

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

11 Cr. 003 (DLI)

ANTHONY SCIBELLI,

Defendant.

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MEMORANDUM IN AID OF SENTENCING

This memorandum is respectfully submitted in support of our request that Anthony Scibelli be sentenced to a term of five years of probation together with an appropriate fine.

In this memorandum, we gather letters that speak eloquently of a man perceived to be a decent father, husband and employer. Nevertheless, our request may seem bold at first. This is, after all, Scibelli's second conviction in the past five years. It is the second time in the past five years that he has pleaded guilty to committing a serious federal felony, and the second time that he is being sentenced. The advisory guidelines in this case may reach an estimate of 27-33 months (though we submit the correct estimate is 21-27 months). The Probation Department recommends a below-guidelines sentence of 366 days of imprisonment. Yet, we comfortably press our request for a term of probation because of the unique facts of this case – unique circumstances that begin with the fact that Anthony Scibelli is *not* a re-offender.

On August 14, 2008, Judge Jack B. Weinstein sentenced Anthony Scibelli to a five year term of probation in United States v. Agate, 08 Cr. 76 (JBW). Scibelli was being sentenced on one extortion count, in connection with a construction project that his companies spearheaded in 2006 and 2007. There were 62 defendants in Agate, many of whom received prison terms, but Judge Weinstein acknowledged that Scibelli's case was different. His construction companies employed

more than 200 workers at a time when the construction industry was in a deep recession. Through hands-on leadership, Scibelli kept the companies afloat and ensured that his employees received a paycheck every week. Judge Weinstein acknowledged that sentencing Scibelli to a prison term would cause significant hardship to those employees, most likely even the loss of their jobs. In Judge Weinstein's words:

One major reason for the sentence [of probation] is that there are 210 employees at stake here, and given the present recession and the difficulty of people in this industry, particularly those who do physical labor, of getting another job and supporting their families has to be taken into account, and that is, actually, the primary reason for the Court's decision. (Exhibit A, Sentencing Transcript, dated August 14, 2008, at 49.)

On August 14, 2008, Judge Weinstein gave Anthony Scibelli a second chance to keep his companies in business and his workers employed, and to prove that he could live a law-abiding life.

We request a sentence of probation in this case because Anthony Scibelli has made good on that second chance. In the four years and four months since Judge Weinstein sentenced him, Scibelli has been a model probationer and a model citizen. The charges in the present case stem from incidents in 2007 – the same period as the charges in Agate, and more than a year before Judge Weinstein sentenced Scibelli to probation. Anthony Scibelli has not re-offended, and he has not betrayed the trust that Judge Weinstein placed in him. He has proven that he can live a law-abiding life.

In the more than four years since he was sentenced, Scibelli has also grown his companies and taken on new construction projects. He still runs all of the day-to-day operations of the companies, and he still employs large crews of workers on construction projects in Manhattan, Brooklyn, Queens and the Bronx. During that time he has also been receiving regular mental health treatment for his life-long struggle with bipolar disorder, anxiety disorder, and panic disorder.

The Proposed Sentence

We submit that a sentence of five years of probation, running consecutively to Scibelli's sentence in Agate, is appropriate and warranted in this case for the following reasons:

- (a) As described above, it would give effect to the spirit of Judge Weinstein's sentence in Agate, which granted Scibelli an opportunity to continue working and to keep his companies afloat in difficult economic times;
- (b) It would allow Scibelli's employees to keep their jobs;
- (c) It would provide adequate supervision, by ensuring that Scibelli would be supervised by probation for a full ten years from the date of his sentence in Agate;
- (d) It would acknowledge that Scibelli has been a model probationer and citizen since his sentencing in Agate;
- (e) It would recognize that Scibelli has made tremendous individual progress since 2008, including a commitment to prescribed mental health treatment;
- (f) It would recognize Scibelli's good character and his value to his family (including his three young children); and
- (g) It would recognize his full and genuine acceptance of responsibility, and his honest remorse.

Community and Family Support

Attached to this letter, and cited below, are 38 letters of support that we received from Anthony Scibelli's family, friends and colleagues in anticipation of his sentencing. The outpouring of genuine support is astounding. These letters come from individuals in all walks of life – a construction attorney, a real estate manager, a union carpenter, a Suffolk County Correction Officer, a Lieutenant Colonel in the United States Air Force, and a Vietnam veteran, to name a few.

We submit that these letters demonstrate that a clear support network is in place, covering all aspects of Scibelli's life. That network is prepared to support him and, if the Court grants our sentencing request, to add a second layer of monitoring to ensure his ongoing compliance with the terms of probation. See United States v. Batista, 163 F. Supp. 2d 222, 224-25 (S.D.N.Y. 2001) (addressing value of "moral suasion" in bail context).

Anthony Scibelli's Letter to the Court

Attached as Exhibit B is a letter from Anthony Scibelli to the Court. In the pages below, we endeavor to describe Scibelli's professional history, his relationship with his family and friends, and his remorse and rehabilitation. We submit that Scibelli's letter to the Court expresses these issues more forcefully than any description we could offer, and we request that the Court give it all possible consideration.

Anthony Scibelli's Work History

From the time he was old enough to do so, Anthony Scibelli worked. First he worked at odd jobs in his Long Island neighborhood to earn extra money to help his family. Later, he took jobs in the restaurant business, starting at the bottom and working his way up. As his lifelong friend Daniel McCarthy notes, Scibelli "always worked." (Exhibit C.)

Family friend Charles Castelli writes:

I have known Anthony since he was 14 years old. He worked in my restaurant, and started as a dishwasher and worked himself up to a managerial position. I have known him for 20 years and during that time I have known him to be loyal, hardworking and trustworthy. (Exhibit D.)

He used virtually every dollar he earned to support his parents and his sisters. His mother Phyllis Scibelli writes:

Anthony always understood how hard it was for me and would always try to help. At a very young age, he would go out on his bicycle to try to find work. He would mow lawns, babysit, work for an upholsterer, had a paper route, work at the pizza place and worked anywhere else he could to help with my financial burdens. (Exhibit E.)

His aunt Josette Ferra adds:

He had a hard childhood. Anthony started working at a young age to help his parents make ends meet. His father was unable to work at that time and now resides in a nursing home today. Anthony took on the responsibility to support his family[.] (Exhibit F.)

Scibelli's sister Michelle writes:

I can still remember the days when we were in school, my brother would mow lawns during summer recess to help my parents buy school clothes for my sister and I for the upcoming school year. (Exhibit G.)

After graduating from high school, Scibelli began working full-time in his uncle's restaurant, La Famiglia in Patchogue, Long Island. From there, Scibelli moved on to a number of other restaurants, apprenticing in the trade and learning both cooking and restaurant management, while intending to one day open a restaurant of his own. As Scibelli's sister Michelle writes:

Since I can remember, my brother was always an extremely hard worker. He used to manage a pizzeria, working fourteen hours a day, six to seven days a week. He did this for a very long time until he saved up enough money to open his own store. (Exhibit G.)

After years of learning the trade, he finally opened his own shop in 1997, Bella Cosa Pizzeria, which was located in Lawrence, Long Island. In 1999, he sold that shop to open another restaurant, Rafaelos, in Commack. After selling Rafaelos in 2001, he opened Scibelli's Pizza & Pasta, in the Ronkonkoma train station. Scibelli worked for years to build the business into something his family could be proud to have their name attached to, and it eventually proved to be a success, earning a profit and providing for more than ten employees. (See Exhibit H, Letter of Landlord Charles D. Carames.) He recently sold the business to his sister Gina. She writes of what that gesture meant to her, and what it shows about her brother's character:

As a single parent, I was working full time and was living at my mother's when my brother came to me and said Gina 'I want to help you secure your future and make a future for you and your family.' He always looked out for my best interests. My brother sold me his pizzeria, which he worked most of his adult life to build. He trusted me, knowing the values he taught me as a child and with his help, I would become successful. Anthony wanted my children and I to become secure and have a better future. (Exhibit I.)

A true family business, his sister Michelle has worked for years as the restaurant's manager. (Exhibit G, Letter of Michelle Scibelli.)

Anthony Scibelli's Move to the Construction Industry

Looking for greater business opportunities, Scibelli developed an interest in construction (his father, grandfather and several uncles had all been union laborers). His equity was earned by his own sweat. Scibelli first entered the industry by doing odd jobs on construction sites, to learn as much as he could. Later, from 2002 through 2005, he worked with Quantum Construction, a company owned by his friend Gregory Sulger, and apprenticed on Quantum's jobs throughout New York. Scibelli took only a small salary from Quantum, focusing instead on his long-term goal of thoroughly learning the business. Gregory Sulger writes:

Together, Anthony and I would commute daily into the city. Anthony learned the basics. He started taking classes at a local college. To start, Anthony would go to the various jobs with the project manager – he learned a great deal. He showed much enthusiasm and his knowledge and abilities quickly grew. He was always willing to go above and beyond – putting in long hours whenever we needed him to. (Exhibit J.)

After more than three years apprenticing at Quantum Construction, Scibelli finally opened his own company, VMS Consulting, Inc., in early 2005.¹ He founded a second construction company, Hunter-Atlantic, Inc., in 2006, and a third company, Degraw Construction Group, Inc., in 2011. Now, Scibelli not only provides for his family, but for his employees as well. His companies

¹ The company name VMS was taken from the initials of Scibelli's daughter Valentina Marie Scibelli.

(“companies”) have at times employed over 200 workers (depending on the number and scope of current projects) who depend on him for their livelihood.²

Anthony Scibelli is the paradigm of a “hands-on” businessman; he spends every workday shuttling between his Ronkonkoma office and his construction sites. He takes a personal interest in every project that his companies undertake, seeing each job through from contract to completion. Many of the letters attached to this memorandum attest to his “hands-on” attitude and the responsibility that he feels toward each project, each co-worker, each contractor and each employee. For example, one of his employees, Christopher DuBrino, writes:

Anthony is consistently fair and equitable in all of his dealings. He treats his associates and employees with the same respect and evenhandedness he expects in return. His bills are paid in a timely manner, our checks never bounce, and our contracts are closed to the satisfaction of the clients and contractors we work for.

* * *

He does it, because he has people who depend on him. His employees look to him for direction and support, clients expect him to answer the telephone whenever they decide to call, business associates to meet and plan our future with, and negotiations to conclude. He does it because it is the right thing to do. (Exhibit K.)

Gerald Zisholtz, Scibelli’s longtime construction litigation attorney, offers a similar observation:

Mr. Scibelli is extremely loyal to his subcontractors and associates. He goes out of his way to make sure that the people who work for him get a day’s pay for a day’s work. He does not shirk his responsibilities and if he finds something is wrong he assumes responsibility and deals with the facts as they exist. He does not make excuses to avoid his obligations or to blame others. (Exhibit L.)

Rizal Chan, the owner of a building supply company that worked on construction projects with Scibelli, writes of Scibelli’s problem-solving abilities:

² At the time of Scibelli’s sentencing in Agate, his companies employed approximately 210 workers (as reflected in Judge Weinstein’s comments at sentencing). His companies currently employ approximately 100 workers, with the expectation that the total will again approach or exceed 200 by early next year.

[Another contractor] ran into financial problems and technical complications, and was unable to finish the job, and thus left with a big debt of unpaid bills, over \$100,000 owed to us. Anthony stepped in to take over the job, with all the responsibility of restoring the construction work, unknown risks, and he promised to pay all the debts in just one hour of negotiations. Starting from the following months, with an efficient work force and leadership, the problems were gradually corrected, and the debts were promptly paid to us as promised. ... Had Anthony not stepped in, and not promised to pay us the balance owed from the previous subcontractor, we would have ended up with a financial disaster. (Exhibit M.)

Matt O'Brien, a rebar supplier for many of Scibelli's construction jobs, adds:

He's been a pleasure to work with from a business perspective. He has always made sure I was paid in a timely manner. We have not had one issue. He has always honored his commitments. If he bought material not only would he take it but pay for it when it was due. In my industry I can't say that about too many people. (Exhibit N.)

One of his employees, John LoIacono, relates a story that perfectly describes Scibelli's character as a business owner:

During the 2008 recession, I walked into work one morning and was told that I no longer had a job. No warning, no severance and a wife and two children who depended on me. I was devastated. That same afternoon I called Anthony Scibelli, who I had met back in 2001 while working on a landmark project together, and kept in touch with him throughout the years. He agreed to meet with me that same day, and within hours I was employed again. Anthony understood that I had a family to support and empathized with my situation. That was four years ago.

In working with Anthony for the past four years, he has always conducted himself professionally and ethically. In the time that I have worked for him, there has never been any project or business dealing that was not carried out to the letter of the law. Having been in the construction business for over twenty-five years I can attest to the difficulties of maintaining employment, the inconsistencies in work and the many employers who feel that workers are disposable commodities depending on the company's profit margin. Anthony Scibelli is not one of those guys. ... Never in all my years of work have I met anyone like Anthony; a person who genuinely cares about the people that work for him. (Exhibit O.)

We respectfully submit that this is not a quote from an ordinary sentencing letter, written on behalf of an ordinary defendant. It is an exceptional statement on the character of an exceptional person and employer. For Anthony Scibelli, running a company is a privilege and a responsibility.

It is an opportunity to work for himself, but always with a mind to what he can do for others. A further example of this quality is expressed in the letter of his lifelong friend Daniel McCarthy:

My wife who had suffered from breast cancer for three years had passed away leaving this world with a six year old daughter and myself, a guy who got a wakeup call to reality in those years. ... At times I did feel ashamed as a man because with the bills, the health insurance and doctor's co-pays, I couldn't handle it. Anthony knew this and it was in his character to bypass my pride and help me out by not just giving me money because he knew I would never take a handout but by giving me a job that provided health insurance. (Exhibit C.)

His mother Phyllis Scibelli adds:

His desire to be successful has not been self serving. He uses his success to help others on a daily basis. He has taken the time as well as a personal interest in many of his employees' lives and has always been there for them. Anthony employs a lot of people and they depend on him greatly to make ends meet in their own homes. Losing Anthony as a boss and a friend who be devastating to both his employees and their families. (Exhibit E.)

Anthony Scibelli realizes full well that he risked his livelihood, and the livelihood of his employees, with his conduct in 2006 and 2007. But we submit that he has earned the right to continue his good work by his actions over the past four-plus years. A non-custodial sentence in this case would allow him keep his companies alive, and to keep giving his employees a chance to work and earn a fair living.

Current New York City Construction Projects

Scibelli's companies are currently engaged in numerous major construction projects in New York City, including the following:

- YMCA Aquatic Center, 330 8th St., Brooklyn, NY
- Nan Shan Center, 133-1441 Ave., Flushing, NY
- 27 Vandam St., New York, NY
- 3170 Webster Ave., Bronx, NY
- Jac's Place Townhouse, 11 St. Luke's Place, New York, NY
- Market Rate Residential, 5-11 47th Ave., Long Island City, NY

On each of these construction projects, Scibelli's companies provide much of the initial construction work to build the "shell" of the structures being erected.³ On the YMCA and Nan Shan projects, Scibelli's companies are responsible for excavation, sheeting and shoring (placing supports to stabilize a structure during excavation and construction, especially concrete work), underpinning (strengthening and stabilizing the foundation of an existing building by extending the foundation in depth or breadth), footings and foundation (installing foundational support for buildings), and slab on grade (forming a concrete slab foundation from a mold set into the ground by pouring concrete into the mold, leaving no space between the ground and the structure). On the Vandam St. project, the companies are responsible for all of the above except underpinning. On the Webster Ave. project, the companies are responsible for slab on grade and superstructure (creating the structure of the building above the foundation). On the Jac's Place Townhouse project, the companies are responsible for excavation, shoring, underpinning, and slab on grade, as well as pouring the foundation walls and slab (horizontal slabs of steel-reinforced concrete used to construct floors and ceilings) on the upper levels and the roof.

The Market Rate Residential project in Long Island City is the newest project on which Scibelli's companies have begun working. The companies are responsible for slab on grade, columns, shear walls (walls composed of braced panels designed to counter the effects of lateral load acting on a structure), and slab for all twelve floors, including the roof. They are also responsible for repairing faulty installations done by the previous concrete contractor. This is a large job, and taking on this project meant that Scibelli could provide work for a large number of new employees.

³ Attached as Exhibit P are photographs of Scibelli's employees working on major construction projects.

Attached as Exhibit Q are photographs of completed construction projects on which Scibelli's companies have worked.

Unfortunately, this was also the project hit hardest by Hurricane Sandy. As the photographs attached to this memorandum attest, water damage on the site was extensive (flooding the job site to a depth of between 8-10 feet), requiring that the companies repair or replace much of the equipment and materials already put in place. (See Exhibit R.) Despite the added time and expense, Scibelli's companies are moving forward with construction, with the hope that insurance may cover some of the damage at some point in the future.

Current Employees

The projects described above require both raw manpower and the skill and experience necessary to handle multiple aspects of erecting complex structures. In connection with these projects, Scibelli's companies currently employ more than 100 workers, and expect that number to reach more than 200 in the coming year (due to expected work on the Liberty View Harbor project, as detailed below).

Significantly, these employment figures do not account for the large number of workers that are not directly employed by Scibelli's companies but are nonetheless employed by virtue of Scibelli's ongoing construction projects. This includes engineers, subcontractors, material vendors and suppliers, and employees of rental equipment companies, all of which constitute an additional 50-100 persons or more employed at any given time.

Office Staff

Scibelli's companies keep an office with a small office staff (Scibelli and three others) at 90 Railroad Ave. in Ronkonkoma, NY. The office handles and manages the daily operations for each project. These operations include, among other things, procuring and maintaining proper insurance for each project; submitting payment requisitions; managing payroll; ordering materials (including

concrete, lumber, steel, reinforced steel and forms); handling rental of tools and equipment; processing change orders for additional work; producing and submitting engineer-designed shop drawings for approval, and recording shop drawings for each project; recording and submitting Material Safety Data Sheets for items used in each project; handling disbursements for subcontractor payments and lien waivers; scheduling and updating mandatory employee training; producing and providing a company site safety manual for each project; recording documentation for testing performed for each project; managing subcontractors (including concrete masons, electricians, welders, plumbers and trucking companies that perform work on each project as needed); and managing logistics for equipment and material deliveries. Each site also has a field trailer, where the superintendent and workers in the field handle business operations for that project.

In addition to overseeing day-to-day field work, the majority of Scibelli's time is spent in back-office management, including those tasks described above. In this role, he is particularly valuable. Because of his experience and expertise, there is no one else who could step into the business role of running the companies. And, without his presence and leadership on a daily basis, there is little hope that the companies could be managed effectively enough to survive.

Future Work – Liberty View Harbor

Scibelli's companies are expected to have an increase of at least 120 employees on payroll over the next six to 12 months in connection with work to be performed at the "Liberty View Harbor" site in Jersey City, NJ. This is a site situated on 65 acres of Jersey City waterfront, covering an area of over 27 city blocks. The owner of the Liberty View Harbor site, Peter Mocco, a real estate developer, attorney and the former mayor of North Bergen, New Jersey, conceived of the project as an "urban rehabilitation," and has plans to construct 10,000 apartment units in nearly 30 separate buildings to be erected over a 15-year period. In addition, commercial buildings designed

to provide shopping and other services to the tenants (over 500,000 square feet of retail space and over 5 million square feet of commercial space) have been planned.

Scibelli's companies began work on this project in 2005 – in fact, Scibelli's company VMS was the first company to perform concrete work when the project started. And, Scibelli's companies have continued to perform all of the available concrete work at the site. Construction there has slowed over the past year and a half due to the economic slowdown, but the project is expected to expand in scope in the coming months, and will constitute a major long-term building project. Scibelli's companies anticipate performing most, if not all of the future concrete work at the site. His companies anticipate being responsible for excavation, pile work (placing beams for a foundation or support), pile cap work (casting reinforced concrete around the head of a group of piles to ensure that they act as a unit to support a load), foundation and superstructure. Scibelli's companies are positioned perfectly to do this work because they already have equipment on site – a substantial money-saving boon for the project. The work for each building on the Liberty View Harbor site is performed under a separate and individual contract, and there are currently 27 additional buildings scheduled to be erected.

In a letter to the Court, site owner Peter Mocco writes:

Over the last 8 years, Anthony has proven to be a hard working, honest and dedicated contractor, who in the face of adversity on the job has exhibited courage, resourcefulness and integrity at every turn and at every level. (Exhibit S.)

He describes in detail the work that Scibelli's companies already completed on the site, including “the concrete contracting work for the 134 unit, 9 story Sutton Building.” (Id.) This was a project riddled with adversity, but with Scibelli's hands-on leadership his companies were able to persevere and complete the work. As Mocco writes, “There were many, many issues and Anthony Scibelli was there with our staff personally resolving each issue in a creative, resourceful and honorable way.” (Id.) He notes that “As a result of Anthony's pro-active solutions, continued

commitment to the job, resourcefulness, integrity and honesty, VMS has also done contract work on the Zenith, an 8 story loft building and the Regent, a 9 story 173 unit residential building at Liberty Harbor.” (Id.) Scibelli’s companies also worked on the construction of townhouses at the Liberty View Harbor site.⁴

We submit that it is the rare defendant who is able to procure a character letter from the owner of a major construction site, no less a site owner with Peter Mocco’s credentials, reputation and public visibility. Because of his sterling reputation in the industry, and the character and qualities that he displayed through his work, Anthony Scibelli is that rare individual.

Even more striking is that Mocco remains eager to move forward with Scibelli’s companies in future work at the Liberty View Harbor site, with full knowledge of the charges in this case. As he writes:

Liberty Harbor has approvals for an additional 9 story and 16 story building. We are presently working with architects to prepare final working drawings for the 200 unit, 9 story building. We anticipate starting construction in the spring of 2013. Because of Mr. Scibelli’s past positive construction activity at Liberty Harbor and the fact that Mr. Scibelli has substantial concrete construction equipment stored on vacant portions of our site, I anticipate requesting Anthony Scibelli to bid on the project. And based on past performance I believe Anthony will be the contractor to construct the concrete portion of the building. (Id.)

In fact, since Peter Mocco’s letter was written, Scibelli has submitted a budget for those projects, and Mocco has submitted that budget to the bank for approval.

Peter Mocco concludes his letter by stating:

In the construction field every day brings a new set of issues, problems, dilemmas, and catastrophes. Our site is no different. The one constant over the last 4 years is that Anthony Scibelli has proven himself to be an honest, hard working, creative and innovative member of the construction team. In all my dealings with Anthony and his company, he has never once suggested anything, or implied anything that was inappropriate. I believe that Anthony Scibelli and his company are an asset to the New York Metropolitan area and sincerely hope you will give him the opportunity to

⁴ Attached as Exhibit T are photographs of the projects that Scibelli’s companies have completed at the Liberty View Harbor site.

continue providing services to the construction industry and Liberty Harbor in the future. (Id.)

We submit that it is a remarkable testament to Anthony Scibelli's character that Peter Mocco has the confidence to continue with him as one of his principal contractors. We further submit that the large number of additional workers Scibelli would employ on this project if he were able to continue running his companies should weigh heavily in favor of a sentence of probation.

A Prison Term would Destroy Scibelli's Business

Anthony Scibelli is a true "hands-on" businessman, micromanaging both the big-picture and detail work for each of his companies' projects. He is the face of his companies and the driving force behind their success both in the field and in the back-office. And, because of his experience managing every aspect of the daily operation of his construction companies, it is highly unlikely that those businesses would survive if Scibelli were to be incarcerated for any length of time. Particularly with regard to the Liberty View Harbor project, which as described above is based in a history of personal trust and confidence, it is unlikely in the extreme that Scibelli's companies could continue their work without him at the helm. A sentence of probation, on the other hand, would allow Scibelli to keep working, and, even more importantly, to keep his businesses running and his employees working.

There is significant precedent for a below-guidelines sentence based on a defendant's indispensability to his or her business, and the undue hardship that employees would suffer should the defendant be incarcerated and the business fail as a result.

One example is the case of United States v. Toback, No. 01 CR. 410, 2005 WL 992004, at *4-6 (S.D.N.Y. Apr. 14, 2005). In Toback, Judge Sweet of the Southern District of New York sentenced a defendant to "a non-Guideline sentence . . . of time served [one day] . . . followed by a three-year term of supervised release, ten months of which are to be served through home

confinement.” Id. at *6 (citing United States v. Milikowski, 65 F.3d 4 (2d Cir. 1995)). Judge Sweet weighed heavily the fact that “Toback’s position as sole owner and operator of Westerly Market, a business that employs upwards of 80 people, demands his daily personal involvement to secure the continued success of the business and the continued job security currently provided its many employees.” See id. at *5. Judge Sweet found that:

Toback is essential to the successful operations of Westerly Market. His daily guidance and input keep the business thriving; conversely, his removal would cause extraordinary hardship on those who are employed by him. . . . Should Toback be imprisoned, a vacuum in leadership would result, significantly threatening the business’s continued prosperity and endangering the future employment of its 80 plus employees. Id.

Judge Sweet imposed a non-custodial sentence in order “to avert this undue hardship on innocent third parties, namely Westerly Market’s employees.” Id. at *6. We submit that Anthony Scibelli is in a very similar position. He is indispensable to his businesses, and to the continued well-being of his employees.

Other courts have reached similar results. In United States v. Somerstein, 20 F. Supp. 2d 454, 460-61 (E.D.N.Y. 1998), Judge Spatt held that a downward departure was warranted because the defendant “demonstrated her total ‘indispensability to ... the business’” and because of “the extraordinary hardship her incarceration would impose on [her] employees, and on the business itself.” Id. (citing Milikowsky, 65 F.3d at 8). Citing a variety of sentencing letters, Judge Spatt found that the defendant was “an exceptional business woman,” and the “public face” and “backbone” of her business. Id. at 461. Like Scibelli in this case, the court in Somerstein found that the defendant was “essential to the survival” of her business, and “not replaceable.” See id. at 462. Judge Spatt concluded that “there is no one else available to assume her duties in her absence,” and that incarcerating the defendant would “impose a grave hardship on the employees, and with reasonable certainty, will leave them jobless. In the Court’s view, this is precisely the sort of extraordinary circumstance contemplated in Milikowsky. Marianna is the ‘only individual with

the knowledge, skill, experience, and relationships to run [Somerstein Caterers] on a daily basis [and] is virtually the only reason that [the company] remains [a] viable operation.” See *id.* (citing *Milikowsky*, 65 F.3d at 8) (brackets in original).

Similarly, in *United States v. Kloda*, 133 F. Supp. 2d 345, 349 (S.D.N.Y. 2001), Judge Hellerstein of the Southern District granted a downward departure based, in part, on “the needs of [the defendant’s] business and employees.” See *id.* (citing *Mililowsky*, 65 F.3d at 8). The court noted that the defendant claimed “to work 80 hours per week in his printing businesses, and to be vitally needed for the continuation of his business” and that “his thirteen workers ... would lose their work if he would be unable to manage the business.” *Id.* at 346-47. The defendant in *Kloda* told the court at sentencing that no one else was “sufficiently knowledgeable about the business to succeed him.” See *id.* Considering this, along with other factors, Judge Hellerstein found that a departure was warranted.

In *United States v. Patel*, 164 F.3d 620, 1998 WL 650589, at *3 (2d Cir. 1998) (Table), the Court of Appeals affirmed a downward departure based on similar factors. The Court wrote:

The district court also found that ‘the adverse effect upon any incarceration of Mr. Patel upon the business and the business employees’ constituted an extraordinary business circumstance that justified a downward departure. Patel’s involvement in his donut shops, which employ twelve people, extends to every aspect of their operation. He reportedly works seven days a week, seventy to eighty hours per week. One of Patel’s partners has been deported to India, and the other apparently lacks the skills needed to manage the shops. On this basis, the district court concluded that the survival of the shops – and therefore the jobs of Patel’s twelve employees – depended on his presence. *Id.* (citing *Milikowsky*, 65 F.3d at 8.)

Here, Anthony Scibelli is as indispensable to his business as the defendants in the cases cited above. Although he has employees capable of supervising field work, in his absence no one would be able to effectively run the companies, and if he were removed for any length of time it is highly unlikely that they could endure. As a result, Scibelli’s employees, and the non-employee workers

that rely on the business generated by his construction projects, would become the unintended victims of his crime, suffering along with him.

As detailed above, Judge Weinstein found this argument persuasive in Agate and sentenced Scibelli to probation, rather than a prison term, for just this reason. Judge Weinstein specifically stated that:

One major reason for the sentence [of probation] is that there are 210 employees at stake here, and given the present recession and the difficulty of people in this industry, particularly those who do physical labor, of getting another job and supporting their families has to be taken into account, and that is, actually, the primary reason for the Court's decision.

(Exhibit A, Sentencing Transcript, dated August 14, 2008, at 49.)

We respectfully submit that the surrounding circumstances are the same today as they were in 2008. The construction industry in and around the New York area continues to struggle, and construction workers continue to struggle to find employment. In the wake of hurricane Sandy, conditions have only become more difficult. Several of Scibelli's construction sites are literally underwater. Equipment and materials have been damaged or destroyed. Insurance payments, if they come at all, will be received months in the future. Scibelli and his employees visited their jobsites before the rains had even stopped, photographing the catastrophic damage. (See Exhibit R.) Because the heart of Judge Weinstein's sentencing rationale is as true today as it was in 2008, we respectfully submit that a sentence of probation is warranted here.

Anthony Scibelli is a Good and Decent Person

As devoted as he is to his companies and his employees, Anthony Scibelli is even more devoted to his family, including his three young children. If he were incarcerated, they would be left without an essential source of financial and emotional support.

Anthony Scibelli was born in Danbury, Connecticut to a working-class two-income family. He was raised on Long Island, and continues to live there.

Scibelli's 61-year-old father was a union construction worker left permanently disabled in a job-related accident in 1987, when Scibelli was still in high school. His father continues to suffer health problems related to that disability that have resulted in four total knee replacement surgeries, additional surgeries for broken bones in his leg, as well as literally hundreds of emergency hospitalizations for pneumonia and other illnesses. He suffers from chronic liver disease and cirrhosis of the liver, hepatic encephalopathy (impairment of brain function as a result of liver failure)⁵, hepatitis C, chronic obstructive pulmonary disease, and dementia. His long-term reliance on pain medication also led to both addiction problems and further health issues related to that addiction. For the past several years he has been living in a nursing home. As Scibelli's aunt Diane Aufrecht writes, "Due to his increasing health problems, there is little hope that he will ever live at home again. All of this at the young age of 61." (Exhibit U.)

For the past twenty-one years (since his father's accident), Scibelli has supported his parents, both financially and emotionally. His aunt Rose Nardello writes:

Anthony is a very important part of his father's life. Unfortunately, [his father] is in a nursing home at the young age of 61. He has recently been informed by his doctors that he will never walk again. Anthony's father has many other serious health issues and is confined to a wheelchair at Saint James Nursing and Rehabilitation Center in Saint James, NY. The nursing home is less than a mile away from Anthony's home. He brings his dad dinner almost every night and ensures that he has all the proper care necessary to keep him as comfortable as possible. ... Since hearing the doctors' prognosis of his inability to walk, [his father] has been very depressed. His son Anthony brings him love, laughter and above all, companionship. I know their special relationship is one of the few things that keeps my brother going from one day to the next. (Exhibit V.)

His aunt Diane Aufrecht adds:

⁵ Scibelli's father has been told by his doctors that he is in need of a liver transplant, but is not a candidate for transplant surgery because of his other serious health issues.

His father's condition has been very taxing on Anthony and their family, but he has stepped up to the plate and provides care to his father in more ways than one can count. ... [His father] will unfortunately spend the rest of his life in this facility and it is a blessing that Anthony lives so close. (Exhibit U.)

Because of his father's disability, Scibelli was forced at a young age to take on the responsibilities of an adult, and to become the backbone of his family. This included raising his younger sisters Gina and Michelle. His sister Gina writes: "Growing up, Anthony was more of a father figure than a brother. He instilled some of my greatest qualities, teaching me to be family oriented, respectful, hard working, and conscientious of others' needs and feelings." (Exhibit I.)

Without complaint, Scibelli shoulders those same responsibilities to this day. Scibelli's mother Phyllis writes:

Like me, at a young age Anthony was forced to become an adult and take on the responsibility that comes with raising a family. ... As much as he would have preferred playing sports with his friends, he always did the right thing for his family out of necessity and to ensure that his sisters would always have a father figure and someone to depend on. Anthony sacrificed his own youth and his passion for sports to provide for his sisters, myself and his dad. The personal sacrifices that my son made growing up has made him into the man he is today. He continues to live his life always putting others' needs before his own. (Exhibit E.)

Shawn Eichorn, Scibelli's friend since high school, writes:

He took the responsibility for caring for his mother and two sisters at a very young age after his father could or wouldn't do it himself. Anthony put aside his dreams of a future to give his family whatever it took to keep them in their home, in school and give them everything they needed.

He still takes care of his mom, two sisters and father who is now sick. A selfless son to his mother, helping to take the burden off her with his father's illness, keeping him in a care center. He makes sure his wife and three young children have the opportunity he didn't. (Exhibit W.)

Scibelli now also supports his mother, who suffers from heart disease, and his father-in-law, a disabled Vietnam veteran. Scibelli's father-in-law, who suffers from PTSD as well as a variety of other ailments, lives with Scibelli and his wife for two weeks of each month. (Exhibit X, Letter of

Alonzo Campbell.) Scibelli takes his father-in-law to appointments at the V.A. hospital, and supports him both financially and by giving him a place that he can always call his home. (Id.) As his aunt Rose Nardello writes, “Anthony is the core of his family right now for moral support as well as financial support.” (Exhibit V).

While supporting his family, Scibelli also worked to better himself by returning to school in 2001. He put himself through one year at Suffolk Community College, and two semesters at the New York City College of Technology, in Brooklyn, where he achieved a 4.0 grade-point-average.

Anthony Scibelli and his wife Charise now have three children: Valentina, age 7; Anthony Jr., age 4; and Emilio, who is 2 years old. It is no exaggeration to say that his children are the most important thing in his life. His mother Phyllis writes:

Anthony’s immediate family is his highest priority. He devotes all of his free time to being with his children[.] He cooks breakfast for his children every morning then takes his daughter Valentina to the bus stop every day. After work, he participates in as many after school activities as he can[.] ... Watching Anthony dote over his children fills me with pride. I can honestly say he is a wonderful father to his children and they are his life. (Exhibit E.)

Scibelli’s aunt Rose Nardello writes:

He is one of the most attentive and involved fathers I have ever seen. He is very hands-on with them. He takes them out alone on weekends to plays, dinners, parties, children’s Broadway shows, and Knicks basketball games. Anthony does most of the cooking in the home. He makes breakfast everyday for the kids before he leaves for work. (Exhibit V.)

His aunt Diane Aufrecht adds:

Anthony has grown to be an amazing father and husband. He is so involved in his children’s everyday life; I have never known such a nurturing and encouraging father. I cannot imagine what a void his children will feel, if Anthony is suddenly not a part of the ins and outs of their days. He cooks for them, plays with them, does homework with their oldest child Valentina; he even knows how to braid her hair. He is very attentive to them and you know when you meet Anthony that his children are the light of his life. (Exhibit U.)

Many of the letters accompanying this memorandum express the devotion Anthony Scibelli has to his immediate family, and, in turn, how much they depend on him. His wife Charise writes:

“Whether it be sharing his passion for sports or teaching our daughter how to ride a bicycle without training wheels, he’s always pushing them to try new things and be the best they can be.” (Exhibit Y.) His sister Gina writes: “As much as my brother has been a role model to me, his children idolize him.” (Exhibit I.) His sister Michelle describes how he raises his children “with the same family values that he was brought up with,” always stressing “how necessary it is to work hard and that you can accomplish any goals in life you set for yourself.” (Exhibit G.) Without exception, the letters from Scibelli’s family also express the fact that if he were incarcerated it would leave a void in his family’s life that would be impossible to fill.

Throughout his life, Anthony Scibelli has been devoted not only to his nuclear family, but to his extended family as well. For example, his cousin Georgina Rivera writes:

I lost my father to lung cancer at the age of 5 forcing my mother and I to move to New York shortly after to be with family. Knowing my mother’s financial situation, being a single mother working two jobs, Anthony did everything in his power to make the burden seem a little lighter beginning with offering us to live in his downstairs apartment. Without having a dominant male figure in my life at this age, Anthony filled the shoes of a father figure. He made sure I always made the right decisions, and pushed me the way a father would do for his daughter. (Exhibit Z; see also Exhibit AA, Letter of Maryann Rivera.)

His grandfather, Joseph Scibelli, describes how much Scibelli’s frequent visits, telephone calls, and generosity mean to him. (Exhibit BB.) His cousin Jessica Pelletier, who is preparing to enter law school, describes Scibelli as her “mentor,” and writes that “it is Anthony that I owe most of [my academic] achievements to – he has always pointed me in the right direction, helping me make the right decisions[.]” (Exhibit CC.) Another family member writes how Scibelli is truly a “family-oriented person” with a “huge heart” who “is always the one to make sure the family gets together” as much as possible. (Exhibit DD, Letter of Dana Varricchio; see also Exhibit EE, Letter of Johanna Varricchio; Exhibit FF, Letter of Lucille Pelletier; Exhibit GG, Letter of Gary Pelletier.)

Scibelli’s care and generosity have extended even beyond members of his family. The letters attached to this memorandum describe the role that he plays in his community by, for

example: providing money and food from his restaurants to various charities (Exhibit HH, Letter of Nicholas Marchesi); donating money to a family – strangers – in financial need (Exhibit K, Letter of Christopher DuBrino); encouraging a family friend to attend college and then providing all of the food for his graduation party (Exhibit II, Letter of Anthony Trinca); giving a “generous donation” to a friend’s family after a tragic car accident (*id.*); donating food to the families of firefighters killed on 9/11 (Exhibit V, Letter of Rose Nardello); shoveling the storefronts of neighboring businesses during snowstorms (Exhibit JJ, Letter of Thomas Cordingly); and using his construction experience to help a friend and single father with home renovations (Exhibit KK, Letter of Thomas Alston).

Perhaps most remarkable is that Scibelli does all of these things without even being asked, simply because it is in his character to do so. As family friend Marie Salmieri notes, “For as long as I have known him, he has always thought about others before himself.” (Exhibit LL.) His mother-in-law Alma Arzuaga adds: “He is always concerned for the well-being of others and takes the time to call and reach out to family and friends making sure all is well and offering his help whenever possible.” (Exhibit MM.) His neighbor Edward Jarvis perhaps describes his character best when he writes:

Anthony is a very devoted father and husband, and would do anything for his friends and neighbors. ... He is the kind of guy that makes you want to help him out because he is always willing to help you. (Exhibit NN.)

The Offense Conduct

Anthony Scibelli pleaded guilty to Count One in the Indictment, charging a racketeering conspiracy. The pattern of racketeering activity to which Scibelli pleaded guilty involved two related acts, both occurring in 2007. We submit that the facts underlying these racketeering acts are noteworthy, not only because of when they occurred (2007, the same time-period as the charge in Agate), but because the conduct is in many respects atypical of a RICO extortion.

The Sitt Management Extortion
(Racketeering Act 5B)

In the months between March and the end of May, 2007, Scibelli agreed with others to obtain money from the owners of Sitt Asset Management through the filing of an extortionate construction lien. For several months, Hunter-Atlantic, Inc. (one of Scibelli's companies) had been assisting in the completion of a construction project on Avenue P in Brooklyn. Hunter-Atlantic supplied labor, material and financial support to Duramax, another company working on the project, while Duramax was awaiting final payment for the work it had performed. When the project was completed, and the owners and developers (Sitt Asset Management) stalled final payment, Scibelli and others caused a lien to be filed on the project. Unfortunately, the lien was based in significant part on false representations. It was filed through one of the vendors on the job, ACE Materials Inc., and falsely claimed that ACE was owed \$288,000, when in fact that amount included work that was performed not by ACE but by other companies (including Hunter-Atlantic and Duramax). In other words, the lien amount was inflated by falsely aggregating other work into the ACE Materials billing records. As a result of the economic pressure applied by virtue of the lien, Sitt Asset Management settled with Ace for \$120,000.⁶

⁶ The government's letter dated November 17, 2012, filed in connection with the sentencing of Vincent Dragonetti, includes an incorrect statement of fact with regard to Racketeering Act 5B. Specifically, the government's letter (at p. 2) states that Duramax was "a company owned and controlled" in part by Anthony Scibelli. This is flatly wrong. Scibelli never owned or controlled Duramax. Duramax was wholly owned and controlled by Thomas Frangiapane. Scibelli's only involvement with Duramax on the Avenue P construction project was that he provided support for Duramax (both money and manpower) at a time when Duramax was struggling to complete its work due to financial problems and a lack of credit. In exchange for doing so, Scibelli hoped to receive substantial reimbursement once Duramax was paid for its work. When payment from Sitt Management to Duramax was not forthcoming – making it impossible for Duramax to reimburse Scibelli – Scibelli and others caused the fraudulent lien at issue in Racketeering Act 5B to be placed.

The government's letter (at p. 2 n.1) is correct in noting that Scibelli's company VMS Consulting, Inc. was not the general contractor on the Avenue P project. As detailed above, VMS had no relationship with the Avenue P project. Rather it was Hunter-Atlantic, Inc. that provided support to Duramax. And, Hunter-Atlantic had no formal role on the project, not having had a

Several points are worth noting. As reflected in the guidelines calculation in the plea agreement, there is no allegation that this extortion involved anything other than the threat of economic harm. Filing the lien was a completely impersonal act – the lien was filed by phone, and Scibelli had no contact with the principals of Sitt Asset Management (in fact, he has never so much as met them). And, as the government noted in its detention memorandum dated January 20, 2011, the only pressure brought to bear was that Sitt was “fearful that the lien would impede its ability to proceed with the project.”⁷

Also reflected in the guidelines calculation is that a significant portion of the lien amount was for work legitimately performed on the project. Rather than holding the defendants responsible for the full lien amount (\$288,000), the government agreed that an appropriate loss amount was instead somewhere over \$50,000.⁸

The Extortion of John Doe #3 and John Doe #4
(Racketeering Act 6B)

Between March 2, 2007 and June 4, 2007, Scibelli agreed with others to obtain money from individuals listed in the Indictment as John Doe #3 and John Doe #4 through extortion. This charge follows directly from the Sitt Asset Management lien described above.

contract with Sitt Management. Certainly, therefore, Hunter-Atlantic could not have been the project’s general contractor.

⁷ The government’s November 17 letter (at pp. 2-3) further supports the contention that this extortion involved exclusively the threat of economic harm. The government writes that the defendants “believed that the filing and pendency of this lien would cause banks to stop loaning money to Sitt necessary to complete the construction project, and consequently would force Sitt to pay ACE to satisfy the lien.” The government also writes that Sitt settled with ACE for \$120,000 only because they “fear[ed] that the pending lien would hamper the Avenue P Site project by preventing bank financing and incurring other costs.”

⁸ The actual restitution amount agreed upon with the government and stated in the plea agreement is \$55,000.

John Doe #3 and John Doe #4 are the principals of Ace Materials. When Ace received the \$120,000 from Sitt Asset Management as a result of the lien, Scibelli and the principals of Ace met at Scibelli's office to negotiate the fair distribution of that sum. The principals of Ace offered Scibelli \$20,000 as his share of the lien amount. Scibelli, believing that he was due significantly more because of the work that Hunter-Atlantic performed on the project, and because he financially supported another company on the project, requested \$40,000. Eventually, the principals of Ace agreed to pay Scibelli's companies \$30,000.

Racketeering Conspiracy

Between March 2007 and February 2008, Scibelli conspired with others to participate in the affairs of an enterprise through a pattern of racketeering activity. The government has acknowledged that Scibelli was only a "minor participant" with regard to this charge. (See Exhibit OO, Plea Agreement) (granting two-level reduction under U.S.S.G. § 3B1.2(b) (Mitigating Role)). And, the period of his involvement ended before his arrest in Agate.

The Sentencing Guidelines

For the reasons set forth in this memorandum, we respectfully maintain that a non-guidelines sentence of probation is warranted in this case. Because we understand that the Court is required to acknowledge the advisory sentencing guidelines, however, we address them here. See United States v. Stewart, 686 F.3d 156, 164 (2d Cir. 2012) (citing United States v. Watkins, 667 F.3d 254, 261 (2d Cir. 2012)).

Anthony Scibelli pleaded guilty pursuant to a plea agreement with the government. (Exhibit OO, Plea Agreement.) The plea agreement contained an estimated guidelines calculation, as follows:

Racketeering Act 5B

Base Offense Level (2B3.2(a))	18
Over \$50,000 Demanded (2B3.1(b)(7)(C))	<u>+2</u>
Total	20

Racketeering Act 6B

Base Offense Level (2B3.2(a))	18
Express or Implied Threat (2B3.2(b)(1))	+2
Over \$10,000 Demanded (2B3.1(b)(7)(B))	<u>+1</u>
Total	21

Multiple Racketeering Act Analysis

Highest Adjusted Offense Level	21
Units (3D1.4)	
Racketeering Act 5B	1
Racketeering Act 6B	<u>+1</u>
Total	2
Increase in Total Offense Level (3D1.4)	<u>+2</u>
Total Adjusted Offense Level	23
Minor Participant (3B1.2(b))	-2
Acceptance of Responsibility (3E1.1(a))	<u>-3</u>
Total Offense Level	18

We submit that this guidelines framework is correct but for two points, as detailed below, which should reduce the Total Offense Level to 16.

Racketeering Act 6B -- No Express of Implied Threat of Violence

The plea agreement expressly allows Scibelli to argue that the two-point enhancement for an “express or implied threat of bodily injury” in connection with Racketeering Act 6B is unwarranted (see Plea Agreement at 4), and we do so here.⁹

In negotiating the amount of the lien that was due to Scibelli’s companies from the principals of Ace (as described above), Scibelli’s manner of speaking was unquestionably inappropriate. In particular, his tone and language at many points during the single meeting at issue (which was consensually recorded) are unacceptably harsh, and completely unbecoming a successful business owner. We submit, however, that there was no express or implied threat of violence. This was a purely a threat of economic harm, and the surrounding facts support this contention. Scibelli and the principals of Ace Materials had a long working relationship, which began far before the actions in this case. And, more importantly, that relationship continued long after, unaffected by the tenor of this meeting. Scibelli continued to lease trucks from the principals of Ace, and to pay extremely high market-value rates on those leases (over \$12,000 per month). The principals of Ace even invited Scibelli to participate in future projects with them.

There are two conclusions to be drawn from this relationship. First, a continued future business relationship would be an unlikely result following threats of bodily injury or death. Certainly, the principals of Ace would not have sought out Scibelli to offer his companies additional work on future projects. Here, the business relationship continued uninterrupted.

Second, the ongoing business relationship made the principals of Ace particularly susceptible to a threat of economic harm – the implied threat that if they did not settle the monetary dispute in a way that Scibelli found acceptable, they stood to lose a regular and lucrative business

⁹ There is no contention by the government that the extortion in Racketeering Act 5B involved any express of implied threat of violence. This is reflected in the plea agreement and was expressly agreed to by the government in connection with Scibelli’s plea allocution.

partner. As detailed above, Scibelli's companies are successful, highly regarded, and highly profitable. They have a sterling reputation, and relationships and contracts with major projects in and around New York. We submit that Scibelli used that leverage to extort an extra \$10,000 from the principals of Ace, above and beyond what they initially offered to pay (\$30,000, rather than \$20,000).

Further, in examining the circumstances surrounding the extortion, it cannot be overlooked that the consensually recorded conversation forming the basis for that charge took place in an office, in full view and hearing of a company's staff and employees. Scibelli raised his voice at the meeting, but that was not unusual behavior for him in 2006 and 2007, and his employees would not have been surprised to hear it. His conduct would never have proceeded beyond that, however, to express or implied threats of violence, especially in this business setting.¹⁰

Finally, the purported victims of the threat were uniquely unlikely to be persuaded by threats of violence. John Doe #4 is himself a co-defendant in this case, charged as a co-conspirator. And, John Doe #3 – government cooperator Steven Marcus – is hardly a vulnerable victim: as a December 2011 Report by the State of New Jersey Commission of Investigation states:

Steven G. Marcus is a convicted felon and an associate of the DeCavalcante LCN criminal organization, but neither of those items on his resume has stopped him from making a small fortune as a salesman and broker of business in the underworld of New Jersey's solid waste industry. (See State of New Jersey, Commission of Investigation: *Industrious Subversion: Circumvention of Oversight in Solid Waste and Recycling in New Jersey*, dated December 2011, available at <<http://www.state.nj.us/sci/pdf/Solid%20Waste%20Report.pdf>>, at 31.)

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Scibelli knew who his audience was, and that resorting to threats of violence would have fallen on deaf ears.

For all of these reasons, we submit that a two-point enhancement pursuant to U.S.S.G. § 2B3.2(b)(1) is unwarranted. The correct guidelines calculation under the plea agreement would therefore be:

Racketeering Act 5B

Base Offense Level (2B3.2(a))	18
Over \$50,000 Demanded (2B3.1(b)(7)(C))	<u>+2</u>
Total	20

Racketeering Act 6B

Base Offense Level (2B3.2(a))	18
Over \$10,000 Demanded (2B3.1(b)(7)(B))	<u>+1</u>
Total	19

Multiple Racketeering Act Analysis

Highest Adjusted Offense Level	20
Units (3D1.4)	
Racketeering Act 5B	1
Racketeering Act 6B	<u>+1</u>
Total	2
Increase in Total Offense Level (3D1.4)	<u>+2</u>
Total Adjusted Offense Level	22
Minor Participant (3B1.2(b))	-2
Acceptance of Responsibility (3E1.1(a))	<u>-3</u>
Total Offense Level	17

Global Point

The plea agreement specifically provides for “an additional one-level reduction for a global disposition under Section 5k2.0” if all of the other defendants in the case plead guilty by a certain date. (See Plea Agreement at 4 n.1, 11.) Here, seven of the eight defendants pleaded guilty by that set date. A single defendant has yet to plead due to an unforeseeable circumstance beyond Scibelli’s control – his claimed incompetence due to the effects of recent medical procedures and medications. We submit that withholding the agreed-upon global point under these circumstances would be unreasonable, and that Scibelli should be given the benefit of the one-level reduction that he bargained for at the time of his plea. With this reduction, the final correct guidelines calculation would be:

Racketeering Act 5B

Base Offense Level (2B3.2(a))	18
Over \$50,000 Demanded (2B3.1(b)(7)(C))	<u>+2</u>
Total	20

Racketeering Act 6B

Base Offense Level (2B3.2(a))	18
Over \$10,000 Demanded (2B3.1(b)(7)(B))	<u>+1</u>
Total	19

Multiple Racketeering Act Analysis

Highest Adjusted Offense Level	20
Units (3D1.4)	
Racketeering Act 5B	1
Racketeering Act 6B	<u>+1</u>
Total	2
Increase in Total Offense Level (3D1.4)	<u>+2</u>
Total Adjusted Offense Level	22

Minor Participant (3B1.2(b))	-2
Acceptance of Responsibility (3E1.1(a))	-3
Global Disposition (5k2.0)	<u>-1</u>
Total Offense Level	16

We submit that Level 16 is the correct final Total Offense Level. At Criminal History Category I, the advisory sentencing guidelines range would be 21-27 months.

Probation’s Sentencing Recommendation

Despite numerous errors that incorrectly raised the sentencing guidelines calculation in the PSR¹¹, the Probation Department recommended that the Court impose a sentence of 366 days of imprisonment. (See U.S. Probation Department Sentence Recommendation, dated June 29, 2012, at 1.) In making this recommendation – which is significantly below the advisory guidelines range – the Probation Department concluded that “a below-guidelines sentence is appropriate for this defendant.” (Id. at 3.) The Probation Department, however, still opined that “a minimal custodial sentence” is appropriate. (Id.)

Under the unique facts of this case, we respectfully submit that the Probation Department is wrong in its ultimate recommendation. As detailed above, a prison sentence of even 366 days would likely cause Scibelli’s companies to go out of business, and thereby cost the jobs of his employees. Further, as detailed below, a term of incarceration – beginning years after the offense – would not fulfill any other federal sentencing rationale. Particularly with regard to rehabilitation, Scibelli’s own actions demonstrate his determination to ensure that he will never re-offend.

¹¹ Due to several major errors, the Probation Department calculated a guidelines range of 33 to 41 months of imprisonment. We objected to the errors in the PSR by letter dated April 30, 2012.

Forfeiture and Restitution

At the time of sentencing, Anthony Scibelli will pay the forfeiture amount of \$30,000 that was stipulated in the plea agreement. (See Plea Agreement at 6.) In addition, Scibelli will ensure that the restitution amount of \$55,000 is satisfied at the time of sentencing. (See Plea Agreement at 2.)¹² We submit that it is a significant demonstration of acceptance of responsibility that Scibelli will ensure that any ill-gotten gains are forfeited and the single victim (Sitt Asset Management) is made whole at the earliest possible date.

Anthony Scibelli's Extraordinary Four-Year Rehabilitation

We respectfully submit that Anthony Scibelli's extraordinary rehabilitation since his sentencing in Agate is one of the most compelling reasons why a sentence of probation is warranted in this case. Over the past four years and four months, Anthony Scibelli has changed and grown immensely, and has proven that he can live a productive and law-abiding life. We submit that he has proven that his unlawful actions in 2006 and 2007 will never be repeated.

Many defendants note in sentencing memoranda their "post-plea rehabilitation," which may consist of weeks (or, on occasion, a few months) of effort to find and stay on life's proper path. Viewed in this context, Scibelli's post-sentencing rehabilitation is truly extraordinary. He has taken full responsibility for his actions in 2006 and 2007. He has shown, over a period of years, that he could comply to the letter with the terms of his probation. And, perhaps most importantly, he has undergone years of voluntary and regular mental health treatment to ensure that the changes in his life take permanent root.

¹² We are currently working to arrange payment terms for each of the defendants who are jointly and severally liable for this restitution amount.

Scibelli's Acceptance of Responsibility and Genuine Remorse

Anthony Scibelli is humbled and humiliated by the way he acted at the time of the offense in this case (2007), and is genuinely remorseful for his actions. He understands that he acted and spoke at that time in a manner that was unacceptable for anyone, no less an owner of a successful business. He takes full responsibility for his crimes. He understands that he has no one to blame but himself for his actions, for the position in which he now finds himself, and in which he has put his family and his employees. We urge the Court to look to Scibelli's own letter for an expression of his honest remorse. (See Exhibit B.)

Many of the other letters attached to this memorandum also describe the candid manner in which Scibelli has related his offense to others, and the genuine remorse that he has always expressed. In these letters, those closest to Scibelli also express the conviction that Scibelli has grown from his mistakes and will not re-offend. For example, Scibelli's longtime construction litigation attorney Gerald Zisholtz writes:

In my dealings with Mr. Scibelli, he discussed his present situation that is pending before Your Honor numerous times. He is remorseful and extremely sorry for his poor lack of judgment and the serious mistakes that he has made. I firmly believe that Mr. Scibelli will not let the situation happen again. (Exhibit L.)

His aunt Diane Aufrecht writes:

[H]e confided in us [his family] about his behavior in the past. How regretful he was about the choices he had made and how he would do anything to go back in time and change what he did. He realizes that his judgment was clouded and has done everything in his power to make a very real and positive change in his life. He wants his father to be proud of the man he has become. (Exhibit U.)

His sister Michelle Scibelli adds:

I can't tell you how remorseful and sorry he is, and how his bad judgment, with poor decisions he has made, hurts him on a daily basis. He is honestly sorry, and when given the chance in 2008, he worked extremely hard to change his ways and surroundings to be a positive and productive person. ... [Y]ou can see he has changed since the chance that was given to him in 2008, and wants nothing more than to continue going forward for the rest of his life as a law abiding citizen. (Exhibit G.)

His lifelong friend Frank Castelli writes:

Anthony has expressed remorse for his actions and given the opportunity he will prove to be a model citizen, a plus to our economy (as he runs a successful business), a loving parent, good husband, and a great friend[.] (Exhibit PP; see also Exhibit VV, Letter of Sal Castelli (“Anthony is capable of learning from his missteps and will be an even greater person after this.”).)

His neighbor and friend (and Suffolk County Correction Officer) Marcos Franco writes:

Anthony has expressed to me on numerous occasions how remorseful he is for the situation in which he currently finds himself, and I have no doubt that it is on his mind more than he would ever admit. (Exhibit QQ.)

His friend Lawrence R. Sullivan, a Lieutenant Colonel in the United States Air Force, writes:

Over the course of the last year or so, I have also had the opportunity to discuss with Anthony the circumstances he currently finds himself in. During these discussions with Anthony, he has confided in me he truly regrets the decisions he has made which have placed his freedom in jeopardy. His single greatest fear is being forced to abandon his children. Due, in part, to those conversations and the countless interactions I have had with Anthony, I am even more impressed with him today. A lesser man would whine or point fingers elsewhere. My friend, Anthony, has accepted full responsibility for his actions. (Exhibit RR.)

His employee John LoIacono writes:

We work long hours Monday to Friday; often twelve hour days and often speak throughout the weekend about work. There have been many heart-felt conversations about the events that have me writing this letter. To say Anthony regrets the choices he has made in the past would be an understatement. He is greatly saddened, in fact devastated, that he has caused his family and friends such hurt and sadness. He knows that they will suffer an overwhelming loss if he is taken away from them, both monetarily and emotionally. Anthony is not only responsible for his family, but many others depend on him so they can support their families, including myself. If Anthony was no longer able to work many people would be affected, and this also burdens him greatly. Anthony’s utmost concern is not for himself, but for those who depend upon him. (Exhibit O.)

We respectfully submit, again, that letters like these are extraordinary. They convey a heartfelt remorse that speaks volumes about Scibelli’s character, and about the certainty of those

closest to him that he would never re-offend. Certainly, true acceptance of responsibility for one's actions is the first step in ensuring that those actions will never be repeated.

Scibelli's Compliance with Court-Ordered Obligations

Since his arrest in Agate (in February 2008), Scibelli has forged an unusually close relationship with his Pretrial Services and Probation Officers. Because of the faith they have in his rehabilitation, his Probation Officers placed him on "Phase II" probation after 18 months, meaning that he is no longer required to report to them in person. And, in telephone conversations that we have had with them, they universally noted the responsible and respectful manner in which Scibelli has always treated his obligations. He has never violated any of the terms of his probation. Indeed, he is scrupulously careful to remain in perfect compliance.¹³

Further, it should be noted that Scibelli almost immediately paid in full the \$250,000 fine that was ordered by Judge Weinstein as part of his sentence in Agate.

Scibelli's Mental Health Treatment

REDACTED

¹³ This includes strict compliance with the rule that Scibelli have no contact whatsoever with anyone involved in racketeering activity.

REDACTED

REDACTED

REDACTED

REDACTED

Because Anthony Scibelli has taken every possible step since his arrest in Agate to change for the better, we respectfully submit that he has shown the type of extraordinary rehabilitation that warrants a sentence of probation in this case. See United States v. Hawkins, 380 F. Supp. 2d 143, 176-77 (E.D.N.Y. 2005) (granting downward departure for “extraordinary rehabilitation” and collecting cases).

Conclusion

For the reasons set forth above, including the needs of Anthony Scibelli's employees and family, combined with Scibelli's extraordinary rehabilitation over the past four years and four months, we respectfully submit that a sentence of probation is warranted in this case.


We would leave the Court with one statement from the sentencing letter we received from Scibelli's employee John LoIacono, who writes:

I assure you that if Anthony had an opportunity to redo [his past mistakes], he would most certainly make a very different decision, not because of the consequences but because he is a smarter, wiser person today. (Exhibit O.)

We join in this sentiment, and request that the Court give all possible consideration to the full facts and circumstances of this very unique case.

Dated: New York, NY
December 29, 2012

Respectfully submitted,

By: 

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