

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE № 14-20854-CR-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILBERT FIORENTINO,

Defendant,

**DEFENDANT GILBERT FIORENTINO'S RESPONSE TO THE PRESENTENCE
INVESTIGATION REPORT AND REQUEST FOR AN ALTERNATIVE SENTENCE**

The Defendant, **GILBERT FIORENTINO**, by and through his undersigned counsel, and pursuant to U.S.S.G. § 6A1.2-3, p.s., Fed. R. Crim. P. 32 (d), (e)(2) and (f), and the Fifth and Sixth Amendments to the United States Constitution, respectfully file this Response to the Presentence Investigation Report (hereafter "PSR") and Request for an Alternative Sentence, and as grounds therefore state as follows:

I.
INTRODUCTION

Pursuant to *U.S. v. Booker*, 543 U.S. 220 (2005), the federal sentencing process has adopted a three-step approach. See Fed. R. Crim. P. 11(M), amended December 1, 2007, *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008); and, most recently, Amendment 741 of the Sentencing Guidelines, effective November 1, 2010. First, the Court is to resolve any disputed guideline issues and determine the advisory guideline range. In **MR. FIORENTINO'S** case, the parties agree that pursuant to paragraphs 9 and 10 of the written Plea Agreement § 2B1.1 of the Sentencing Guidelines is the applicable guideline. Therefore, the base offense level in this case is 6, which is increased based upon the

amount of loss, the use of sophisticated means and **MR. FIORENTINO'S** role in the conspiracy. **MR. FIORENTINO** then merits a reduction for his complete and timely acceptance of responsibility. With that said, the guidelines offered in the PSR are consistent with the agreement between the parties and the advisory guideline sentence is 60 months, § 5G1.1 (a).

Second, the Court is to consider if there are any factors that may warrant a departure from the advisory guideline range. As before *U.S. v. Booker*, 543 U.S. 220 (2005), this Court is to depart when it is warranted under the facts and circumstances of a particular case. See *U.S. v. Jordj*, 418 F.3d 1212, 1215 (11th Cir. 2005) (the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered). Although the PSR states that **MR. FIORENTINO** has agreed to cooperate with the government and it may result in a motion pursuant to § 5K1.1 and/or 18 USC § 3553(e) (see paragraph 109), it fails to identify additional factors that may warrant a downward departure. By this pleading, **MR. FIORENTINO** provides additional factors we believe warrant a sentence below the advisory guideline range.

Lastly, the Court is to consider the sentencing factors found in 18 USC § 3553(a) and impose a sentence which is "reasonable" but not greater than necessary to achieve the sentencing objectives set forth in 18 USC § 3553(a). We respectfully suggest that there are such factors here worthy of the Court's consideration.

II.

REQUEST FOR DOWNWARD DEPARTURE PURSUANT TO § 5K2.0

As stated above, we have no objections to the PSR, but **MR. FIORENTINO** respectfully requests this Court consider a downward departure, pursuant to § 5K2.0,

Grounds for Departure (policy statement). The standard for considering a departure under this section is § 5K2.0(a)(1)(A), which states that the sentencing court may depart from the applicable guideline range if there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 USC § 3553(a)(2), should result in a sentence different from that described. Accordingly, **MR. FIORENTINO** argues that, (1) the application of § 5G1.1(a) has not afforded him the full 3-level reduction for his complete and timely acceptance of responsibility and this Court has discretion to correct this via a downward departure, and; (2) there is nothing to prohibit this Court from recognizing **MR. FIORENTINO'S** substantial assistance in this offense, even without the government's motion. Downward departures under § 5K2.0 are not prohibited by the Guidelines, § 5K2.0(d), and, in fact, are available for this Court's consideration in the Statement of Reasons form, AO 245B, in Section V, "Departures Authorized By the Advisory Sentencing Guidelines."

A.

**MR. FIORENTINO IS ENTITLED TO A REDUCTION
FOR HIS ACCEPTANCE OF RESPONSIBILITY**

Pursuant to paragraph 9 of the written plea agreement, the United States has agreed to recommend at sentencing that the Court reduce **MR. FIORENTINO'S** adjusted offense level by three-levels, due to his complete and timely acceptance of responsibility. However, **MR. FIORENTINO** does not benefit from this adjustment because of his guilty plea to a Class D felony and the application of § 5G1.1(a). (See paragraph 98 of PSR). The Eleventh Circuit has considered this unique circumstance and unequivocally opined that a

district court has the discretion to reward a defendant for his or her acceptance of responsibility by departing downward when § 5G1.1(a) renders § 3E1.1 ineffectual in reducing the defendant's actual sentence. See *U.S. v. Rodriguez*, 64 F.3d 638, 643 (11th Cir. 1995).¹

Based upon the reasoning in *Rodriguez, supra*, and because it remains the intent of the Sentencing Commission that one who clearly demonstrates his acceptance of responsibility for his criminal acts receive a benefit, we urge this Court to deduct the three (3) "acceptance points" from the guideline equivalent of five (5) years, or level 25, thereby yielding a new adjusted offense level of 22 as the starting point from which to fashion an appropriate sentence *sub judice*.

B.

**MR. FIORENTINO'S SHOULD RECEIVE SOME BENEFIT
FOR HIS SUBSTANTIAL ASSISTANCE IN THIS CASE**

Notwithstanding paragraph 13 of the written Plea Agreement, which states that the government reserves the right to evaluate the nature and extent of **MR. FIORENTINO'S** cooperation by filing a motion pursuant to § 5K1.1 and/ or Rule 35 of the Federal Rules of Criminal Procedure, **MR. FIORENTINO** asks this Court to consider the following:

¹ In *U.S. v. William Corte and Curtis Renie*, 11-60123-CR-Dimitrouleas, the defense asked for the same consideration for the defendants who managed Rothstein's IT department at RRA. The government objected, but did acknowledge that the court had discretion to grant the 3-level downward departure. The court granted the downward departure from the *advisory* 60 month guideline sentence and imposed sentences of 37 months as to each defendant. Each defendant was held responsible for losses of between \$50 and \$100 million. Further, in *U.S. v. George, et al*, 10-80149-CR-Marra, defendant doctors pled guilty to single count charges that placed them in the same situation that **MR. FIORENTINO** now argues. In each of those cases, pursuant to their respective plea agreements, the government did not oppose their request for downward departure under *Rodriguez* and the court granted them. The doctors had been held responsible for prescribing between 74,000 and more than 34 million Oxycodone pills.

- In the case before this Court, **MR. FIORENTINO** has provided substantial assistance to both the government and his former employer, Systemax, in the investigation and prosecution of others. **MR. FIORENTINO**, through counsel, will have further remarks regarding his cooperation at sentencing.

- **MR. FIORENTINO** does not face a mandatory minimum sentence in this case and, therefore, the filing of a § 5K1.1 motion is not necessary to reduce his sentence beyond any statutory minimum sentence. The Court, under § 5K2.0 or 18 USC § 3553, may apply any weight to **MR. FIORENTINO'S** cooperation. In *U.S. v. Garcia*, 926 F.2d 125 (2d Cir. 1991), the court ruled that even in the absence of a government sponsored § 5K1.1 motion, the district court can depart downward where the defendant's plea induced others to likewise plead guilty thereby clearing the court's busy trial calendar. Indeed, this Court may also consider *U.S. v. Knox*, 573 F.3d 441 (7th Cir. 2009) (we agree with Davis that, as a general matter, a district court may consider a defendant's cooperation with the government as a basis for a reduced sentence, even if the government has not made a § 5K1.1 motion); *U.S. v. Fernandez*, 443 F. 19, 33 (2nd Cir. 2006) (reasoning that a district court should consider "the contention that a defendant made efforts to cooperate even if those efforts did not yield a government motion for a downward departure pursuant to U.S.S.G. § 5K1.1"); *U.S. v. Doe*, 398 F.3d 1254, 1260-61 (10th Cir. 2005) (concluding that "a defendant's assistance should be fully considered by the district court at sentencing even if that assistance is not presented to a court in the form of a § 5K1.1 motion"); *U.S. v. Murray*, 2005 WL 1200185 (S.D.N.Y. May 20, 2005 (unpub.)) ("fact that defendant testified as witness for the government at time when he had nothing to gain provides support for his

genuine contrition”); *U.S. v. Hubbard*, 369 F.Supp.2d 146, 150 (D. Mass. 2005) (suggesting court can correct for government’s bad faith not making motion under 3553(a)(2)(C); and *U.S. v. Khoury*, 62 F.3d 1138 (9th Cir. 1995) (court may depart downward where government refuses to make § 5K1.1 motion because defendant went to trial although government initially offered to do so and where defendant’s cooperation led to arrest of co-defendant). In *Roberts v. U.S.*, 445 U.S. 552, 558 (1980), pre-federal sentencing guidelines and pre-*Booker*, the court said that a defendant’s cooperation demonstrates that the “defendant will transgress no more [and will] respond to rehabilitative efforts [and] not deem himself at war with his society.” In summary, **MR. FIORENTINO** prays this Court will find that he has met the standards of § 5K2.0 and grant him a downward departure, which takes into consideration his unique situation in not receiving the full three-levels for his acceptance of responsibility coupled with the supporting Eleventh Circuit law, as well as his cooperation with both the government and his former employer. Of course, this Court may also consider both of these matters as sentencing factors under 18 USC § 3553, in determining a “reasonable but not greater than necessary sentence.”

III.

SENTENCING SUBMISSION AND REQUEST FOR ALTERNATIVE SENTENCE

As this Court is well aware, it is now free from the mandatory nature of the Federal Sentencing Guidelines, *U.S. v. Booker*, 543 U.S. 220 (2005). Subsequent to *Booker*, *Gall v. U.S.*, 128 S.Ct. 586, and *Kimbrough v. U.S.*, 128 S.Ct. 558, both decided on December 10, 2007, and *U.S. v. McBride*, 511 F. 3D 1293 (11th Cir. 2007), made clear that district courts are only required to give “some weight” to the advisory guidelines, as they are to the other 18 USC § 3553 factors, and any attempt to give special weight to the sentencing

guidelines is contrary to *Booker*. However, the Supreme Court has since gone further in its recent decision in *Nelson v. U.S.*, 129 S.Ct. 890 (2009), where the court reiterated what it said in *Rita v. U.S.*, 551 U.S. 338 (2007), that a sentencing court may not presume that a sentence within the applicable guideline range is reasonable but added “the Guidelines are not only not mandatory on sentencing courts, they are also not to be presumed reasonable.”

A.

NATURE AND CIRCUMSTANCES OF OFFENSE

According to paragraph 18 of the Plea Agreement, **MR. FIORENTINO** has agreed the offense occurred between January 2005 and January 2011, when he was a director and senior executive of Systemax, and he received undisclosed payments, goods, services, and kickbacks. He also failed to disclose these payments in securities filings and his tax returns.

MR. FIORENTINO'S cooperation with the government and Systemax began following the indictment of his brother Carl in June 2013. The instant information was filed on November 20, 2014, and **MR. FIORENTINO** surrendered five (5) days later. He pleaded guilty on December 2, 2014. His acceptance of responsibility has been immediate and complete. His remorse is both sincere and profound. During the past four (4) years, **MR. FIORENTINO** has tried to resolve his financial liability in this case. It has been costly, financially, physically and emotionally, and has greatly affected **MR. FIORENTINO'S** health. In short, **MR. FIORENTINO** comes before this Court a far different person than when he involved himself in criminal activity several years ago. The court, in *Pepper v. U.S.*, 131 S.Ct. 1229 (2011), addressed the importance of considering events that transpire between

the criminal conduct and the sentencing and punishment decision. To that end, this Court is asked to consider the following:

- **MR. FIORENTINO** resigned from Systemax in May 2011. He had built the company he founded from almost nothing into a \$3.5 billion business that employed over 2000 people in North America and approximately 1400 people in Europe. Under his leadership, the company was profitable and, over the years, returned approximately \$100 million in dividends to its shareholders.

- Within a month of his departure from Systemax, in April 2011, **MR. FIORENTINO** entered into a settlement agreement with Systemax to pay \$11 million in cash and vested shares of stock to resolve threatened civil litigation.

- On May 23, 2011, **MR. FIORENTINO** was accepted into the Internal Revenue Tax Amnesty Program. To date, approximately \$200,000 has been paid to the IRS for estimated taxes due.²

- In September 2011, **MR. FIORENTINO** entered into an agreement with the Securities and Exchange Commission. Pursuant to that agreement, he paid a \$65,000 fine and agreed to never again serve as an officer or director of a public company.

- On September 17, 2012, Systemax filed a civil law suit naming **MR. FIORENTINO'S** brothers, Carl and Patrick, and others. **MR. FIORENTINO** was not named in this lawsuit because of his earlier settlement; however he was brought in as a third-party

² Subsequent to his agreement with Systemax, Systemax reissued W-2 statements for **MR. FIORENTINO** for tax years 2008, 2009, and 2011.

defendant by two defendants in the case. This case remains pending (№ 12-500519 CA 40).

- By late 2011, **MR. FIORENTINO** began suffering extreme depression, anxiety, and panic attacks. He lost his professional, personal and social life. He became estranged from his brothers and many others close to him. He spent significant sums of money trying to resolve his liability and “make things right” but all the while, he was abusing alcohol, Xanax and Ambien to cope with his “downfall.” This combination of drugs and alcohol and a diagnosis of atrial fibrillation in 2009, and to Type II diabetes, in 2010 made life very difficult for Fiorentino.

- It was not until mid-2012 that **MR. FIORENTINO** began to come out of his depression, and chronic drug and alcohol abuse and get out of his house. He began to donate his time as a mentor and adviser to numerous start-up companies, including GradSave and it was during this period that he helped create KIPU.³ He began to attend church and he became involved in religious classes. After 30 months with no income, he was finally started receiving income from KIPU.

Pursuant to 18 USC § 3553, this Court should consider the nature and circumstances of the offense in fashioning a reasonable but not greater than necessary sentence. In this case, **MR. FIORENTINO** did not hide from his former employer or any government agencies. To the contrary, he and his attorneys did everything possible to “make things right.” His cooperation has continued throughout these years. This Court is also asked to consider *U.S. v. Anderson*, 533 F.3d 623 (8th Cir. 2008), in which a

³ KIPU is discussed more fully in a subsequent section of this filing.

downward variance was affirmed based in part of “other ways in which the defendant had suffered atypical punishment such as the loss of his reputation and his company and the case that was lodged against him by the Securities and Exchange Commission.

B.

MR. FIORENTINO’S PERSONAL AND FAMILY HISTORY

MR. FIORENTINO is a 55 year old native of Hialeah, Florida. He is the son of Isaac and Greta Fiorentino and the younger brother of Michele Patterson and Patrick and Carl Fiorentino. He has been married to his wife, the former Alina Medel, for 28 years, and they have two children; Desiree, age 26, a doctor in training at Jackson Health, and Jeffrey, age 25, an accountant.

MR. FIORENTINO has absolutely no prior criminal history.

MR. FIORENTINO’S parents emigrated from Europe, arrived in New York, and settled in Hialeah in March 1959. **MR. FIORENTINO** was born later that year. That same year, his parents bought a modest home for \$17,000, in which **MR. FIORENTINO** shared a bedroom with his two brothers until 1982. His father found work as a cutter in the garment industry and, in his later years, he owned a small sewing shop. Throughout most of **MR. FIORENTINO’S** life his father earned a modest income although he became unemployed while **MR. FIORENTINO** was in college. It was at this time that **MR. FIORENTINO** began to support his family and he has done so since without interruption.

MR. FIORENTINO attended local public schools and excelled as a student. Between 1977 and 1984, he earned both an undergraduate degree in economics and a law degree at the University of Miami. He paid his own way through school, although he received some financial aid. After his father closed his business, **MR. FIORENTINO** earned income as

a research assistant at the University of Miami. He used this income to support both he and his parents. During law school, from 1981 to 1984, he was both a full-time student and he held the position of Vice-President of Marketing for International Computer Systems. He continued to provide financial support to both parents, until his father died in 2000, and to his mother thereafter. He continues to help support his mother, now in her 80's who suffers from dementia and has a history of strokes.

MR. FIORENTINO continued to work for International Computer Systems after he completed law school.⁴ In early 1985, he met his wife outside one of the computer stores in Coral Gables. She was working as a meter maid and she gave **MR. FIORENTINO** a parking ticket after which they soon began dating and have been together ever since. Later that year, **MR. FIORENTINO**, at the age of 25, started Marketing Solutions, an advertisement agency. Before he was 30, he married Alina, had his first child, Desiree, moved his family into their home at 9766 S.W. 111 Terrace in Miami, and created Tiger Direct.⁵

Jeffrey was born on January 4, 1990. In 1995, **MR. FIORENTINO** sold Tiger Direct to Systemax for approximately \$4 million which went to the company's shareholders. Under his guidance, the company was saved from bankruptcy and he remained the head of the company he created. In April 2011, **MR. FIORENTINO** was confronted with claims from

⁴ **MR. FIORENTINO** has never practiced law. However, he was an adjunct business law professor at the University of Miami School of Business s from 1984 to 1994 and, again, from 2007 to 2011. He received nominal pay but always considered this one of his proudest endeavors.

⁵ Sometime after Marketing Solutions began selling software to its high-tech clients, **MR. FIORENTINO** closed the advertising agency and created Tiger Direct as an offshoot of that business.

Systemax based upon the subject conduct and he entered into an \$11 million settlement agreement with the company and resigned from the company in May 2011. Between 1989 and 2011, **MR. FIORENTINO** took a company from almost nothing to head of a \$3.5 billion international business that had approximately 3400 employees. He was by all accounts a generous and faithful head of the company. He was always proud of the fact that he never had mass layoffs of employees, even in the worse of financial times. After years of negotiating settlements with Systemax, the Securities and Exchange Commission, and the Internal Revenue Service, all at great expense to **MR. FIORENTINO**, he was arrested on the instant offense on his 55th birthday -- on November 25, 2014, close to four (4) years after he had resigned from Systemax. During those years, **MR. FIORENTINO** helped found KIPU Systems, a software development company for electronic records used by the substance abuse treatment industry. KIPU's mission is to improve the treatment of addicts and thereby assist in alleviating the scourge that drug abuse inflicts on society. His passion for KIPU was born from his own history of substance abuse.

C.

MR. FIORENTINO IS 55 YEARS OLD AND HAS SERIOUS HEALTH PROBLEMS

Because the guidelines fail to consider the length of time a defendant refrains from committing his first crime, **MR. FIORENTINO** may receive some consideration in sentencing, pursuant to *U.S. v. Ward*, 814 F.Supp. 23 (E.D. Va. 1993). In *Ward*, the court recognized that a departure was warranted because the guidelines failed to consider that *Ward* had not committed his first offense until he was 49 years old. **MR. FIORENTINO** also believes that, post-*Booker*, this argument is compelling when coupled with the fact that age makes recidivism less likely.

This Court may consider that as a first-time offender at age 55, and already facing physical and mental health issues (he has been seeing a therapist as well), **MR. FIORENTINO** presents a lower risk of recidivism than most offenders. In *U.S. v. Lucania*, 379 F.Supp.2d 288, 297 (E.D. N.Y. 2005), the district judge found that “Post-*Booker* courts have noted that recidivism is markedly lower for older defendants” and in *U.S. v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005)(unpub.), the court cited lower recidivism rates for older defendants and granted a downward departure. In this case, **MR. FIORENTINO** asks that this be considered as a sentencing factor under 18 USC § 3553 in fashioning his sentence.

The “Silver Tsunami” and Sentencing - Age and Health as Mitigating Factors, by Evan A. Jenness and published in the September/October 2013 *Champion*, discusses the issue of elderly and infirmed inmates. What is “old” when it comes to sentencing a defendant to prison is not the equivalent of “old” in the outside world. The medium age of a federal defendant at sentencing is 34.⁶ The National Institute of Corrections defines prisoners 50 and older as “elderly” and “aging,”⁷ and 15 states specifically define an “older” inmate as 50 or older.⁸ Only 10.8 % of all federal defendants are over 50.⁹ **MR. FIORENTINO** is 55 years old. The following serious health conditions and medications are presented in paragraph 83 of the PSR.

⁶ Sourcebook, Table 6.

⁷ Dr. Joann B. Morton, *An Administrative Review of the Older Inmate*, USDOJ, National Institute of Corrections, 4 (1992).

⁸ *Old Behind Bars*, at 17.

⁹ Sourcebook, Table 6.

In 2009, before he turned 50, **MR. FIORENTINO** was diagnosed with atrial fibrillation. He has been hospitalized on several occasions as a result of this condition.

In 2010, **MR. FIORENTINO** was diagnosed with Type II Diabetes, which requires both oral and injectable medications daily. Medical records from the University of Miami Health System, Diabetes Research Institute, dated September 24, 2014, verify **MR. FIORENTINO'S** diagnosis of diabetes, lab results, medications and diet restrictions.

MR. FIORENTINO'S current medications include 1,000 milligrams metformin, 10 glucose blood used as directed, and 18 milligrams liraglutide injected daily. (See paragraph 83 of PSR).

Pursuant to the most recent amendment (739) to § 5H1.4, a defendant's physical condition, individually or in combination with other offender characteristics, such as age and the length of any expected sentence, may be considered as sentencing factors in fashioning a reasonable but not greater than necessary sentence.

In an August 21, 2006 memorandum to all district court judges, the Administrative Office of the U.S. Courts indicated that the Bureau of Prisons will consider the presentence investigation report, the statement of reasons and judicial placement recommendations in assigning a CARE level to an inmate. There are four levels in the BOP CARE level system, which classifies inmates according to their healthcare needs. At 55 years of age and with **MR. FIORENTINO'S** physical and mental health history, we believe he is already precluded from Level 1. Level 2 is reserved for inmates who are stable out-patients, who can handle their own daily living activities, and their need for acute medical services is less than three months in duration, occur no more than every two years, and can be resolved

without hospitalization. Level 3 is reserved for inmates who are fragile out-patients and Level 4 is for inmates with acute medical conditions. At **MR. FIORENTINO'S** current age and health, any incarceration sentence imposed will, most likely, result in **MR. FIORENTINO** finding himself at a high CARE level. His advancing age and health conditions will certainly tax the resources and finances of the Bureau of Prisons, place an added risk to the inmate, and exacerbate present conditions. Even when the sentencing guidelines were mandatory, downward departures under § 5H1.4 were permissible. Again, **MR. FIORENTINO** asks that his age and health be considered as sentencing factors under 18 USC § 3553 in fashioning his sentence.

D.

KIPU SYSTEMS AND THE POTENTIAL LOSS OF JOBS

In 2012, when **MR. FIORENTINO** was volunteering his time at Incubate Miami, he met Tobias Franoszek and Natasha Duwin. They were trying to create a health records software company that could benefit substance abuse treatment facilities. Because of **MR. FIORENTINO'S** own problems with alcohol and prescription drugs, he was interested in their project and began to mentor them. He eventually became one of the co-founders of the company before the cloud based software was commercially available and before KIPU produced any significant revenue. He worked every day to establish the company's vision, strategy, and business plan, and helped to raise capital for KIPU Systems. He became CEO and has guided the company from the initial three (3) employees to the present 32 employees, many of which are recovering addicts, and the company continues to grow today. The other two co-founders work with the company; Tobias as the software programmer and developer and Natasha as the implementation specialist and trainer.

While both are capable within their areas of specialty, neither of them has the business skills necessary to manage the company through the first five years when 80% of software startups fail.

As CEO, **MR. FIORENTINO** works 90 hour weeks, driven by the goal of finding a way to improve drug and alcohol treatment for millions of addicts in the United States. KIPU has over 260 treatment facility clients and it has already helped over 60,000 addicts through improved care.

If an alcohol or drug addict needs help today, chances are that they will go through detox, rehab, or a treatment center that runs on KIPU Cloud Based, Electronic Health Management Platform. KIPU is unique; it was created and designed to help addicts receive better care through technology which enables the treatment facilities and therapists to do a better job. KIPU creates group session notes for therapists, it calendars sessions, and it has 800 pages of treatment plans so therapists can create customized treatment plans for each patient. Where therapists were overwhelmed with paperwork before KIPU, they can now work much more efficiently and spend most of their time treating patients.

MR. FIORENTINO created KIPU after he resigned from TigerDirect. Once again, he created something significant from almost nothing. This Court will receive many letters from those employed or associated with KIPU. They will tell this Court that **MR. FIORENTINO'S** leadership role in KIPU cannot be replaced and that jobs and the financial future of this company will be greatly at risk without his presence.

MR. FIORENTINO does not suggest to this Court that his incarceration, even for a matter of months, would jeopardize the very existence of KIPU, an issue which was

nonetheless successfully argued in *U.S. v. Millikosky*, 64 F.3d 4 (2nd Cir. 1995). However, it is clear that given the startup nature and uniqueness of this business, as well as **MR. FIORENTINO'S** business experience which KIPU cannot replace, many of KIPU's 36 employees and their families will be at risk of losing their jobs and may experience great difficulty in finding new employment. Likewise, the hundreds of treatment facilities, and tens of thousands of addicts receiving help from facilities running the KIPU system, may not be able to continue. Given these realities, this Court is respectfully asked to consider the instant circumstances and how they were resolved in *U.S. v. Olbres*, 99 F.3d 28 (1st Cir. 1996) (guidelines do not prohibit departure on grounds that incarceration of defendant will cause job losses to his employees; case remanded to determine if extent of loss is outside the heartland of such cases); and *U.S. v. Kloda*, 133 F.Supp.2d 345 (S/D NY 2001) (in business tax fraud case, one-level departure granted, in part, because of "the needs of [defendant's] business and employees").

E.

CHARITY CHARITABLE WORKS AND GOOD DEEDS

MR. FIORENTINO has been fortunate to experience success in his life. Because of that success, he has been able to contribute to his community and those seeking his help.

MR. FIORENTINO has always said YES to those in need.

- **MR. FIORENTINO** derived great satisfaction as an adjunct professor at the University of Miami School of Business Administration (hereafter "UM") where he taught undergraduate business law from 1984 to 1994, and again from 2007 to 2011. Adjunct professors are paid about \$1,800 a course, and **MR. FIORENTINO** often donated his salary to the school's scholarship fund or used it in other charitable endeavors. **MR. FIORENTINO**

taught at UM during the years he was CEO of TigerDirect. He gave of his time and personally ran a summer intern program for students at TigerDirect and featured a rotation through the company's various departments. He personally hosted "CEO lunches" every week during the summer months. **MR. FIORENTINO** touched many lives and made a difference as both TigerDirect's CEO and a business law professor at UM.

- As the Chief Executive at TigerDirect, **MR. FIORENTINO** was always a generous employer, helping the company's employees, often through his own funding through disease, cancer, and hurricanes. **MR. FIORENTINO** never had mass layoffs of employees, even in the worse economic times, and he was selected "Best Employer in South Florida" in 2005.

In 1997, **MR. FIORENTINO** founded the Great PC race for Education Charity, an annual fund raising event. For years, he personally managed and hosted this annual fund raising event in Las Vegas, and during his tenure at TigerDirect, this charity raised approximately \$2 million in cash and PC Products.

- Beginning in 2007, **MR. FIORENTINO** established the "Pink Friday Charity" and turned Black Friday, the busiest shopping day of the year, into "Pink Friday" for "Komen for the Cure," one of America's largest breast cancer philanthropies. **MR. FIORENTINO** spent his time and effort to promote and coordinate this annual event, which raised approximately \$100,000 per year from 2007 to 2010. During those years, **MR. FIORENTINO** made it easy for TigerDirect customers to add a charitable gift to their purchase as a contribution to the "Cure." Over 1 million people have participated in this event since its inception.

- After **MR. FIORENTINO** resigned from TigerDirect, he experienced depression and went through a terrible time. However, in mid 2012 he began donating his time again. He was a mentor and advisor at Incubate Miami, a tech startup incubator, at Tudor Ice, a super-pure health-oriented consumer ice business, and GradSave, a business that helps families save for college. He started out working half-days as he recovered from his deep depression, and as he improved, half-days turned into full days. Over the years, **MR. FIORENTINO** has helped many startup businesses.

- Finally, in October 2012, **MR. FIORENTINO** mentored the creators, and later became CEO of KIPU. KIPU is described in the following section of this filing; however, **MR. FIORENTINO** has committed to donating 10% of KIPU's total electronic medical record (EMR) patient base to deserving organizations for free, so as to help military veterans and low income persons seeking medical help, as a way to give back to the community and help addicts in need. On January 5, 2015, KIPU announced its first donation (a \$1 million grant) to Crossroads, Inc., an Arizona based residential substance abuse treatment facility. Shannon Casazza, Deputy Director at Crossroads, stated the following.

We have been working closely with KIPU's highly skilled team for the last month and we cannot wait to roll it out at all five of our facilities. I cannot thank KIPU Systems enough for this incredible opportunity to improve services to recovering men and women in Arizona.

MR. FIORENTINO also dedicated KIPU's data project for the public good. KIPU houses the largest database of addiction treatment episodes in the world, over 60,000 today with 200,000 expected in 12 months based upon the present growth rate. This database would cost millions, if not tens of millions of dollars to assemble. While the company could sell or rent such data to pharmaceutical companies, educational or

government entities, **MR. FIORENTINO** has agreed to make the database (minus HIPPA protected and specific Treatment Center information) available to qualified researchers for the public good. Through such research, **MR. FIORENTINO** expects that the relapse rate in drug treatment will improve (drop) from what could be as high as 90 percent (relapse) in the first year. Only a few percentage points of improvement of treatment success will be meaningful to millions of addicts and help reduce this countries consumption of drugs. **MR. FIORENTINO** has re-dedicated his life to this mission and to improving the lives of addicts.

What we have demonstrated to the Court is that **MR. FIORENTINO** has given much more than money to a multitude of charities, educations institutions and business endeavors. He has given his time and worked in the trenches. In *U.S. v. Cooper*, 394 F.3d 172 (3rd Cir. 2005), a securities and tax evasion case with a sentencing range of 15 to 21 months, a four-level downward departure for good works and a sentence of probation was warranted for a defendant's "exceptional" good works who did not simply donate money to charity but also organized and ran youth football team in depressed area, mentored its members, and helped several members attend better high schools or go to college, which qualified as exceptional because they entail "hands on personal sacrifices which have a dramatic and positive impact on the lives of others." In *U.S. v. Serafini*, 233 F.3d 758 (3rd Cir. 2000), the community service and charitable works performed by the defendant, a state legislator convicted of perjury in a federal grand jury investigation, were sufficiently "extraordinary and exceptional" to justify a three-level downward departure for community and charitable activities; e.g., providing a \$300,000 guarantee for medical

treatment of a terminally ill patient and mentoring a seriously injured college student, and generosity of time and money; In *U.S. v. Woods*, 159 F.3d 1132 (8th Cir. 1998), the defendant's exceptional charitable efforts bringing two troubled young women into her home, paying for them to attend private school and also assisting an elderly friend to move from a nursing home to an apartment justified a one-level departure; In *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998), a defendant pled guilty to possession of a firearm by a prohibited person and the district court did not abuse its discretion when it departed downward three-levels when, as one of several factors, it considered the defendant's long history of community service; In *U.S. v. Crouse*, 145 F.3d 786 (6th Cir. 1998), the defendant was a chief executive officer of a company found to have distributed orange juice adulterated with sugar, and where the judge departed downward 13 levels, from 60 to 37 months, to impose home confinement, the appeals court deferred to the district court's decision that the departure was justified, but the extent of it was excessive; In *U.S. v. Rioux*, 97 F.3d 648, 663 (2nd Cir. 1996), affirming downward departure on charitable fund-raising conduct as well as poor medical condition; *U.S. v. Canoy*, 38 F. 3d 893 (7th Cir. 1994), charitable and civic activities may, if exceptional, provide a basis for departure. Finally, in *U.S. v. Greene*, 249 F.Supp.2d 262 (SDNY 2003), a tax case, the defendant was granted a 7-level departure because of extraordinary charitable good works – devoting his life to orphaned children, while just a salaried employee, and extraordinary family circumstances and; *U.S. v. Bennett*, 9 F.Supp. 2d 513 (EDPA 1998), in the largest charitable fraud case in history, under § 5H1.11, the defendant's civic and charitable good deeds were

extraordinary and, together with other grounds, a departure from 232 months to 92 months was warranted.

In sum, **MR. FIORENTINO** believes his long history of community service and good deeds is truly exceptional and may be considered by this Court as either a downward departure under § 5H1.11 or as a sentencing factor under 18 USC § 3553(a)(1).

F.

MR. FIORENTINO'S HISTORY OF SUBSTANCE ABUSE AND REQUEST FOR RDAP

MR. FIORENTINO has a long and extensive history of substance abuse. Indeed, a persistent theme throughout the narrative of **MR. FIORENTINO'S** offense conduct is the prevalence alcohol abuse. Since his resignation from Systemax, **MR. FIORENTINO** has continued to battle his addiction, along with various mental and emotional problems.

Presented in paragraph 85 of the PSR, **MR. FIORENTINO** first began abusing alcohol in law school to relieve stress both from his studies and the need to work full-time to provide financial support for both his parents and himself. During those years, he consumed excessive amounts of alcohol and was frequently intoxicated evenings and weekends.

During the years 1984 to 1989, **MR. FIORENTINO** created and grew an advertisement agency and, later, spun off TigerDirect. Still in his twenties, his abuse of alcohol continued.

Beginning in 1989, **MR. FIORENTINO** was responsible for the tremendous growth of TigerDirect. He took the company international with thousands of employees and billions in revenue. The responsibilities were often overwhelming and included frequent travel. There were business lunches during the day, and dinners and long hours at hotel bars, often alone. By 2005, **MR. FIORENTINO'S** drinking became more public. He was drinking

excessive amounts of alcohol, at least eight (8) bottles a week. Since he resigned from Systemax in May 2011, **MR. FIORENTINO** has abused Xanax, Ambien, and he has consumed excessive amounts of alcohol.

MR. FIORENTINO has never received treatment for his substance abuse issues. When he is sentenced, we will request that the Court recommend that he be considered for the BOP Residential Anti-Substance Abuse Program (RDAP) under the provisions of 18 USC § 3621(e).

G.
REHABILITATION, DETERRENCE AND RECIDIVISM

The sentencing factors of 18 USC § 3553(a)(1) include the nature and circumstances of the offense and the history and characteristics of the defendant. However, **MR. FIORENTINO** is aware they also include the sentencing factors of 18 USC § 3553(a)(2), and this Court must also consider rehabilitation, deterrence and recidivism.

The Sentencing Commission's report, "Measuring Recidivism," offers a statistical analysis of the type of person most likely and least likely to re-offend. The study demonstrates that the risk of **MR. FIORENTINO** re-offending, given his age and health, is extremely unlikely and also shows how important it is in this case to limit any further incarceration. The study demonstrated that (1) those who are married are less likely to recidivate than those who were not; (2) those who have not used illicit drugs are less likely to recidivate than those who did; (3) non-violent offenders are less likely to recidivate than violent offenders; (4) first time offenders are less likely to recidivate than repeat offenders; (5) those who are employed are less likely to recidivate than those who are not employed;

and (6) those who are sentenced to non-jail sentences are less likely to recidivate than those who receive straight jail. **MR. FIORENTINO** falls into ALL of those categories.

At the age of 55 and with serious health problems, we believe, even the government will concede, **MR. FIORENTINO** poses little risk to re-offend and he is not in need of rehabilitation. We also believe that just the anticipation of a prison sentence at his age and health condition is a deterrent itself. However, admittedly, **MR. FIORENTINO** also knows this Court must fashion a sentence that serves as a deterrent to others who might be considering engaging in criminal conduct similar to what he admittedly involved himself. We believe that any examination of what has become of **MR. FIORENTINO'S** life at this time and the threat of incarceration will serve as an adequate warning to others.

IV. CONCLUSION

MR. FIORENTINO is well aware that in fashioning a sentence in his case, this Court must consider the nature and circumstances of the offense, 18 USC § 3553(a)(1). To that end, following **MR. FIORENTINO'S** resignation from Systemax in May 2011, he immediately agreed to an \$11 million settlement with his former employer, he was accepted into the Internal Revenue Tax Amnesty Program, and he entered into a separate agreement with the Securities and Exchange Commission. **MR. FIORENTINO** never hid from either the government or Systemax, rather, he immediately did everything he could to resolve his admitted liability.

MR. FIORENTINO'S cooperation with the government and Systemax began following the indictment of his brother, Carl, in June 2013. Once he was charged he pleaded guilty within two weeks. His acceptance of responsibility in this case has been immediate and

complete. His remorse is profound. He has not objected to either the guideline calculations or the Offense Conduct presented in the PSR.

Subsequent to *Booker*, this Court must also consider the history and characteristics of the defendant, 18 USC § 3553(a)(1). To that end, **MR. FIORENTINO** asks this Court to consider that this offense is but a small slice of an otherwise remarkable life. **MR. FIORENTINO** has led a successful life and he has shared his success, with both his time and financial means, with many. He has truly changed the lives of many people. He has also enjoyed a wonderful marriage with Alina for more than 28 years and together they have raised two successful children. **MR. FIORENTINO** asks this Court to consider a sentence that will not separate him from his loved ones and others who need him for any longer than the Court deems necessary.

Finally, Judge Jed Rakoff, of the Southern District of New York, in *U.S. v. Adelson*, 441 F.Supp 506,511 (SDNY 2006), explained the importance of a defendant's good works and the support of his community that he receives at sentencing. The court reflected on in letters from people "from all walks of life," attesting to Adelson's good works and deep humanity. Writers described his "generosity of spirit and his ever-present willingness to go above and beyond the call of duty to help others." 441 F.Supp. 2d 513. The court further referred to the numerous colleagues, professionals and public officials who wrote to the court to express their admiration for the defendant. *Id.* As the court further explained:

But, surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. The elementary principle of weighing the good with the bad, which is basic to all great religions, moral philosophies, and systems of justice, was plainly part of Congress had in mind when it directed courts to

consider, as a necessary sentencing factor, “the history and characteristics of the defendant.

We appreciate the Court’s consideration of the foregoing Response to the Presentence Investigation Report and Request for Alternative Sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2015, a true and correct copy of the foregoing was furnished via the CM/ECF system to all parties designated to receive the electronic filings in this cause.

s/ Samuel J. Rabin, Jr.

SAMUEL J. RABIN, JR.