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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,) No. CR 05-1210-PA
15)
Plaintiff,) **GOVERNMENT'S MEMORANDUM AND**
16) **SENTENCING POSITION FOR**
v.) **RALPHS GROCERY COMPANY;**
17) **EXHIBITS**
RALPHS GROCERY COMPANY,)
18) Sentencing Hearing
Defendant.) Date: October 16, 2006
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1 Plaintiff United States of America, by and through its
2 attorneys of record, Assistant United States Attorneys Adam H.
3 Braun, Jeremy D. Matz, and David K. Willingham, hereby
4 respectfully submits its Memorandum And Sentencing Position For
5 Ralphs Grocery Company, with the accompanying Exhibits.

6
7 Dated: September __, 2006

Respectfully submitted,

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1 **GOVERNMENT'S MEMORANDUM AND SENTENCING POSITION**

2 **FOR RALPHS GROCERY COMPANY**

3 I.

4 **INTRODUCTION**

5 On July 26, 2006, defendant Ralphs Grocery Company
6 ("RALPHS") pleaded guilty to five felony counts stemming from its
7 criminal conduct during a labor dispute in 2003 and 2004. The
8 guilty plea by RALPHS was entered as part of a binding plea
9 agreement (the "Plea Agreement") reached with the government,
10 requiring RALPHS to pay more than \$70,000,000 in financial
11 penalties and to assist the government in its ongoing
12 investigation. On September 11, 2006, the United States
13 Probation Office disclosed the Pre-Sentence Report ("PSR") for
14 RALPHS. The PSR concludes that the financial penalties provided
15 in the Plea Agreement are sufficient punishment in this matter.
16 In this sentencing memorandum, the government respectfully
17 requests that the Court accept the Plea Agreement, appoint the
18 Special Master as set forth below, and sentence RALPHS in
19 accordance with the Plea Agreement.

20 **A. DEFENDANT RALPHS GROCERY COMPANY**

21 Defendant RALPHS is an Ohio corporation that is
22 headquartered in Compton, California. RALPHS' President,
23 Executive Vice-President for Store Operations, Group Vice-
24 President for Human Resources/Labor Relations, Vice-President of
25 Legal Services, and other senior management work in the company
26 headquarters in Compton. In addition, RALPHS' media and public
27 relations staff, including its Director of Public Relations, also
28 work at the Compton headquarters.

1 The Kroger Co. ("Kroger") is an Ohio corporation
2 headquartered in Cincinnati, Ohio. (Indictment ¶ 3). Kroger's
3 stock is publicly traded on the New York Stock Exchange under the
4 symbol "KR". RALPHS is a wholly-owned subsidiary of Kroger and
5 operates approximately 300 grocery stores in Southern California.
6 (Indictment ¶¶ 2(a), 3).

7 **B. THE NATIONAL LABOR RELATIONS BOARD PROCEEDINGS**

8 From November 2003 through January 2004, seven local unions
9 of the United Food and Commercial Workers Union (collectively,
10 "the Unions") filed unfair labor practice charges with the
11 National Labor Relations Board ("NLRB") alleging that RALPHS was
12 engaged in unfair labor practices during a 4 ½ month lockout that
13 began in October 2003 (the "lockout"). (Indictment ¶¶ 140, 144,
14 149). The Unions have appealed the NLRB's dismissals of the
15 unfair labor practice charges. If the Court accepts the Plea
16 Agreement in the instant case and determines to be bound by it,
17 the Unions will withdraw their appeals and request that the NLRB
18 dismiss any related charges. (Plea Agreement, Ex. C).

19 **C. THE GOVERNMENT'S CRIMINAL INVESTIGATION AND PROSECUTION**

20 In approximately February 2004, the United States Attorney's
21 Office for the Central District of California ("USAO") began an
22 investigation into allegations that RALPHS was engaged in illegal
23 hiring practices during the 2003-2004 lockout. Among other
24 things, the USAO began investigating whether RALPHS was hiring
25 locked-out employees under false names and social security
26 numbers in an effort to both better operate its stores during the
27 labor dispute and conceal its rehiring of locked-out employees
28 from labor unions and regulatory authorities.

1 The prosecution of RALPHS was the result of a two-year
2 investigation drawing upon the investigative resources of the
3 Department of Labor ("DOL"), Internal Revenue Service ("IRS"),
4 Social Security Administration ("SSA"), the USAO and a federal
5 grand jury. During the course of the investigation, the USAO
6 called between 70 and 80 witnesses before a federal grand jury, a
7 large number of whom were management officials from RALPHS and
8 other Kroger subsidiaries. In addition, government investigators
9 interviewed nearly 250 company employees and reviewed nearly
10 500,000 pages of company memoranda, e-mails and other business
11 records produced to the government in response to federal grand
12 jury subpoenas. From this investigation, the government obtained
13 a clear picture of the prevalence of RALPHS' illegal rehiring
14 practices during the 2003-2004 lockout as well as which
15 executives and management figures participated in, directed or
16 condoned the practices. The Indictment described below reflects
17 the federal grand jury's and government's conclusions regarding
18 the scope and senior management endorsement of RALPHS' illegal
19 rehiring practices.

20 On December 15, 2005, a federal grand jury sitting in the
21 Central District of California returned a 106-page, 53-count
22 Indictment charging RALPHS with conspiracy, false representation
23 of social security numbers, identity fraud, falsification and
24 concealment of material facts within the jurisdiction of the IRS
25 and SSA, money laundering, false statements and concealment of
26 facts relating to employee benefit plans, false statements to the
27 NLRB in connection with the NLRB's investigation of unfair labor
28 practice charges, and obstruction of a federal grand jury

1 investigation.

2 RALPHS has not admitted as part of its plea each and every
3 allegation contained in the Indictment. However, the government
4 submits for the reasons discussed herein that the size of the
5 financial penalty and nature of the other obligations imposed on
6 RALPHS make the Plea Agreement reasonable and sufficient whether
7 the Court considers only those facts admitted by RALPHS or it
8 considers the entire scope of criminal conduct alleged in the
9 Indictment.

10 **D. FINDINGS AND CONCLUSIONS OF THE PRESENTENCE REPORT**

11 The government has no objections to the offense conduct
12 section contained in the PSR. See PSR ¶¶ 22-66. However, as set
13 forth below, the government seeks to clarify certain portions of
14 the PSR pertinent to the fine and restitution calculations set
15 forth in the PSR.

16 **II.**

17 **SUMMARY OF GUILTY PLEAS ENTERED AND**
18 **SENTENCE TO BE IMPOSED UNDER THE PLEA AGREEMENT**

19 **A. GUILTY PLEAS**

20 On June 30, 2006, the Plea Agreement for RALPHS was filed.
21 On July 26, 2006, pursuant to the Plea Agreement, RALPHS pleaded
22 guilty to the following five counts in the Indictment:

23 1. Count One: conspiracy to commit the crimes of:

24 a. False representation of social security numbers,
25 in violation of 42 U.S.C. § 408(a)(7)(B);

26 b. Identity fraud, in violation of 18 U.S.C.
27 § 1028(a)(7); and
28

1 c. Falsification and concealment of material facts
2 within federal agency jurisdiction, in violation of 18 U.S.C.
3 § 1001(a) (1).

4 2. Count Four: false representation of a social security
5 number, in violation of 42 U.S.C. § 408(a) (7) (B).

6 3. Count Nineteen: identity fraud, in violation of
7 18 U.S.C. § 1028(a) (7).

8 4. Count Twenty-One: falsification and concealment of
9 material facts within the jurisdiction of SSA and IRS, in
10 violation of 18 U.S.C. § 1001(a) (1).

11 5. Count Fifty: concealment of facts relating to employee
12 benefit plans, in violation of 18 U.S.C. § 1027.

13 **B. CONDITIONS PRECEDENT TO THE PLEA AGREEMENT**

14 **1. Conditions Precedent For RALPHS**

15 Certain obligations created by the Plea Agreement do not
16 become binding on RALPHS unless the following conditions
17 precedent, which have not yet been met, are satisfied:

18 1. The Court determines to be bound by the Plea Agreement,
19 accepts it, and appoints the Special Master to administer the
20 Ralps Restitution Fund ("RRF") in accordance with Section XIII
21 of the Plea Agreement.

22 2. No later than three business days after the Court
23 determines to be bound by the Plea Agreement and accepts it, but
24 before RALPHS is sentenced, the Unions request that the NLRB
25 withdraw the three cases encompassing the unfair labor practice
26 charges brought by the Unions and still pending before the NLRB,
27 in reliance on RALPHS' agreement to establish and fund the RRF.

28

1 3. No later than three business days after the Court
2 determines to be bound by the Plea Agreement and accepts it, but
3 before RALPHS is sentenced, the individual charging parties in
4 two other cases pending before the NLRB and relating to the
5 October 2003 - March 2004 labor dispute request that the NLRB
6 withdraw those cases, in reliance on RALPHS' agreement to
7 establish and fund the RRF.

8 4. Upon request of the Unions and the individual charging
9 parties, but before RALPHS funds the RRF, the NLRB approves the
10 withdrawal of, and dismisses, the five cases set forth above
11 (collectively, "the NLRB Charges").

12 **2. Conditions Precedent For The USAO**

13 The Plea Agreement does not become binding on the USAO
14 unless the following conditions precedent, which have not yet
15 been met, are satisfied:

16 1. The Court determines to be bound by the Plea Agreement,
17 accepts it, and appoints the Special Master to administer the
18 RRF.

19 2. No later than three business days after RALPHS receives
20 notice that the NLRB has approved the requests to withdraw, and
21 has dismissed, the NLRB Charges, RALPHS pays, or causes to be
22 paid, a \$20,000,000 criminal fine to the United States Treasury.

23 3. No later than three business days after RALPHS receives
24 notice that the NLRB has approved the requests to withdraw, and
25 has dismissed, the NLRB Charges, RALPHS pays, or causes to be
26 paid, \$2,000 in special assessments to the United States
27 Treasury.

28

1 4. RALPHS establishes and funds, or causes to be
2 established and funded, the RRF.

3 **C. SENTENCING**

4 **1. Probation**

5 RALPHS will be placed on three years probation, under the
6 following terms and conditions, among others:¹

7 1. No commission of any felony offense;

8 2. Institution of a Court-approved compliance and
9 training program regarding RALPHS' hiring practices leading up to
10 and during any potential labor dispute;

11 3. Institution of a Court-approved compliance and training
12 program regarding verification of identification of applicants
13 for employment at RALPHS; and

14 4. Institution of a Court-approved compliance and training
15 program to ensure fulfillment of all fiduciary duties owed by
16 RALPHS and all RALPHS officers and employees to employee benefit
17 funds, such funds' participants, and such participants'
18 beneficiaries.

19 **2. Criminal Fine**

20 RALPHS will pay a criminal fine of \$20,000,000, no later
21 than three business days after RALPHS receives notice that the
22 NLRB has approved the requests to withdraw, and has dismissed,
23 the NLRB Charges. Should the Court find that RALPHS has violated
24 a condition of probation, the Court may impose an additional
25 criminal fine of up to \$20,000,000 less the sum of all additional
26

27 ¹ The terms and conditions are only summarized here. For
28 the complete terms and conditions, see Plea Agreement at 35
¶¶ 73-75, & Ex. F.

1 criminal fines imposed for any prior violations of probation by
2 RALPHS.

3 **3. Restitution**

4 In lieu of an individualized judicial determination of
5 restitution potentially due to each of the approximately 17,000
6 to 19,000 RALPHS employees whom RALPHS locked out during the
7 labor dispute, and no later than three business days after RALPHS
8 receives notice that the NLRB has approved the requests to
9 withdraw, and has dismissed, the NLRB Charges, RALPHS will pay
10 \$50,000,000 to establish the RRF. From that \$50,000,000,
11 payments shall be made to:

12 1. The employee benefit funds, for remaining unpaid
13 contributions due from RALPHS based upon hours worked by
14 locked-out employees at RALPHS during the labor dispute, as
15 calculated by the auditing firm of Hemming Morse, Inc;

16 2. Eligible Employees, defined as RALPHS employees who
17 (i) were covered by the collective bargaining agreement that
18 expired on or about October 5, 2003; (ii) were locked out by
19 RALPHS during the labor dispute; and (iii) did not work for
20 RALPHS, Albertson's, Inc., or Vons during the labor dispute,
21 under any name or identity; and

22 3. The Unions, to partially reimburse the Unions for
23 lockout benefits and other financial assistance provided by the
24 Unions to Eligible Employees during the labor dispute.

25 **4. Special Assessment**

26 RALPHS will pay a total special assessment of \$2,000, no
27 later than three business days after RALPHS receives notice that
28 the NLRB has approved the requests to withdraw, and has

1 dismissed, the NLRB Charges.

2 **D. OTHER RALPHS OBLIGATIONS UNDER THE PLEA AGREEMENT**

3 RALPHS has agreed to cooperate fully in the USAO's criminal
4 investigation and in any criminal prosecutions arising therefrom,
5 including:

6 1. To produce documents, tangible evidence, and
7 information to the USAO;

8 2. To use best efforts to make present and former RALPHS
9 officers and employees available for interviews or to testify;

10 3. To agree to a limited waiver of the attorney-client
11 privilege and work-product protection; and

12 4. To use best efforts to direct any law firm (other than
13 RALPHS' present counsel of record) that represented RALPHS,
14 Kroger, or any other Kroger subsidiary or affiliate in connection
15 with specified investigations, to produce to the USAO all work-
16 product of such law firm.

17 RALPHS has further agreed not to retaliate against any
18 present or former officer or employee of RALPHS, Kroger, or any
19 other Kroger subsidiary or affiliate, who has chosen, or may
20 choose, to cooperate with the USAO.

21 **III.**

22 **RESTITUTION**

23 **A. APPLICABLE STATUTES**

24 The Mandatory Victim Restitution Act of 1996 ("MVRA"), 18
25 U.S.C. § 3663A, which applies to offenses committed or continuing
26 after April 24, 1996, requires the payment of restitution to
27 victims of "an offense against property under this title [18],
28 including any offense committed by fraud or deceit[,] in which an

1 identifiable victim or victims has suffered a physical injury or
2 pecuniary loss." 18 U.S.C. § 3663(A)(c)(1)(A)(ii), (B).

3 The Victim Witness Protection Act of 1982 ("VWPA"),
4 18 U.S.C. § 3663, permits the Court to order a defendant to make
5 restitution to any victim of a Title 18 offense, other than an
6 offense described in 18 U.S.C. § 3663A(c). 18 U.S.C.
7 § 3663(a)(1)(A).

8 "Victim," for purposes of both the MVRA and VWPA, is defined
9 as "a person directly and proximately harmed as a result of the
10 commission of an offense for which restitution may be ordered
11 including, in the case of an offense that involves as an element
12 a scheme, conspiracy, or pattern of criminal activity, any person
13 directly harmed by the defendant's criminal conduct in the course
14 of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663(a)(2);
15 18 U.S.C. § 3663A(a)(2).

16 Both statutes, however, are inapplicable in certain cases.
17 The VWPA provides that "[t]o the extent that the court determines
18 that the complication and prolongation of the sentencing process
19 resulting from the fashioning of an order of restitution under
20 this section outweighs the need to provide restitution to any
21 victims, the court may decline to make such an order." 18 U.S.C.
22 § 3663(a)(1)(B)(ii). Similarly, the MVRA does not apply in the
23 case of an offense against property "if the court finds, from
24 facts on the record, that (A) the number of identifiable victims
25 is so large as to make restitution impracticable; or
26 (B) determining complex issues of fact related to the cause or
27 amount of the victim's losses would complicate or prolong the
28 sentencing process to a degree that the need to provide

1 restitution to any victim is outweighed by the burden on the
2 sentencing process." 18 U.S.C. § 3663A(c)(3).

3 **B. BACKPAY AS RESTITUTION IN THIS CASE²**

4 As set forth above, this Court may order restitution only if
5 authorized under the VWPA or the MVRA. See also U.S.S.G.
6 § 8B1.1(a)(1). Whether backpay may be ordered in this context as
7 criminal restitution for RALPHS' convictions under 18 U.S.C.
8 § 371, 18 U.S.C. § 1028(a)(7) or 18 U.S.C. § 1001 is an issue of
9 first impression.³ The government has not located any published
10 or unpublished District Court, Circuit Court or Supreme Court

11
12 ² There is no dispute that the employee benefit plans are
13 entitled to restitution for unpaid contributions for hours worked
14 by bargaining unit members employed by RALPHS during the lockout.
15 RALPHS' conviction under 18 U.S.C. § 1027 for concealment of
16 facts relating to employee benefit plans indisputably triggers
17 this restitution obligation. As a result of the concealment, the
18 employee benefit plans suffered a total loss of approximately
\$914,947.96, which represents unpaid contributions as well as
costs incurred by the plans in determining RALPHS' liability.
RALPHS previously paid the employee benefit plans approximately
\$238,985.93. Under the Plea Agreement, the employee benefit
plans will receive restitution for the remaining portion of the
losses incurred, namely, \$675,962.03. Plea Agreement, ¶ 43.

19 The restitution payments to the employee benefit plans
20 contained in the Plea Agreement rely exclusively upon a figure of
21 \$675,962.03 provided to the USAO in mid-June 2006 by the co-
22 administrator for the plans. The figure was provided at the
23 request of the USAO, which was then involved in ongoing plea
24 negotiations and therefore needed the plans' precise losses. The
25 mid-June 2006 figure was largely consistent with previous figures
26 available to the USAO, namely, the unpaid portion (\$633,195.04)
of the plans' February 2005 invoice to RALPHS. However, two
weeks after the parties (and the Unions) entered into and filed
the Plea Agreement specifically relying on the mid-June 2006
figure, the employee benefit plans advised the government that
RALPHS owed them \$850,192.90 instead of \$675,962.03. The USAO
wishes to advise the Court of this discrepancy in the interests
of full disclosure.

27 ³ The government is not entitled to an order of
28 restitution against RALPHS for its conviction under 42 U.S.C.
§ 408(a)(7)(B), as that statute is not expressly enumerated under
the VWPA or the MVRA.

1 opinions discussing this issue. In absence of the Plea
2 Agreement, this Court would have to consider and potentially
3 resolve several novel and complex legal and factual issues before
4 it could order backpay as criminal restitution.

5 One issue is whether backpay is a "property" against which
6 RALPHS committed the offenses of conviction. While backpay is an
7 equitable remedy that may be ordered by the NLRB following the
8 finding of an actual unfair labor practice by the offending
9 company, there is no statutory entitlement to such a remedy.
10 Indeed, backpay is a remedy ordered at the discretion of the
11 NLRB. Even if backpay were considered a property right held by
12 the Eligible Employees of RALPHS, the Court may have to consider
13 and determine whether the offenses of conviction, Sections 371,
14 1001 and 1028(a)(7), were offenses against that property right.

15 In order to award backpay under the VWPA or MVRA, the Court
16 would have to find that locked-out RALPHS employees, not just the
17 government agencies that received the false income tax
18 information, were "victims" of the offenses of conviction. For
19 both statutes, the term "victim" has the same definition: a
20 person that is *directly* and *proximately* harmed as a result of the
21 commission of an offense for which restitution may be ordered.
22 See 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2). Thus, before this
23 Court could order backpay as restitution under either statute
24 (unless, as here, it is agreed upon by the parties), it would
25 have to find that locked-out RALPHS employees were directly and
26 proximately harmed by RALPHS' conspiracy, concealment of
27 information from the government, and identity fraud.

28

1 Furthermore, under both statutes, restitution is available
2 to victims for only those losses that result from the offense.
3 18 U.S.C. §§ 3663(b)(1), 3663A(b)(1). It is without question
4 that RALPHS employees lost wages as a result of the lockout.
5 However, in order to award restitution in the form of backpay,
6 this Court might have to decide as a factual matter whether the
7 lockout was lengthened as a result of RALPHS' criminal conduct
8 and if so, by how much; in other words, how long the lockout
9 would have lasted but for the identity fraud or concealment of
10 information from the IRS and SSA.

11 Finally, even if all of the above pre-requisites were
12 satisfied, the Court would need to make individualized backpay
13 determinations for approximately 17,000 to 19,000 locked-out
14 RALPHS employees. For example, the Court would be required to
15 consider individual circumstances such as pay scales and average
16 work schedules, whether a locked-out employee obtained substitute
17 employment during the lockout and if so, what his or her income
18 was from that substitute employment, and whether a locked-out
19 employee had medical or other circumstances rendering him or her
20 unable to work (illness, pregnancy, relocation to another part of
21 the country, etc.). At a minimum, this would be a burdensome and
22 resource intensive process for the Court and the parties.

23 The criminal restitution provisions in the Plea Agreement
24 resolve all of these issues in favor of the locked-out RALPHS
25 employees, guaranteeing them a historic backpay award. The Plea
26 Agreement, if accepted, will obtain through criminal restitution
27 what would constitute one of the largest payments of backpay in
28 NLRB history (and possibly the first backpay award ever to rely

1 upon an illegal selective lockout theory),⁴ but for the facts
2 that it was obtained through criminal restitution and the NLRB
3 dismissed the Unions' unfair labor practice charges. Under the
4 Plea Agreement, the employees will obtain this historic backpay
5 award without having to endure the time, legal fees and
6 uncertainty of a decade or more of NLRB litigation common in
7 large, contested NLRB cases.

8 **C. THE PROVISIONS REGARDING RESTITUTION IN THE**
9 **PLEA AGREEMENT ARE APPROPRIATE AND REASONABLE**

10 Here, the parties have agreed that RALPHS will pay
11 \$50,000,000 to establish the RRF. Prior to the filing of the
12 Plea Agreement, the government was provided with approximate loss
13 figures from the Unions. According to the figures, the RRF,
14 funded at \$50,000,000, represents approximately seven full weeks
15 of backpay for the 17,000 to 19,000 eligible RALPHS employees.⁵
16 If the Court accepts the Plea Agreement and authorizes the RRF,
17 these victims will receive meaningful and substantial
18 restitution, far faster and potentially in a far greater amount
19 than they might be able to obtain via a contested criminal
20 sentencing hearing (and subsequent appeal) or through any future
21
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23

24
25 ⁴ These statistics are based upon computer searches and
26 other inquiries by staff at the NLRB General Counsel's Office.

27 ⁵ It is important to note that RALPHS is obligated under
28 the Plea Agreement to separately pay the costs of implementing
the RRF, including the fees of the Special Master and claims
administration firms. Thus, the victims in this case will
recover the full amount of the RRF.

1 NLRB proceedings.⁶

2 By establishing the RRF and appointing the Special Master,
3 the Court will delegate the determination of eligibility of each
4 employee and the amount each employee is due. This will ensure
5 the efficient payment of restitution to the victims, and avoid
6 unnecessary burdens on the judicial system. For all of these
7 reasons, the RRF, funded by RALPHS, is a worthy alternative to a
8 judicial resolution of the issues involved in awarding victim
9 restitution in this case.

10 **IV.**

11 **FINE**

12 The government does not dispute the criminal culpability
13 score contained in the PSR, finding that RALPHS has a culpability
14 score of 9, resulting in a fine multiplier range of 1.80 to 3.60.
15 PSR ¶¶ 109-118. As set forth below, the use in the PSR of the
16 amount of restitution agreed-upon by the parties is problematic.
17 PSR ¶ 108.

18 The government seeks to clarify issues arising from the use
19 of the agreed-upon restitution amount - \$50,000,000 - as the
20 appropriate pecuniary loss amount to calculate the base fine
21

22 ⁶ The Plea Agreement provides backpay for locked-out
23 RALPHS workers but not striking Vons or locked-out Albertsons
24 workers. There is one simple reason for this: if RALPHS had been
25 found by the NLRB to have engaged in an illegal selective lock-
26 out, only RALPHS workers would have had the right to return to
27 work at RALPHS and thus, only RALPHS workers would have been
28 eligible for backpay covering that portion of the lockout deemed
by the NLRB to have been unlawful. Consistent with that, the
NLRB charges resolved as part of this criminal disposition are
only those filed by the Unions against RALPHS. Neither Vons nor
Albertsons were charged in the criminal indictment in this matter
and neither are alleged to have assisted RALPHS with the
commission of criminal conduct or unfair labor practices.

1 pursuant to U.S.S.G. § 8C2.4. The PSR states that it is entirely
2 "uncertain [at this point] whether RALPHS' conduct prolonged" the
3 lockout, and if so, for how long. PSR ¶ 103. Because of the
4 complexity of the issue, the PSR took the \$50,000,000 figure as
5 an estimate of the loss. Id. A fine relying upon the backpay
6 figure encounters many of the same factual and legal issues
7 discussed in connection with restitution. Furthermore, the
8 \$50,000,000 figure was not intended by the parties to be an
9 estimate of the loss. Instead, it represents a negotiated
10 component of a global \$70,000,000 financial penalty against
11 RALPHS.

12 Recognizing the possibility that the victims could
13 potentially receive nothing following a contested sentencing
14 proceeding and appeal, the approximately \$49,000,000 in backpay
15 represents a substantial recovery - RALPHS might even contend a
16 windfall - for the locked-out RALPHS employees. The \$20,000,000
17 criminal fine also represents a substantial fine against RALPHS.
18 The relative distribution between criminal fine and restitution
19 in the Plea Agreement was not a reflection of loss analysis but
20 simply the government's desire to ensure that the bulk of RALPHS'
21 financial penalty is paid to those most harmed by RALPHS'
22 conduct, whether or not their harms are legally cognizable in
23 criminal restitution, rather than deposited into the United
24 States Treasury as criminal fines are.

25 As discussed above, at a contested sentencing hearing it
26 would be a disputed issue how much loss, if any, was caused by
27 the offenses committed by RALPHS, other than losses incurred by
28 the employee benefit plans in the amount of approximately

1 \$914,947.96. To the extent the base fine amount were to be
2 calculated using this more certain and undisputed loss amount,
3 the resulting Guideline fine range would be \$6,660,000 to
4 \$13,320,000.⁷ The agreed-upon fine of \$20,000,000, not to
5 mention the larger financial penalty of \$70,000,000, is well
6 above the high-end of the fine range that can be calculated
7 absent substantial litigation before this Court, an additional
8 factor supporting the proposed fine as appropriate and reasonable
9 in this case.

10 **V.**

11 **ACCEPTANCE OF PLEA AGREEMENT**

12 **A. FEDERAL RULE OF CRIMINAL PROCEDURE 11(c)(1)(C)**

13 The Plea Agreement has been entered into pursuant to Fed. R.
14 Crim. P. 11(c)(1)(C). The decision whether to accept or reject a
15 Rule 11(c)(1)(C) plea agreement is left to the sound discretion
16 of the district court. See United States v. Greener, 979 F.2d
17 517, 519 (7th Cir. 1992) ("This is a deferential standard of
18 review, and we will not reverse the district court's decision if
19 any reasonable person could agree with the district court."). As
20 one district court has stated:

21 The court has discretion with regard to
22 whether to accept a plea agreement that is
23 binding. It is obligated to exercise that
24 discretion in a reasoned way. When, as here,
25 the joint sentencing recommendation is the
26 result of arms' length negotiations between
27 capable counsel, this court believes the
28 agreement should be accepted if it is
reasonable. To put it another way, it should

27 ⁷ This fine range is based upon an offense level of 26
28 (base offense 6; loss +14; more than 250 victims +6), a
corresponding base fine for that offense level of \$3,700,000, and
minimum and maximum multipliers of 1.80 and 3.60.

1 be accepted unless there is a good reason to
2 reject it. This is particularly true if the
3 plea will save substantial prosecutorial and
4 judicial resources[.]

5 United States v. C.R. Bard, Inc., 848 F.Supp. 287, 288 (D. Mass.
6 1994) (citations omitted). See also United States v. Monroe, 493
7 F.Supp. 134, 136 (E.D. Tenn. 1980) ("I visualize my obligation to
8 be to supervise the fairness of the bargain [citation omitted],
9 and I shall intervene in a bargain arranged between the
10 prosecution and a defendant only when I conclude the bargain
11 exceeds proper bounds.").⁸

12 **B. THE PLEA AGREEMENT CONSTITUTES A REASONABLE RESOLUTION OF**
13 **THE CRIMINAL PROSECUTION OF RALPHS**

14 For the following reasons, among others, the Plea Agreement
15 is in the interests of the public, those harmed by RALPHS'
16 criminal conduct, and the criminal justice system. The Court
17 should accept it and agree to be bound by its sentencing
18 provisions.

19 ⁸ In C.R. Bard, Inc., the district court accepted a
20 binding plea agreement in which a pharmaceutical company agreed
21 to pay \$30,500,000 as part of a civil settlement, \$30,500,000 in
22 criminal fines payable in two installments over two years, and to
23 implement specified corporate remedial measures, which would
24 remain in effect for four years. 848 F.Supp. at 289. In finding
25 the agreement reasonable, the court considered the following
26 factors: (1) six individuals were being prosecuted; (2) Bard was
27 cooperating with the government in the prosecution of those
28 individuals; (3) Bard was paying substantial penalties; (4) the
plea agreement contained provisions to minimize the risk of Bard
committing future violations, including a corporate compliance
program; and (5) litigating the criminal case, including whether
Bard's products had proximately caused injuries to individual
victims, would be time-consuming and complicated. Id. at 289-93.
All of those factors are also present in the instant case (with
regard to the first factor, the present status is that the
government is investigating individuals for the same criminal
conduct to which RALPHS has pleaded guilty).

1 First, the investigation and Indictment of RALPHS were far-
2 reaching and thorough, and the guilty pleas RALPHS entered
3 pursuant to the Plea Agreement encompass a broad range of its
4 criminal conduct: RALPHS illegally re-hired locked-out employees
5 using false names and identification and concealed that re-hiring
6 from the government and from the employee benefit funds to which
7 RALPHS owed contributions. As a result of its guilty pleas,
8 RALPHS will be subject to a period of three years probation.

9 Second, the Plea Agreement is the result of intensive
10 negotiations between the parties conducted in consultation with
11 the Unions, which are representatives of the primary potential
12 victims as well as victims themselves. These negotiations
13 required addressing a myriad of complex legal, factual,
14 financial, logistical, and practical issues, including multi-
15 party litigation in various legal fora (such as the instant
16 criminal case and the pending NLRB proceedings).

17 Third, this is not a case in which a corporation has agreed
18 to pay a large sum of money to buy immunity for its officers,
19 agents, or employees. To the contrary, the USAO has already
20 designated numerous officers and employees of RALPHS as subjects
21 or targets of the USAO's ongoing investigation, and has informed
22 RALPHS and Kroger of such designations. The Plea Agreement does
23 not restrict, limit, or affect in any way the USAO's discretion,
24 right, or ability to prosecute any of these individuals for any
25 acts and omissions whatsoever. (Plea Agreement at 44, ¶ 87).
26 See C.R. Bard, Inc., 848 F.Supp. at 290 ("[T]he individuals
27 allegedly responsible . . . are being tried . . . for serious
28 federal crimes, which could result in serious terms of

1 imprisonment. Criminal prosecution of individuals in this case
2 has the potential to provide a better sense of just punishment
3 for the crimes committed. It also has the potential to send a
4 message to corporate officials everywhere that crimes can have
5 serious personal consequences and, therefore, to deter future
6 criminal conduct.”).

7 Fourth, the Plea Agreement imposes meaningful financial
8 punishment on RALPHS. Under its terms, RALPHS will pay a total
9 of more than \$70,000,000 in criminal fines, special assessments,
10 victim compensation, and administration costs. As the PSR notes,
11 “[a] financial obligation of more than \$70 million could be
12 counterproductive [because it could] end up harming the victims
13 of the offense (the employees) through staff reductions and store
14 closures. Thus, the proposed \$70 million payment would provide
15 sufficient punishment from a financial perspective.” (PSR ¶ 97);
16 see also C.R. Bard, Inc., 848 F.Supp. at 291 (“[I]t is
17 appropriate that [the corporation] pay a substantial financial
18 penalty. \$61,000,000 in criminal fines and civil settlement is a
19 substantial and reasonable penalty . . ., equal to the estimated
20 gross sales [of the defective products made by the
21 corporation].”).

22 Fifth, the Plea Agreement will require RALPHS to institute
23 Court-approved compliance and training programs that will reduce
24 the likelihood of RALPHS engaging in similar misconduct in the
25 future. See C.R. Bard, Inc., 848 F.Supp. at 292 (“In assessing
26 reasonableness, I have also been influenced by the fact that the
27 plea agreement contains provisions for minimizing the risk that
28 [the corporation] will commit similar offenses in the future.

1 The fine should discourage repetition of criminal conduct, but
2 the plea agreement does not rely on the fine alone. [The
3 corporation must take] steps designed to prevent [the misconduct]
4 from recurring. Among those steps are the implementation of a
5 new corporate compliance program[.]”).

6 Sixth, the Unions, who again are representatives of the
7 primary potential victims and potential victims themselves, have
8 agreed that the Plea Agreement provides satisfactory restitution,
9 and will request the NLRB to withdraw their pending unfair labor
10 practice charges in reliance on RALPHS funding the RRF. The Plea
11 Agreement will enable the Unions to avoid significant costs and
12 fees that they would otherwise incur in pursuing their claims
13 before the NLRB, claims on appeal following dismissal by the
14 NLRB.

15 Seventh, the Plea Agreement requires RALPHS to cooperate in
16 the USAO’s ongoing criminal investigation and any prosecutions
17 arising from that investigation. To that end, both RALPHS and
18 Kroger have provided the USAO with limited attorney-client
19 privilege and attorney work-product waivers that will enable the
20 government to better and more efficiently pursue individual
21 wrongdoers who participated in the criminal activity described in
22 the Indictment. See C.R. Bard, Inc., 848 F.Supp. at 290 (“[The
23 corporation] is cooperating with the Government to the
24 Government’s full satisfaction in the prosecution of those
25 individuals. That is a benefit of the plea agreement, as it
26 increases the possibility that the individuals responsible for
27 [the] crimes will be held responsible for them.”).

1 Eighth, the Plea Agreement conserves valuable and limited
2 prosecutorial and judicial resources by avoiding lengthy,
3 complicated, and expensive criminal litigation. By the USAO's
4 estimate, further litigation of this case would involve extensive
5 pre-trial motion proceedings, a trial lasting approximately ten
6 weeks, and extensive sentencing and appellate litigation.

7 Finally, the Plea Agreement provides substantial recovery to
8 the Unions and the Eligible Employees, allowing them to avoid
9 lengthy litigation in multiple fora that could ultimately result
10 in little to no recovery. The Plea Agreement is designed to
11 maximize the recovery to those parties, effecting a just result
12 to those aggrieved by RALPHS' conduct.

13 In sum, the sentence to which the parties have stipulated in
14 the Plea Agreement "properly reflects the seriousness of the
15 offense[s] and serves the purposes of specific and general
16 deterrence. It should forcefully send a message not only to
17 [RALPHS], but to other corporations and the individual human
18 beings who act for them. It should also protect the public from
19 further possible crimes by [RALPHS], promote respect for the law,
20 and provide just punishment for the offense[s]." C.R. Bard,
21 Inc., 848 F.Supp. at 288.

22 VI.

23 APPOINTMENT OF THE SPECIAL MASTER

24 RALPHS, the Unions, and the government agree that Thomas T.
25 Roberts, Esq., is well-qualified and well-positioned to serve as
26 the Special Master for the RRF. The parties recommend that the
27 Court appoint him. Mr. Roberts has reviewed the Plea Agreement
28 and has discussed with the government the role and

1 responsibilities of the Special Master. He is available to
2 attend the proposed status conference on September 27, 2006, at
3 3:00 p.m., and to accept appointment in this matter.⁹

4 A copy of Mr. Roberts' *curriculum vitae* ("CV") is attached
5 hereto as Exhibit A. As set forth in the CV, Mr. Roberts has
6 been arbitrating and mediating complex labor-management disputes
7 for more than thirty years, including disputes involving owners
8 and players in Major League Baseball, as well as General Motors
9 Corporation ("GMC") and the United Auto Workers ("UAW"). In
10 Major League Baseball, Mr. Roberts has served as an arbitrator
11 since 1974 and has overseen the distribution of \$436,000,000 in
12 damages and interest arising out of a collusion grievance
13 settlement, which involved about 840 players and a total of 3,750
14 claims. In the auto industry, Mr. Roberts served from 1987
15 through 2000 as the Umpire under a national agreement between GMC
16 and the UAW. The government believes that Mr. Roberts'
17 experience in arbitrating large-scale labor-management disputes,
18 including the distribution of millions of dollars of settlement
19 funds, qualifies him to be the Special Master in this case.¹⁰

20 As set forth in the Plea Agreement, the Special Master may
21 select one or more firms to assist him in the operation and
22

23 ⁹ Via a stipulation filed on August 3, 2006, the parties
24 requested a September 27, 2006 status conference.

25 ¹⁰ Mr. Roberts has also held various arbitration-related
26 positions in professional legal associations, and has received
27 awards in the fields. He is a past president of the National
28 Academy of Arbitrators and a past chairman of the Labor and
Employment Law Section of the Los Angeles County Bar Association.
He is also a Fellow of the College of Labor and Employment
Lawyers. In 1991, he received the Distinguished Service Award
from the American Arbitration Association.

1 administration of the RRF, the processing of claim forms sent to
2 the RRF, and the distribution of monies from the RRF. Plea
3 Agreement at 3, ¶ 3(j). In anticipation of his possible
4 appointment as the Special Master, Mr. Roberts has researched
5 firms with expertise in claims administration, for potential
6 retention in this case. In researching these firms, Mr. Roberts
7 has consulted with attorneys who specialize in class action cases
8 and similar large-scale, complex cases involving a multitude of
9 pay-outs to large classes of recipients. Mr. Roberts has spoken
10 several times with officers from at least five such claims
11 administration firms, and has solicited and received written
12 materials from them. Based upon these discussions and materials,
13 Mr. Roberts, if appointed as Special Master, is inclined to
14 select one of two particular claims administration firms to
15 assist him in operating and administering the RRF.¹¹

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26 ¹¹ Materials from these two firms, namely, Rosenthal &
27 Company LLC and Rust Consulting, summarizing how the firms
28 administer class action settlements, are attached as Exhibits B
and C, respectively.

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