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 9 UNITED STATES OF AMERICA

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 11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 SOUTHERN DIVISION

14 UNITED STATES OF AMERICA,
 15 Plaintiff,
 16 v.
 17 PHILIP SOBOL,
 18 Defendant.

No. SA CR 15-148-JLS

GOVERNMENT'S SENTENCING POSITION
FOR DEFENDANT PHILIP SOBOL

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 22 Plaintiff, by and through its attorney of record, the United
 23 States Attorney for the Central District of California, hereby files
 24 its position regarding the Presentence Report ("PSR") submitted by
 25 the United States Probation Office for defendant PHILIP SOBOL.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Philip Sobol ("defendant") is before the Court for sentencing after having pleaded guilty to conspiracy to commit mail fraud and honest services fraud and interstate travel in aid of a racketeering enterprise in violation of 18 U.S.C. §§ 1952(a)(3), 2(a), 2(b). Defendant is a physician who violated his duty to provide honest services to his patients by receiving undisclosed kickbacks in exchange for referring surgeries to Pacific Hospital. The government does not have objections to the presentence report's ("PSR") Sentencing Guideline calculation except it believes that a two level increase is warranted because the scheme involved more than ten victims. The government does not believe that defendant owes restitution because there is no evidence that the surgeries referred were not medically necessary or that defendant participated in fraudulent billing.¹ The government recommends the Court sentence defendant to a term of imprisonment consistent with the low end of the Guidelines.

II. FACTUAL BACKGROUND

Defendant is an orthopedic surgeon. PSR ¶ 16. Beginning in 2005 and continuing through 2013, defendant agreed with Michael Drobot to receive kickbacks in exchange for defendant performing surgeries at Pacific Hospital or referring spinal surgery patients

¹ Defendant received \$5.2 million dollars in kickbacks, which are criminal proceeds and he agreed to forfeit those proceeds as part of his plea agreement. Defendant has made some payments but he has not fully complied with this obligation. The government expects that he will be in full compliance before sentencing.

1 to physicians who would perform the spinal surgeries at Pacific
2 Hospital. PSR ¶¶ 12-19. Defendant and Drobot concealed the
3 kickbacks through a series of sham agreements including a management
4 agreement and option agreement. PSR ¶¶ 16-19. Defendant knew the
5 receipt of undisclosed kickbacks was illegal. PSR ¶ 15. Defendant
6 received approximately \$5.2 million dollars in kickbacks. PSR ¶ 28.

7 **III. THE PRESENTECE REPORT**

8 A. The PSR

9 On February 24, 2017, the United States Probation Office
10 ("USPO") disclosed to the parties its PSR in this matter. See CR
11 33. The USPO found that defendant was subject to the following
12 Sentencing Guidelines calculations:

13	Base offense level:	6	(U.S.S.G. § 2B1.1(a)(2))
14	Kickback Amount:	18	(U.S.S.G. § 2B1.1(b)(1)(J))
15	Position of Trust:	2	(U.S.S.G. § 3B1.3)
16	Acceptance:	-2	(U.S.S.G. § 3E1.1(a))
17	Acceptance:	-1	(U.S.S.G. § 3E1.1(b))
18	Total Offense Level:	23	

19 PSR ¶¶ 27-37.

20 Defendant has no criminal history points, which places him in
21 criminal history category I. See PSR ¶ 60. Based on an offense
22 level of 23 and a criminal history category of I, the USPO found
23 that defendant's sentencing range is 46-57 months' imprisonment.
24 See PSR ¶ 60. The PSR noted that defendant had agreed to pay
25 restitution but did not identify any victims from the harm.

26 B. The PSR

1 The government has no objections to the facts in the PSR and
2 the USPO's Sentencing Guidelines calculations except the Court
3 should apply an additional two level increase because the offense
4 involved more than ten victims. The parties agreed to the two
5 levels in the plea agreement and it is supported by the facts in
6 this investigation. While it is difficult to determine exactly how
7 many surgeries defendant referred where he received a kickback
8 because the kickbacks were paid through sham management and option
9 agreements that were designed to approximate the number of surgeries
10 referred or performed at Pacific Hospital, Drobot admitted in his
11 plea agreement that he paid between \$10,000 and \$15,000 per surgery
12 performed. See SA CR 14-34-JLS, CR 7 at 15. Defendant admits in
13 his plea agreement that he received \$5.2 million in kickbacks, which
14 would equate to well over 10 patient surgeries. The government has
15 also provided the probation office with a list of surgeries that he
16 referred to Pacific Hospital, which supports the enhancement. If
17 the Court applies the enhancement, the Guidelines range is 57-71
18 months' imprisonment.

19 Restitution should be imposed when (1) sentencing a defendant
20 convicted of "an offense against property under [Title 18],
21 including any offense committed by fraud or deceit"; and (2) there
22 is "an identifiable victim or victims [who] suffered ... pecuniary
23 loss." 18 U.S.C. § 3663A(a)(1), (c)(1). Here, defendant received
24 undisclosed kickbacks from Drobot but there is no evidence that
25 defendant caused any losses to identifiable victims. There is no
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1 evidence of pecuniary loss resulting from defendant's failure to
2 disclose the kickbacks to his patients.

3 **IV. THE COURT SHOULD SENTENCE DEFENDANT TO THE LOW END OF THE**
4 **APPLICABLE GUIDELINES RANGE**

5 The Court should sentence defendant to a term of imprisonment
6 consistent with the low end of the Sentencing Guidelines. The
7 section 3553(a) factors cut in favor of a term of imprisonment.
8 Defendant's conduct did not involve a momentary lapse in judgment,
9 but consisted of criminal conduct over a seven plus year period. As
10 a physician, defendant knew that it was against the law to take
11 kickbacks and accepted the kickbacks out of greed. While there is
12 no evidence that unnecessary surgeries were performed, patients -
13 especially those who are undergoing potentially life altering
14 medical procedures - are entitled to conflict-free advice from their
15 physicians about whether to have surgery and, if so, the best
16 hospital for the surgery. See e.g. United States v. Nayak, 769 F.3d
17 978, 984 (7th Cir. 2014) ("Indeed, the intangible harm from a fraud
18 can often be quite substantial, especially in the context of the
19 doctor-patient relationship, where patients depend on their doctor -
20 more or less completely - to provide them with honest medical
21 services in their best interest.") Defendant put his quest for
22 personal profits above his duty to provide his patients conflict-
23 free advice. Defendant profited from the scheme - he received more
24 than \$5.2 million dollars in kickbacks. Defendant is forfeiting
25 \$5.2 million dollars to the United States; nevertheless, defendant
26 should comply with this Court's General Order 03-01, which requires
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1 a defendant to submit a financial affidavit to the probation office
2 for use in the PSR, so that the Court can assess his assets.² Given
3 the forfeiture, the government is unlikely to recommend a fine.

4 In mitigation, defendant has no criminal history and in
5 counsel's view, there is a low risk of recidivism. The primary
6 objective of the sentence here should be to deter other doctors from
7 participating in kickback schemes.³ To the extent the Court
8 believes that a below Guidelines sentence is appropriate, it should
9 consider imposing community services as part of the sentence.
10 Defendant's intellect and skill set may be of value to the
11 community.

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24 ² General Order 03-01 is on the Court's website.

25 ³ While defendant received a substantial amount of kickbacks and is
26 among the more culpable doctors who received kickbacks, the
27 government does not believe that he is as culpable as Michael Drobot
28 Sr. and supports any request that he be sentenced shortly after
Michael Drobot Sr.