that Mr. Mower operated alone in concealing streams of income and bank accounts from Neways employees. Nevertheless, when it helps its cause in seeking an enhanced sentence, the government reverses its position and argues that Mr. Mower was an organizer who directed other "participants" in the criminal activity.

As a threshold matter, in order for the four level enhancement to apply, the alleged criminal activity must have involved five or more persons who are criminally responsible for the commission of the offense. U.S.S.G. § 3B1.1 cmt. n. 1; *United States v. Cruz Camacho*, 137 F.3d 1220, 1224-25 (10th Cir. 1998).

In an effort to satisfy this requirement of the enhancement, the government contends that, in addition to Defendants Leslie D. Mower and James Thompson, Mr. Mower was assisted by an unindicted co-conspirator, Allen Davis, and Randy Lindstrom, Anthony Martin, Richard Wogksch, and Michael Cunningham. *See* Gov.'s Sentencing Memo. at 28.

The inclusion of these individuals is a desperate attempt by the government to satisfy the requirement that five or more participants are involved in the offense. There is no evidence to

demonstrate how any of them, with the possible exception of Mr. Davis, would be criminally responsible for the conduct at issue. The government treated most of these individuals as fact witnesses. None of them received target letters or were advised of their Fifth Amendment rights. Several of the witnesses testified that they did not agree with Mr. Mower's belief in the existence of a loan between Neways U.S./the Mower Family Trust and Neways Australia. The government has the burden to show that these individuals are criminally liable, and it has failed to meet that burden. Accordingly, there is an insufficient number of "participants" to apply this enhancement.

D. DEFENDANT THOMAS E. MOWER'S OFFENSE LEVEL SHOULD BE DECREASED BY TWO LEVELS BASED ON HIS ACCEPTANCE OF RESPONSIBILITY PURSUANT TO U.S.S.G. § 3E1.1.

A court may decrease a defendant's offense level by two levels "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). A sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility and is entitled to great deference on review. *See* U.S.S.G. § 3E1.1 cmt. n. 5.

Conviction by trial does not automatically preclude a defendant from qualifying for a reduction based on acceptance of responsibility. *Id.* at cmt. n. 2. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. *Id.* Such situations occur where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt. *Id.*

United States v. Gawwin, 173 F.3d 798 (10th Cir. 1999), provides an example of how a defendant may obtain a reduction for acceptance of responsibility even though he was convicted of

the alleged conduct at trial. In *Gauvin*, the defendant was convicted by a jury for assault with a dangerous weapon and assault on a federal officer. At trial, the defendant admitted to all of the conduct with which he was charged but disputed whether his acknowledged factual state of mind met the legal criteria of intent. *Id.* at 806. Although the defendant went to trial, the district court reduced his sentence, finding that he “understands the seriousness of his crime and accepts responsibility for his role.” *Id.*

The government appealed the decision, arguing the district court erred in granting a downward adjustment for acceptance of responsibility. The Tenth Circuit Court of Appeals affirmed the decision, stating “[w]hile a jury disagreed with [the defendant’s] defense that he lacked the requisite intent to commit the crime, that does not undermine the good faith in which the district court found this defense was asserted.” *Id.*

As in *Gauvin*, Mr. Mower went to trial to challenge whether he met the legal criteria of intent for tax evasion. While Mr. Mower challenged certain, factual aspects of the government’s case, the charges hinged on whether the jury believed that Mr. Mower acted with the requisite mens rea for tax evasion. Ultimately, the jury disagreed with Mr. Mower’s defense, but he should not be precluded from an adjustment for acceptance of responsibility.

Additionally, the government’s unreasonable position concerning the alleged tax loss forced Mr. Mower to trial. When the government first approached Mr. Mower about the taxes involved in this case, the government alleged that his personal tax deficiency exceeded \$1.5 million, which included large portions of uncashed checks. The government was also unpersuaded by amended, corporate returns that reported most of the income in question. As this Court found in its April 7,

2006 Tax Loss Decision, the amount of actual tax loss is much lower than the amount suggested by the government. This case would probably have taken a different course had the government offered an amount similar to the Court's (\$199,775).

Mr. Mower also exercised his constitutional right to a trial to assert and preserve issues unrelated to factual guilt, specifically his right to vote and his Second Amendment right to bear arms.

As Mr. Mower expressed in his offense conduct statement:

Before long I came to realize that in addition to being branded a thief I would also lose many important rights if I accepted a guilty plea. I learned that I would lose my right to hunt and my right to vote, the two rights that are very important to me as the kind of man and person I am and as an American. As strange as it may seem I felt as though I had no choice but to proceed to trial. Not only to clear my name and clear up what I considered to be some horrible misinterpretations of my intent but to make sure that I could maintain the privileges I, like many Americans, cherish.

PSR at 17.

Even though he went to trial, Mr. Mower has demonstrated acceptance of responsibility for his conduct in the offense. After being found guilty, he instructed his accountants to prepare all of his outstanding tax returns that had not been filed previously due to the underlying dispute with the government. Mr. Mower has now filed tax returns for the years 1998 through present and paid all taxes in full, including interest. This amount totaled in excess of \$14 million. He has also tendered to the Internal Revenue Service all taxes, interest, and penalties on the tax loss found by the Court

in its April 7, 2006 Tax Loss Decision.³ Therefore, the Court should reduce Mr. Mower's offense level by two levels for acceptance of responsibility.

E. DEFENDANT THOMAS E. MOWER'S OFFENSE LEVEL SHOULD BE DECREASED BASED ON HIS CHARITABLE AND EMPLOYMENT-RELATED CONTRIBUTIONS PURSUANT TO U.S.S.G. § 5H1.11.

An individual's charitable and employment-related contributions may be relevant in exceptional cases when determining whether a sentencing departure is appropriate. *See* U.S.S.G. § 5H1.11 and intro. cmt.; *see United States v. Jones*, 158 F.3d 492 (10th Cir. 1998) (district court did not abuse its discretion by departing downward based on defendant's long history of community service and "good works"); *United States v. Milikowsky*, 65 F.3d 4, 9 (2nd Cir. 1995) (affirming a downward departure that was granted on the basis of "economic impact").

1. Charitable Contributions

Mr. Mower has a lifelong history of charitable contributions and community service that should qualify him for a substantial, downward departure. As the Court is aware based on the testimony at trial and the PSR, Mr. Mower comes from humble beginnings. Despite his vast fortune, he knows what it means "to go without," and his modest background has motivated him to be extremely generous in supporting charities, the outdoors, community events, and individuals in need.

Unlike some defendants who on the eve of sentencing attempt to turn themselves into philanthropists, Mr. Mower's dedication to charities and the community is long standing and

³ In accordance with the Court's April 7, 2006 Tax Loss Decision, Mr. Mower recently tendered a check to the Internal Revenue Service for all taxes, penalties, and interest for the tax years of 1992 through 1997 for a total of \$704,210. Most, if not all, of these taxes had been paid to the government previously through amended corporate returns.

genuine. While Mr. Mower has always tried to give back to the community, the recent success of Neways and other endeavors has allowed him to provide assistance on a global scale.

The following list, which is not exhaustive, are examples of Mr. Mower's personal, charitable work:

- Support for a school for handicapped children in St. Petersburg, Russia. Due to gaps in the Russian welfare system the school was short on supplies and Mr. Mower stepped in with both financial and material support. This financial commitment lasted over five years until such time that the Russian government took over the school's administration. In addition to providing charity, Mr. Mower's example encouraged numerous Neways employees to support the school as well.
- Starting in 1985 and lasting 17 years Mr. Mower donated products to an orphanage in Costa Rica. Throughout that 17-year period Mr. Mower was responsible for supplying all of the shampoo, bath soap, laundry soap and disinfectants to the orphanage. Mr. Mower, using his business standing, was also able to negotiate free shipping for these products with a Utah based freight forwarder.
- In 2003, Mr. Mower invested \$250,000 and pledged another \$2,500,000 in the Hossack Ranch in New Zealand. The Hossack Ranch's charter is the development and preservation of big game and endangered species. This investment illustrates Mr. Mower's love of nature, hunting and the outdoors. It is in fact Mr. Mower's love of hunting that, from his perspective, left him no choice but to go to trial in an attempt to preserve his constitutional right to bear arms and hunt.
- In 2004, Mr. Mower donated \$200,000 to Sportsman for Fish and Wildlife. This money will be used to set up a National Conference in January 2007 in Salt Lake City. The national conference will be attended by five national wildlife foundations and will be used to plan wildlife conservation and management. The conference will be held at the Delta Center in downtown Salt Lake.
- In 1996, Mr. Mower sponsored the Utah Russian Games which were hosted by Utah Valley State College.
- Mr. Mower was a sponsor of the Freedom Festival in Provo, Utah in both 2000 and 2001. Total donation was \$70,000.

- In 1996, Mr. Mower supported the Russian, Lithuanian and Ukrainian women's Olympic cycling teams for three months. This support was crucial to the team's appearance at the Atlanta Olympic games. In addition to providing between \$100,000 and \$150,000, Mr. Mower was instrumental in coordinating additional State, County and City agencies to assist the teams in their training as they prepared for the games.
- Mr. Mower personally sponsored United States Olympic Medalist Matt Gaffari for over three years. Mr. Mower provided this notable Olympic athlete a monthly stipend of \$5,000 per month for over three years.

In addition to those charities listed above, Mr. Mower and Mrs. Mower founded an organization called "Neways Empower," which supplies products and money for both disaster relief and charitable causes. Through Neways Empower, products such as bottled water, medicine, vitamins, nutritional supplements, and other personal care products are distributed to victims of natural disasters, such as those impacted by the December 2005 Tsunami and Hurricane Katrina. In 2005 alone, Neways Empower donated approximately \$3.8 million worth of products to a variety of disaster relief agencies.

At the direction of Mr. Mower, Neways U.S. actively contributes to national and local organizations. In the past three years, Neways U.S. has made corporate contributions in excess of \$2.2 million to groups, including the following: The American Red Cross, Boy Scouts of America, Brigham Young University Athletics, Cancer Prevention Coalition, The March of Dimes, Nebo School District, Provo Theatre Company, Utah Highway Patrol, and many others.

In October of 2004, Mr. Mower formed a non-profit corporation called the Earth Stewardship Foundation (ESF). The purpose of ESF is to promote environmental awareness, preserve the natural environment of the rain forests and ecologically significant underdeveloped land, and to educate the

public regarding endangered species. Mr. Mower's initial, financial contribution will be \$25 million. ESF will work with countries and aid organizations directly rather than simply donating money to others.

In sum, Mr. Mower's charitable contributions began long before the government's investigation in this case, and they will continue long after the court imposes a sentence.⁴ The nature and scope of Mr. Mower's charitable contributions demonstrate that a substantial, downward departure is warranted.

2. Employment-Related Contributions

Although Neways has grown into one of the largest and most successful multi-level marketing companies in the world, Mr. Mower and Mrs. Mower are in the process of selling the company due to personal differences. With the sale of the company approaching, Mr. Mower has been developing a new, multi-level company named "Sisel." Like Neways, Sisel will distribute health, beauty, and personal care products through a worldwide network of distributors.

Sisel is on the verge of breaking ground on a fifteen story office building in Utah County. This \$25 million international headquarters will be home to approximately 1,200 employees with an annual payroll of approximately \$48 million. Sisel products will be manufactured locally in a \$50 million plant, which is currently ready to begin manufacturing, that will employ another 650

⁴ In December of 2004, Mr. Mower set up and funded five Charitable Remainder Trusts (CRT), which contain an unappraised, estimated value between \$30 and \$36 million. Upon his death, Mr. Mower has directed that funds from the CRTs be distributed to various charities, including Church of Jesus Christ of Latter Day Saints General Missionary Fund.

individuals with an annual payroll of approximately \$26 million. Sisel is expected to begin operations in the first quarter of 2007.

When viewed within the current economic climate of the State and Utah County, the addition of over 2,000 quality jobs generating over \$80 million in annual payroll will have a significant and far reaching impact on the economic health of the community. Based on recent data, the forecasted hirings of Sisel would make it one Utah County's largest employers.⁵

If Mr. Mower were sentenced to a term of imprisonment, however, the community would likely not enjoy the economic benefits of Sisel. As witnessed with Neways, the overall success of the company is directly tied to his persona, and Mr. Mower would be unable to start this new endeavor if incarcerated. The positive, economic impact that Mr. Mower will have on the local economy with Sisel justifies a downward departure.

F. DEFENDANT THOMAS E. MOWER'S ADVISORY SENTENCING GUIDELINE CALCULATION SHOULD LEAD TO A NON-CUSTODIAL SENTENCE.

For all the foregoing reasons, the advisory offense level calculation set forth in the PSR is erroneous and should be disregarded. The calculation of the advisory Sentencing Guidelines, which should be based on the 1997 Sentencing Guidelines, for Mr. Mower is as follows:

Base Offense Level (§ 2T4.1(J)):	15
Acceptance of Responsibility (§ 3E1.1):	- 2
Downward Departure (§ 5H1.11):	- 5
Total Adjusted Offense Level:	8

⁵ According to the Utah County Economic Development Council, there were 159,499 full time employees in Utah County in 1994. By comparing Sisel's predicted hirings with this figure, Sisel would employ approximately one out of every one hundred workers in Utah County.

Based on a total Offense Level of 8 and a Criminal History Category of I, the advisory Sentencing Guideline range for imprisonment is 0-6 months. Accordingly, Mr. Mower is eligible for probation pursuant to U.S.S.G. § 5B1.1(a)(1). Pursuant to U.S.S.G. § 5E1.2(c)(3) and (4), the advisory fine range is between \$1,000 and \$10,000.

In light of the calculation above, this Court should impose a non-custodial sentence for Mr. Mower.

II. RELEVANT FACTORS PURSUANT TO 18 U.S.C. § 3553(a)

Following *United States v. Booker*, 543 U.S. 220 (2005), when imposing a sentence, courts must now consider the impact of the factors enumerated in 18 U.S.C. § 3553(a) in addition to the advisory Sentencing Guidelines. See *United States v. Montgomery*, 439 F.3d 1260, 1262 (10th Cir. 2006) (court may depart downward from advisory guideline range so long as sentence is reasonable based upon factors of 3553(a)); see also *United States v. Jones*, --- F.3d ---, 2006 WL 2167171 (2nd Cir. 2006) (affirming district court's non-Guidelines sentence that was based on "gut feeling" about defendant).

A. 18 U.S.C. § 3553(a)(1): The History and Characteristics of the Defendant and the Nature and Circumstances of the Offense.

Mr. Mower's personal history and characteristics, as well as the nature and circumstances of the offense, support a sentence of probation.

1. History and Characteristics of the Defendant⁶

The history and characteristics of Mr. Mower demonstrate that he has led an exemplary life and has always been a hard working member of the community. He was born in Salt Lake City, Utah, into a poor, farming family. He graduated from Bountiful High School in 1960 and later attended classes at the University of Utah. Due to financial hardship, Mr. Mower left college to pursue a career in sales.

Mr. Mower enlisted into the United States Marine Corps in 1965 but was medically discharged less than two weeks later after failing a physical due to an ankle injury sustained as a child. Mr. Mower spent most of his adult life as an entrepreneur, working sales and/or marketing in some capacity. He eventually became involved in personal, health care products in the 1980s, eventually starting a multimillion, international company out of his garage.

Mr. Mower is living proof of the American dream. Born into humble circumstances, he worked long and hard to make his goals a reality. Unfortunately, some mistakes were made along the way that led to the current predicament. An examination of Mr. Mower's entire life, however, reveals that this case is an aberration and not a true reflection of his character.

Mr. Mower's background, and the absence of any significant violations, demonstrates that he is not someone who disrespects the law. In fact as discussed earlier, *see supra* Section I.E., Mr. Mower believes deeply in giving back to the community and has donated millions of dollars in

⁶ The statement Mr. Mower submitted to the U.S. Office of Probation and Pretrial Services contains his personal background as well. *See* PSR at 13-18.

products and money to organizations throughout the world. In sum, Mr. Mower is an upstanding citizen and valued member of the community.

2. Nature and Circumstances of the Offense

Despite having exercised his constitutional right to a trial, Mr. Mower accepts responsibility for his actions. Due to the government's efforts to have the Court impose an overly punitive sentence, however, Mr. Mower refutes the government's assertions in support of the proposed sentencing enhancements. Mr. Mower's arguments in this regard should not be construed as an effort to diminish the seriousness of the offense or minimize his acceptance of responsibility.

Although tax related crimes are serious offenses, they present a wide range of seriousness, depending upon the amount and scope of the tax evasion. When the government first approached Mr. Mower about the taxes involved in this case, he believed that government would be reasonable in resolving any dispute. Instead, the government was cavalier in its estimation of the alleged tax deficiencies, claiming that he owed in excess of \$1.5 million.

As this Court found in its April 7, 2006 Tax Loss Decision, the amount of actual tax loss is much lower than the amount suggested by the government. This case would probably have taken a different course had the government offered an amount similar to the Court's (\$199,775). The government's entrenched position gave Mr. Mower no other choice but to go to trial.

While the jury disagreed with Mr. Mower's defense, the nature and circumstances of the offense are of a much smaller scale and scope than that alleged by the government. Following the conviction, Mr. Mower instructed his accountants to prepare all of his outstanding tax returns that had not been filed previously due to the underlying dispute with the government. Mr. Mower has

now filed tax returns for the years 1998 through present and paid all taxes in full, including interest. This amount totaled in excess of \$14 million. He has also tendered to the Internal Revenue Service all taxes, interest, and penalties on the tax loss found by the Court in its April 7, 2006 Tax Loss Decision. Although this offense is serious, it is certainly not aggravated. Mr. Mower's personal history and the nature and circumstances of the offense support a sentence of probation.

B. 3553(a)(2): The Need for the Sentence Imposed to Reflect the Seriousness of the Offense and Provide Just Punishment and Deterrence.

The law requires the Court to “impose a sentence **sufficient, but not greater than necessary** to comply with the [following] purposes...(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)(emphasis added). These factors weigh in favor of a probationary sentence for Mr. Mower.

Having been a target in a federal investigation and a defendant in a criminal trial resulting in a conviction has been a difficult experience for Mr. Mower and his family. As a result of the government's investigation and subsequent charges, Mr. Mower and his wife of nineteen years were divorced, and he was forced to step down from the company that he founded. The charges and conviction have caused Mr. Mower a great deal of personal grief and humiliation. Furthermore, as a convicted felon, Mr. Mower stands to lose two rights that he holds sacred—his right to vote and his right to bear arms. The uncertainty of the sentencing process has also been painful. The personal,

emotional, and professional toll that this case has taken on Mr. Mower has provided just punishment for the offense.

Mr. Mower's conviction, penalties, interest, and fine are sufficient to provide just punishment and serve as a deterrent to others. There is clearly no need for a term of imprisonment to deter Mr. Mower. The circumstances that led to his income not being reported have been remedied and will not be repeated. Additionally, no imprisonment is necessary to protect the public from Mr. Mower. He is not a threat to society in any way and has virtually no criminal background.

C. 3553(a)(3): The Kinds of Sentences Available.

Several types of sentences are available in this case, including probation and community service, which would be far more appropriate than incarceration. Should the Court determine that a more severe penalty is in order, it could impose restrictive conditions on any probationary term, including home detention, among others. 18 U.S.C. § 3563(b)(19).

D. 3553(a)(4): The Kinds of Sentence and the Sentencing Range Established by the Sentencing Guidelines

By statute, Mr. Mower is eligible for probation. 18 U.S.C. § 3561(a). There are several restrictive conditions that the Court could impose that would serve to further punish Mr. Mower if the Court viewed them as necessary. 18 U.S.C. § 3563(b)(1)-(22).

The advisory offense level calculation set forth in the PSR is erroneous and should be disregarded. As explained above, *see supra* Section I, the proper advisory Sentencing Guideline range for Mr. Mower is 0-6 months (based on a Criminal History Category of I and an Offense Level

of 8). Accordingly, in contrast to the PSR, Mr. Mower is eligible for probation pursuant to section 5B1.1(a)(1) of the Sentencing Guidelines.

CONCLUSION

For the reasons set forth above, Defendant Thomas E. Mower respectfully requests that the Court impose a probationary sentence based upon the advisory Sentencing Guidelines and the factors set forth in 18 U.S.C. § 3553(a).

DATED this 6th day of September, 2006.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Max D. Wheeler

Max D. Wheeler

Sam Harkness

/s/ Rebecca C. Hyde

(Signed by filing attorney with permission
of Ms. Hyde)

Rebecca C. Hyde

Attorneys for Defendant Thomas E. Mower

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system to the following:

Kevin Downing, Esq
Caryn D. Mark, Esq
Special Assistant United States Attorneys
c/o United States Attorney's Office
185 South State Street, #400
Salt Lake City, Utah 84111

Scott C. Williams, Esq
43 East 400 South
Salt Lake City, Utah 84111

Neil A. Kaplan, Esq.
Anneli R. Smith, Esq.
Jennifer A. James, Esq.
Clyde Snow Sessions & Swenson
201 South Main, #1300
Salt Lake City, Utah 84111

/s/ Kathy Dugdale