UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	**Case No.: SA-21-CR-00124(1)-XR**
v.	§	
	§	
MICHAEL ANGELO PADRON,	§	
	§	
Defendant.	§	

UNITED STATES' SENTENCING MEMORANDUM

COMES NOW the United States of America, by and through the undersigned counsel, and files this Sentencing Memorandum. The Defendant organized, led, and profited from a complex thirteen-year scheme to defraud government programs that were meant to help service-disabled veterans and small business owners. Through the scheme, the Defendant's strawman-owned company, Blackhawk, retained at least $6 million in gross profit that should have gone to a legitimate set-aside company. To this day, the Defendant has expressed no remorse for his criminal conduct, insisting—against the weight of dozens of exhibits and days of witness testimony—that he is blameless in the conspiracy and fraud scheme for which he stands convicted. The jury rejected the Defendant's claim of blamelessness at trial, and the Court should reject it at sentencing. As explained below, the sentencing range under the United States Sentencing Guidelines is 108 to 135 months' imprisonment, and, under the factors set forth in 18 U.S.C. § 3553(a), a term of imprisonment within this Guidelines range is sufficient, but not greater than necessary, to meet the goals of sentencing.

I. BACKGROUND

A jury convicted the Defendant of one count of conspiracy to commit wire fraud and to defraud the United States, in violation of 18 U.S.C. § 371, and six counts of wire fraud, in violation of 18 U.S.C. § 1343. Those charges stemmed from the Defendant's leadership position in a conspiracy and fraud scheme to install service-disabled veterans as the figurehead owners of Blackhawk Ventures, LLC ("Blackhawk") so that the Defendant, his business partners, and his businesses could have access to contracts set aside under the Service-Disabled Veteran-Owned Small Business ("SDVOSB") program and other small business programs.[1] *See* ECF No. 1 ¶ 19; ECF No. 156.

II. THE GUIDELINES RANGE IS 108 TO 135 MONTHS' IMPRISONMENT

Calculating the applicable Sentencing Guidelines range "should be the starting point and the initial benchmark" during sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). Here, the Defendant's base offense level is seven, U.S.S.G. § 2B1.1(a)(1), and there are three applicable Guidelines provisions that increase the offense level. First, § 2B1.1(b)(1)(J) provides an eighteen-level increase because the cumulative actual loss from the Defendant's scheme is $6,299,766, which represents a conservative calculation of the contract revenue Blackhawk received from the government from 2009 to 2014 on fraudulently obtained contracts, less the value of the services Blackhawk provided to the government. Put another way, the $6,299,766 is the money that should have gone to a legitimate set-aside company. Notably, this loss amount only captures actual loss for a *portion* of the conspiracy and fraud scheme, as it excludes revenue that Blackhawk obtained from the federal government from 2015 through 2017. Second,

[1] The jury acquitted the Defendant on Counts Two and Three, which both charged wire fraud. *See* ECF No. 156.

§ 2B1.1(b)(10)(C) provides a two-level increase because the Defendant used "sophisticated means" to further his conspiracy and fraud scheme. Third, § 3B1.1(a) provides a four-level increase because the Defendant was an organizer and leader of the conspiracy and fraud scheme. Those Guidelines sections set the Defendant's offense level at thirty-one, which, when coupled with the Defendant's criminal history category I, results in a Sentencing Guidelines range of 108 to 135 months' imprisonment.

A. The Base Offense Level Under U.S.S.G. § 2B1.1(a)(1) Is Seven.

Because the Defendant was convicted of wire fraud, 18 U.S.C. § 1343, and conspiracy to commit wire fraud, 18 U.S.C. § 371, which are offenses referenced to § 2B1.1, the base offense level is seven. *See* U.S.S.G. §§ 2B1.1(a)(1); 2X1.1(c).

B. The Conservative Loss Amount Calculation of $6,299,766 Supports an Eighteen-Level Increase Under U.S.S.G. § 2B1.1(b)(1)(J).

The core issue before the Court is calculating the loss amount under § 2B1.1. Although the parties' proposed loss amounts differ substantially, the ultimate factual dispute that the Court needs to resolve is narrow: what is the difference between the money that the procuring agencies paid to Blackhawk on the fraudulently obtained set-aside contracts and the value of goods and services Blackhawk rendered to the procuring agencies. This difference represents the profit margin that the federal government intended to pay to a legitimate set-aside company. As explained below, a conservative answer to that question is $6,299,766.

The Loss Amount is $6,299,766: Under § 2B1.1, the Court must increase the offense level based on the loss amount from the offense. *See* U.S.S.G. § 2B1.1(b)(1). When estimating loss in a multiple-count indictment, "the cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." *Id.* § 2B1.1 cmt. n. 20; *accord United States v. Esogbue*, 79 F.3d 1145

(5th Cir. 1996) (affirming fraud loss amount based on "total losses caused by the entire scheme as defined in the indictment—a conspiracy to commit wire fraud"). "The court need only make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 cmt. n. 3(C). Rather than a perfectly precise calculation of loss, the Fifth Circuit requires only that the Court's estimate be plausible in light of the entire record. *See United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007).

In a set-aside procurement fraud case like this, the Court must apply the "general rule" for loss calculation. *See United States v. Harris*, 821 F.3d 589, 604 (5th Cir. 2016) (holding that the "general rule," not the "government benefits rule" applies to set-aside fraud). Under the general rule, the loss for purposes of § 2B1.1(b) is the "contract price less the fair market value of services rendered by the [defendant's company] to the procuring agencies." *Id.* at 605. Indeed, both the United States and the Defendant agree that the "general rule" for calculating loss under § 2B1.1(b) applies here. That means that in this case, the loss amount is the function of two numbers: the money the government paid to Blackhawk on fraudulently obtained contracts throughout the scheme (i.e., contract revenue) minus the fair market value of the goods returned and services rendered by Blackhawk to the procuring agencies (i.e., construction costs). *See id.*

Here, the Court can reach a conservative estimate of loss using Blackhawk's own financial statements produced by Ridout Barrett & Co., P.C., ("Ridout Barrett"), the accounting firm for Blackhawk, MAPCO, and Federal Management Services ("FMS"). The Ridout Barrett-prepared financial statements are available for the years 2009 through 2014, which includes only a portion of the conspiracy and fraud scheme. As summarized in the table below, the financial statements show that Blackhawk earned a combined $202,329,454 in "construction revenue" and spent $196,029,688 in "construction costs," resulting in a total "gross profit" of $6,299,766. Applying § 2B1.1 to this set-aside fraud case, the gross profit of $6,299,766 reflects the contract

price (i.e., construction revenue) less the fair market value of the services rendered to the procuring agency (i.e., construction costs), and is the appropriate measure for fraud loss. Put simply, the Blackhawk financial statements provide exactly the sort of evidence that the Fifth Circuit said sentencing courts should evaluate when determining loss in a set-aside fraud case.[2]

Blackhawk Financial Statements 2009–2014
(GX 163 at 6; GX 164 at 6; GX 129 at 6; GX 165 at 7; GX 131 at 6; GX 132 at 6)

Contract Revenue (Actual Loss)	$202,329,454
Construction Costs (Credits Against Loss)	$196,029,688
Applicable Loss Under § 2B1.1	**$6,299,766**

Given the sheer volume of federal set-aside contracts that Blackhawk fraudulently obtained throughout the thirteen-year conspiracy, the construction revenue and construction costs, as calculated by Blackhawk's accounting firm, provide a reasonable estimate of the loss caused by the fraud scheme. Using the financial statements is also a reasonable method for calculating loss because a contract-by-contract examination would be unduly complex. *See United States v. Nagle*, 664 F. App'x 212, 216 (3d Cir. 2016) (noting, in a set-aside fraud case, that contract-by-contract loss calculation was "unduly complex . . . given the duration of the fraud—approximately fifteen years—and the sheer number of contracts involved . . . .").

To this point, the Defendant has not challenged (nor could he seriously challenge) the reliability of the Blackhawk financial statements. The Defendant's own trial witness, Anthony

[2] Three of the financial statements were entered into evidence at trial, (Government Exhibits 129, 131, 132), and the United States offered three additional financial statements to Probation for purposes of sentencing (Government Exhibits 163, 164, 165). All financial statements were incorporated into the Presentence Investigation Report and are appended to this memorandum for ease of reference. All financial statements were certified as business records of Ridout Barrett.

Ridout, prepared the Blackhawk financial statements that support the United States' loss amount calculation. During his trial testimony, Mr. Ridout explained the process that his firm used to prepare Blackhawk's annual financial reports. Trial Tr. 1255:13–1260:5. And the $6,299,766 gross profit figure calculated in the Presentence Investigation Report incorporates the revised 2012 financial statement that Mr. Ridout testified about at trial. Trial Tr. 1260:12–18.

Moreover, using the Blackhawk financial statements to calculate loss is conservative and underinclusive. Because the financial statements do not cover the entire conspiracy period, they necessarily undercount the contract revenue that Blackhawk received on fraudulently obtained contracts. As the invoices on the Dallas Parking Garage contract show, Blackhawk continued to receive payment on set-aside contracts in the period postdating the available financial statements. To underscore the underinclusive nature of the estimated loss, evidence at trial showed that Blackhawk received over $240 million in payments on federal government contracts from 2010 to 2017, GX 157; Trial Tr. 834:23–837:17, which is roughly $38 million *more* than the $202 million shown in Blackhawk's financial statements from 2009 to 2014.

Evidence and testimony during the trial corroborate the conservative value of the loss amount calculated using the Blackhawk financial statements. John Hobbs, the Vice President of Finance for MAPCO and FMS, who was responsible for maintaining Blackhawk's accounts receivable and accounts payable, testified that Blackhawk had a profit margin of 5–10% on its federal government contracts. Trial Tr. 845:1–845:9. Applying the 5–10% estimate to the $240 million (the amount Blackhawk's bank account shows incoming from the federal government) produces an estimate of roughly $12 million to $24 million in profit from Blackhawk's federal contract work. Testimony at trial also established that practically all of Blackhawk's work involved federal contracting, Trial Tr. 555:20–22 ("Q. Approximately what percentage of

Blackhawk's total work was for the federal government? A. Ninety-nine, 100 percent."), and almost all of Blackhawk's profit was derived from set-aside contracts, Trial Tr. 184:23–25 ("Q. How much of Blackhawk's profit was tied to contracts under the service-disabled veteran-owned small business program? A. I would say almost 100 percent."). Indeed, the Defendant told Betty Butler that he and Michael Wibracht installed Ruben Villarreal as the figurehead owner of Blackhawk "because they were trying to get set-aside contracts." Trial Tr. 335:22–24. Therefore, all of Blackhawk's contracting revenue is tainted by the fraud scheme, since the Defendant's control would have disqualified it from the federal set-aside programs it participated in. Put another way, the evidence at trial suggests that the $6,299,766 loss calculated using the financial statements is underinclusive. Thus, if anything, using Blackhawk financial statements to calculate the § 2B1.1 loss amount errs in the Defendant's favor.

Publicly available federal procurement data also corroborate the reasonableness of the $6,299,766 loss amount. The Federal Procurement Data System ("FPDS") shows that Blackhawk won hundreds of millions of dollars of set-aside contracts through the conspiracy period.[3] According to the FPDS data, which was provided to the Probation Office, Blackhawk received approximately $255 million from 2005 through 2017.[4] The FPDS data also indicate that those payments were overwhelmingly tied to three categories of set-aside contracts—SDVOSB set

[3] FPDS data are publicly available through www.SAM.gov and provide a means for federal agencies to track spending for set-aside businesses. F.A.R. § 4.602(a)(2). Government contracting officers are required to input contract award data into FPDS within three business days after contract award. *Id.* § 4.604(b)(2).

[4] The Blackhawk BBVA Compass bank account data admitted at trial covered the period of *2010* through 2017, *see* GX 156, which explains the lesser amount incoming into Blackhawk's BBVA account compared to the amount paid to Blackhawk in the FPDS 2005 to 2017 data. In any event, the United States' loss amount relies on the Blackhawk financial statements, which uses the lowest contract revenue number, and therefore ensures that the loss amount calculation is underinclusive, rather than overinclusive.

asides, small business set asides, and HUBZone set asides. Notably, all three of those set-aside categories require Blackhawk to be a legitimate small business or SDVOSB, Trial Tr. 665:9–666:3; 667:4–9, which it was not on account of its control by the Defendant and Blackhawk's concealed affiliations with MAPCO and FMS. Thus, the publicly available federal procurement data corroborate the conservative nature of the United States' calculated loss amount.

The procuring agencies did not receive the benefit of their bargain: As recently as the post-trial motions hearing, the Defendant asserted that the federal government got "the benefit of the bargain" because the "buildings were built." Mots. Hrg. Tr. at 40, ECF No. 180. That argument is not only wrong, it shows that the Defendant still does not understand the immense harm he has caused. As John Klein, Associate General Counsel for the Small Business Administration ("SBA"), explained at trial, the purpose of the set-aside contracts that the Defendant fraudulently obtained were not just to construct buildings or complete maintenance work, but also to ensure that service-disabled veterans and small business owners could get a foothold in the competitive government contracting industry. *See* Trial Tr. 667:4–9 ("Just like any of our programs, whether it's a small, service-disabled veteran-owned, 8(a), Congress has determined that it's important to have service-disabled veterans have an opportunity to participate fully in the free enterprise system and they reserve certain contracts solely for those types of businesses in order to help them become viable businesses."); 38 U.S.C. § 8127 (explaining that the "[c]ontracting [g]oals" of the SDVOSB program are to "increase contracting opportunities for . . . small business concerns owned and controlled by veterans with service-connected disabilities . . . ."). It is true that through these contracts, Blackhawk provided goods and services to the procuring agencies, and the Defendant should receive credit for Blackhawk's construction costs under the Fifth Circuit's decision in *Harris*. But the set-aside contracts were

also designed to enable legitimate set-aside businesses to make a profit. To say that the Defendant or Blackhawk was entitled to retain a gross profit margin ignores entirely the core objective of the set-aside programs that the Defendant defrauded and must not be credited against the loss amount.

The Defendant agrees that the "general rule" on loss applies under the Fifth Circuit's decision in *Harris*, but he contends that the loss should be zero because Blackhawk performed on its contracts, and, he says, the government got exactly what it bargained for. The Third Circuit's opinion in *United States v. Nagle*, 803 F.3d 167 (3d Cir. 2015), addresses a set of facts that are on point and shows why the Defendant's argument fails. In *Nagle*, the defendant fraudulently obtained hundreds of government contracts set aside for "disadvantaged business enterprises." *Id.* at 171. When explaining how § 2B1.1 applied in that case, the Third Circuit stated that the procuring agencies "did not receive the entire benefit of their bargain," even if they "did receive the benefit of having the building materials provided and assembled." *Id.* at 182. Ultimately, the Third Circuit adopted the same rule for calculating loss in a set-aside fraud case that the Fifth Circuit adopted in *Harris*—"the amount of loss . . . is the face value of the contracts [the company] received minus the fair market value of the services they provided under the contracts." *Id.* at 180. In fact, the Fifth Circuit relied upon *Nagle* when deciding *Harris*. *See Harris*, 821 F.3d at 605 (citing *Nagle*, 803 F.3d at 181–83).

After the defendant in *Nagle* was resentenced, consistent with the "general rule," the Third Circuit affirmed the district court's decision to "calculate[] the loss as equivalent to the profits Defendants earned on the fraudulently procured contracts." *Nagle*, 664 F. App'x at 213. As the Third Circuit explained, the government "paid for the provision and installation of concrete beams by DBEs," the set-aside program at issue, "and got the provision and installation

of concrete beams by non-DBEs instead. As a result, the Government did not achieve the goals of the DBE program and provided profit opportunities to entities not entitled to them." *Id.* at 216 (citation omitted). Thus, the Court concluded, "using the profit Defendants received is an appropriate measure for loss." *Id.*; *see also id.* at 216 n.8. The same is true here: as a result of the Defendant's fraud scheme, the government provided profit opportunities to Blackhawk, a company not entitled to them.

The Defendant has argued that an out-of-circuit district court decision, *United States v. Crummy*, 249 F. Supp. 3d 475 (D.D.C. 2017), commands a loss amount of zero here. But *Crummy* does not undermine the United States' proposed loss amount. Like the Fifth Circuit in *Harris*, the district court in *Crummy* concluded that, under Application Note 3(E)'s credits-against-loss rule, "the Court must subtract from the total contract price the value of the services that the defendant rendered." *Id.* at 485. In *Crummy*, the court concluded that the loss amount was zero because the government offered *no evidence* to allow the court to compare the contract price to the value of the services rendered. *Id.* at 484 ("Notably, and perhaps unfortunately, there is no evidence in the instant matter of any [loss]."). In other words, it was a factual deficiency that resulted in a loss amount of zero in *Crummy*, not a legal conclusion that the government received the full benefit of its bargain. In fact, the *Crummy* court went out of its way to "debunk the mistaken belief that" applying the credits-against-loss rule to set-aside contract fraud will always result in a loss amount of zero. *Id.* ("[T]he loss amount need not always be zero once it is reduced by the value of the services rendered in [set-aside] procurement fraud cases.").

Here, by contrast, there is evidence that allows this Court to compare contract payments to Blackhawk to the value of services rendered, thus satisfying the requirements of § 2B1.1 and Application Note 3(E). The financial statements expressly lay out the money that Blackhawk

received from the federal government, as well as the value of services that Blackhawk provided on the construction projects. As a result, there is not the factual deficiency that existed in *Crummy*, and the Court can calculate a reasonable estimate of the loss amount using the available financial statements.

There is no loss offset other than construction costs: The Defendant has argued that the gross profit of $6,299,766, as reflected in Blackhawk's financial statements for 2009 to 2014, should be offset by Blackhawk's overhead expenses, income taxes paid, and the Defendant's 2020 settlement with Blackhawk's bonding company, Travelers Insurance, in a civil lawsuit. But a plain reading of the Sentencing Guidelines and Fifth Circuit precedent make clear that none of these expenses are appropriate credits against loss under § 2B1.1.

Starting with the text of the Sentencing Guidelines, it is clear that Blackhawk's overhead, taxes, and settlement expenses do not count against the loss amount. The credits-against-loss rule provides, in relevant part, that "[l]oss shall be reduced by . . . the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, *to the victim* before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E) (emphasis added). It goes without saying that overhead expenses, income taxes, and private civil settlement payments are not value conferred on the victim procuring agencies. The Defendant's argument that these expenses should offset his loss amount would improperly read the "to the victim" clause entirely out of the Guidelines. *Accord United States v. Wise*, 447 F.3d 440, 446 (5th Cir. 2006) ("Courts interpreting the Guidelines must begin with the text of the provision at issue and the plain meaning of the words in the text. In addition, we must consider the commentary to the Guidelines as authoritative." (internal citation omitted)).

Fifth Circuit decisions confirm the importance of the "to the victim" language when applying § 2B1.1's credits-against-loss rule. The Fifth Circuit has held that the key question when applying the credits-against-loss rule is whether the goods or services were given *to the victim*, not simply whether those goods or services were "legitimate business expenses." *See United States v. Alfaro*, 30 F.4th 514, 519 (5th Cir. 2022) ("[B]ecause the [victim] investors did not receive any value or benefit from [the defendant's] legitimate business expenditures, there is no reason to credit those amounts against the actual loss amount."); *United States v. Spalding*, 894 F.3d 173, 191 (5th Cir. 2018) ("No further discounts were warranted because [the defendant] returned his victims nothing else of value, notwithstanding his putative 'legitimate business expenses.'"). Where the so-called "legitimate business expenses" had the effect of "prolonging the fraud," crediting those expenses against the loss amount is even more inappropriate. *Spalding*, 894 F.3d at 192; *see also id.* 192 n.28 (collecting cases from six circuits refusing to credit business expenses that were not conferred on the victims).

Here, offsetting the loss amount by Blackhawk's overhead expenses would allow the Defendant to deduct amounts that Blackhawk paid to FMS—the Defendant's "consulting" company that he used to exercise disqualifying control over Blackhawk. As the trial record shows, the Defendant and his co-conspirators transferred millions of dollars from Blackhawk to FMS. In total, from 2010 to 2017, there was a net outflow from Blackhawk's BBVA bank account to FMS of $8,745,048. GX 156. Moreover, the trial record shows that the Defendant stood to receive fifty to sixty percent of the profit distributions from FMS. Trial Tr. 218:15–25; GX 17 at 38; Trial Tr. 219:3–24; GX 20 at 4. As a result, the Defendant personally profited from the more than $8.7 million that Blackhawk paid to FMS in so-called "overhead expenses." What is more, Blackhawk's transfers to FMS make up a significant portion of Blackhawk's "overhead"

that the Defendant argues should be deducted from the loss amount. For example, in 2012, Blackhawk recorded operating expenses of $4,739,239. GX 165 at 7. In that same year, it transferred $4,478,527 to FMS. GX 156. Likewise, in 2013, Blackhawk recorded operating expenses of $3,218,868. GX 131 at 6. In that same year, it transferred $1,570,019 to FMS. GX 156. None of the money that Blackhawk transferred to FMS was conferred on the victim agencies, and therefore it falls outside the credits-against-loss rule. The Defendant's argument that these "overhead" expenses, which lined his pockets and prolonged his criminal scheme, should reduce his fraud loss amount is flatly wrong under a plain reading of the Sentencing Guidelines and Fifth Circuit decisions.

The same is true for the Defendant's argument that the Court should reduce his loss amount for payments on Blackhawk's income taxes and a private civil settlement with Travelers. There is no offset of the loss amount based on Blackhawk's payment of taxes because Blackhawk was obligated to pay taxes even on fraudulently obtained funds, *Rutkin v. United States*, 343 U.S. 130, 137 (1952), making the expense similar to overhead expenses already discussed. Though the income taxes are paid to the Internal Revenue Service, the taxes were not paid to the procuring agencies that are the victims of the Defendant's crimes.

As for the 2020 settlement with Travelers, it is obvious that the private civil settlement was not money given to the victim agencies. Indeed, in other filings the Defendant has acknowledged that Travelers was not a victim of the crimes for which he was convicted. Defs. Mot. for Judgment of Acquittal, ECF No. 169 at 26–27 (calling "Travelers Insurance" a "private compan[y]."). Beyond not being an expense conferred on a victim of the offense, there is no evidence that the Defendant actually paid the Travelers civil settlement. Moreover, the Defendant entered into the civil settlement with Travelers in February 2020, GX 95, which was

after the investigation in this case had begun. Because the credits-against-loss rule only applies to credits conferred "*before* the offense was detected," U.S.S.G. § 2B1.1 cmt. n.3(E) (emphasis added), even if the Court were to treat the settlement as a legitimate credit, it came after the offense was detected and therefore would not offset the loss amount.

Lastly, the Court should reject the notion that the loss should be discounted by the profit margin that a legitimate set-aside company would have made on the contracts. As explained above, such an argument is inconsistent with the purpose of federal set-aside programs, which is to put that profit margin in the pockets of legitimate set-aside businesses. It is also inconsistent with the reasoning behind the credits-against-loss rule. Although the Fifth Circuit has not expressly addressed how to treat a Defendant's profits under the credits-against-loss rule, profit is not value conferred upon the victim agencies and therefore should not offset loss amount.

A thorough opinion from the District of New Mexico considers, and rejects, the argument that loss should be discounted by profit margin. *See United States v. Jarvis*, No. 13-cr-2379, 2015 WL 7873740, at *9 (D.N.M. Nov. 16, 2015). There, the defendant argued that profit is included in the credits-against-loss rule's use of "fair market value," thus rendering the loss amount zero. The district court rejected that argument, concluding that "loss amount should not be reduced to account for the Defendants' profit, even if an honest broker would have made a profit on the same deal." *Id.* Turning to the credits-against-loss application note, the *Jarvis* court explained that "[b]ecause that profit margin conferred no value upon [the victim] . . . the Court cannot reduce the loss amount by that amount." *Id.* Moreover, the court noted, "Application Note 3(E) does not include a profit margin for defendants as one of the credits against loss." *Id.* "To allow the Defendants to subtract the full price that an honest broker would charge," the court concluded, would "legitimize[] some of the profit [the defendant] fraudulently made." *Id.* The

logic of the district court's decision in *Jarvis* is persuasive, and consistent with the Fifth Circuit's interpretation of the credits-against-loss rule in *Harris*, *Alfaro*, and *Spalding*. Thus, the Court should not accept the Defendant's argument that the loss amount is zero.

The loss amount supports an eighteen-level offense level increase: In sum, the loss amount for purposes of § 2B1.1 is the value of the contracts that the defrauded agencies awarded to Blackhawk, less the fair market value of Blackhawk's construction costs. The Court can determine that amount by reviewing Blackhawk's financial statements, which show a conservative loss estimate of $6,299,766. No further offsets are appropriate because nothing, other than construction costs, was value conferred on the victim agencies. Thus, the Court should calculate the loss estimate as $6,299,766, which results in an eighteen-level increase to the Defendant's offense level. U.S.S.G. § 2B1.1(b)(1)(J).

C. The Defendant's Use of Sophisticated Means Supports a Two-Level Enhancement Under U.S.S.G. § 2B1.1(b)(10)(C).

The Defendant's use of multiple bank accounts, cashier's checks, and other means of financial deception supports a sophisticated means enhancement. Section 2B1.1(b)(10)(C) of the U.S. Sentencing Guidelines provides for a two-level increase when "the offense . . . involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means." The application notes to that Guidelines section explain that "'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1 cmt. n.9(B). As examples, the application note states that "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." *Id.*

The Fifth Circuit has approved of applying the sophisticated means enhancement when a defendant routed money through multiple businesses to conceal his involvement in a fraud scheme. *See United States v. Conner*, 537 F.3d 480, 492 (5th Cir. 2008) (using a fictitious name and business to conduct fraudulent transactions in multiple states involved sophisticated means); *United States v. Valdez*, 726 F.3d 684, 695 (5th Cir. 2013) ("We have affirmed the application of the sophisticated means enhancement in cases involving some method that made it more difficult for the offense to be detected, even if that method was not by itself particularly sophisticated."). Similarly, the Fifth Circuit has explained that the sophisticated means enhancement is appropriate when a defendant used bank accounts in others' names and cashier's checks to conceal his receipt of money from a fraud scheme. *See United States v. Clements*, 73 F.3d 1330, 1340 (5th Cir. 1996) (holding that sophisticated means enhancement was appropriate when defendant used "multiple cashier's checks and his wife's separate bank account to obscure the link between the money and . . . himself undeniably made it more difficult for the IRS to detect his evasion."); *United States v. Wright*, 496 F.3d 371, 379 (5th Cir. 2007) (depositing a check into an account and then using money to purchase a cashier's check in another name involved sophisticated means).

Here, the Defendant's methods of taking money out of Blackhawk support the sophisticated means enhancement. The record established that the Defendant and his co-conspirators routed over $8.7 million from Blackhawk to FMS under the guise of a "consulting" arrangement. That movement of funds between the strawman-owned company, Blackhawk, and the Defendant's company, FMS, falls squarely within the Fifth Circuit's sophisticated means enhancement. *Valdez*, 726 F.3d at 695.

The Defendant also found other ways to extract money from Blackhawk that justify a sophisticated means enhancement. For example, Ruben Villarreal testified that the Defendant required him to turn the proceeds of a Blackhawk tax refund of $206,000 over to the Defendant, which Mr. Villarreal paid to the Defendant in cash in increments of about $9,700 to avoid detection by the federal government. Trial Tr. 415:4–416:11. Mr. Villarreal also provided the Defendant with $400,000 from his retirement account. *Id.* 416:12–417:18.

Mr. Villarreal further testified about a $150,000 cashier's check from the Blackhawk BBVA Compass bank account made payable to the Defendant. Trial Tr. 419:12–421:10. Jodi Familo, financial analyst with the Defense Criminal Investigative Service, testified about that same $150,000 cashier's check, explaining that the use of a cashier's check would not indicate in the BBVA account records who received the $150,000. Trial Tr. 833:22–834:3. The Fifth Circuit has approved, on multiple occasions, application of the sophisticated means enhancement to similar use of cashier's checks. *See, e.g.*, *Clements*, 73 F.3d at 1340 (applying sophisticated means enhancement to use of cashier's checks to obscure link between defendant and money); *Wright*, 496 F.3d at 379.

Along the same lines, Anita Hernandez, the Defendant's longtime assistant, testified that the Defendant had a stamp created so that he could endorse checks made out to Blackhawk over to himself. *See* Trial Tr. 912:2–913:18. The Defendant would then instruct Hernandez and another assistant to stamp Blackhawk checks over to him. *See id.* And as Familo testified, the use of the stamp endorsements would not appear in the Blackhawk bank records because the money would be diverted directly to the endorsee's account. Trial Tr. 834:5–12. Such conduct also falls squarely within the Fifth Circuit's definition of "sophisticated means." *Valdez*, 726 F.3d at 695 ("We have affirmed the application of the sophisticated means enhancement in cases involving

some method that made it more difficult for the offense to be detected, even if that method was not by itself particularly sophisticated."). Accordingly, the Defendant is subject to a two-level increase under § 2B1.1(b)(10)(C).

D. The Defendant's Role as an Organizer and Leader of the Conspiracy and Fraud Scheme Supports a Four-Level Enhancement Under U.S.S.G. § 3B1.1(a).

The Defendant's leadership of the conspiracy and fraud scheme supports a four-level role enhancement. Section 3B1.1(a) of the U.S. Sentencing Guidelines provides an enhancement "[b]ased on the defendant's role in the offense" and instructs that "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." This Guidelines provision "has two requirements: (1) the defendant must have been a leader or organizer in the criminal activity, and (2) the scheme must have either included five or more participants *or* been otherwise extensive." *United States v. Ronning*, 47 F.3d 710, 711 (5th Cir. 1995) (emphasis added).

For the first prong, whether the defendant was an organizer or leader, the application notes to § 3B1.1 state:

> Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 cmt. n.4. The application notes also explain that "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." *Id.*

The application notes to § 3B1.1 also elaborate on both ways of establishing the second prong of the "organizer or leader" enhancement. To determine if the criminal activity had "five

or more participants," § 3B1.1(a), the application notes state that "[a] 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted," *id.* cmt. n.1. As for whether criminal activity was "otherwise extensive," the application notes also provide that "[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." *Id.* cmt. n.3.

The Defendant easily qualifies as an organizer or leader of the criminal activity for which he was convicted. The Defendant exercised decision-making authority over Blackhawk; that was the core premise underpinning the case against him. Jason Helms, a former Blackhawk project manager, testified that the Defendant decided what bids Blackhawk would submit. Trial Tr. 528:6–8. As Betty Butler, former Blackhawk controller, testified, the Defendant controlled access to Blackhawk's checkbook. Trial Tr. 337:4–338:22. Ruben Villarreal testified that the Defendant decided which bank accounts Blackhawk would use, which bills Blackhawk would pay, which subcontractors Blackhawk would use, and which project managers Blackhawk would hire. Trial Tr. 395:17–397:16. Even Michael Wallace, a Blackhawk employee and defense witness, testified on direct examination that he "presume[d] that [the Defendant] had the right to give direction" at Blackhawk. Trial Tr. 1005:10–11. The Defendant also recruited accomplices to the criminal activity, most notably Mr. Villarreal, who the Defendant had obtain his certification as a service-disabled veteran. Trial Tr. 381:19–382:23; GX 122.

The Defendant's claim that the four-level enhancement is inappropriate because Michael Wibracht was the organizer or leader fails for at least two reasons. First, Mr. Wibracht and the Defendant separated as business partners in 2013, yet Blackhawk continued to operate under the

Defendant's control for years longer—including the period when Blackhawk filed false statements to the SBA in response to the Dallas Parking Garage protest and secured over $24 million in payments on that contract alone. GX 116 at 2. Thus, the notion that "it was all Michael Wibracht" does not align with the facts shown at trial. Second, the application notes to § 3B1.1 make clear that multiple individuals can be an organizer or leader. U.S.S.G. § 3B1.1 cmt. n.4 ("There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy."). Thus, whether or not anyone else was the organizer or leader of the criminal activity is not dispositive in deciding whether the Defendant was an organizer or leader.

The facts proven at trial also readily establish § 3B1.1(a)'s second prong—that there were *either* five or more participants *or* the criminal activity was otherwise extensive. First, there were five or more participants: (1) the Defendant, (2) Michael Wibracht, (3) Ruben Villarreal, (4) Brian Taylor, and (5) Steven Wibracht. In fact, the jury instructions specifically named those individuals in the conspiracy instruction. Jury Instructions, ECF No. 149 at 10. And, as the application notes make clear, it is no issue when determining who is a "participant" that Steven Wibracht and Brian Taylor were not convicted of an offense. U.S.S.G. § 3B1.1 cmt. n.1 ("A 'participant' is a person who is criminally responsible for the commission of the offense, *but need not have been convicted*." (emphasis added)). The Fifth Circuit has held that, to be a "participant," "[a]ll that is required is that the person participate knowingly in some part of the criminal enterprise." *United States v. Glinsey*, 209 F.3d 386, 396 (5th Cir. 2000) (citing *United States v. Boutte*, 13 F.3d 855, 860 (5th Cir. 1994)). For all five individuals named above, there was abundant evidence of that knowledge and participation.

The facts also easily establish the alternative proof of § 3B1.1(a)'s second prong—that the criminal activity was otherwise extensive. As the Fifth Circuit explained, "[i]n deciding whether a scheme was otherwise extensive, the district court must take into account "all persons involved during the course of the entire offense." *United States v. Davis*, 226 F.3d 346, 360 (5th Cir. 2000) (citing *Glinsey*, 209 F.3d at 396). That can include "lawyers who wrote misleading letters" for the defendant. *Id.* And the Fifth Circuit has instructed that the district court must consider all individuals involved throughout the entire scheme. *United States v. Ho*, 311 F.3d 589, 611 (5th Cir. 2002) ("[W]e repeatedly have held that '[i]n deciding whether a scheme was otherwise extensive, the district court *must* take into account all persons involved during the course of the entire offense.'" (emphasis in original) (quoting *Davis*, 226 F.3d at 360)).

Even if the Court concluded that there were not five culpable participants, the Defendant's scheme was "otherwise extensive." Considering the former Blackhawk and MAPCO employees who testified at trial alone shows how extensive the scheme was: attorney Johnathan Bailey (testified to the Defendant's use of legal advice to advance the scheme); former MAPCO controller Betty Butler (testified to the Defendant's control of Blackhawk's bank accounts and checkbook); former vice president of finance John Hobbs (testified to the Defendant's financial control of Blackhawk); former project manager Jason Helms (testified to the Defendant's bidding decisions for Blackhawk); and former assistant Anita Hernandez (testified to the Defendant's day-to-day control of Blackhawk), as well as the testimony from Michael Wibracht, Ruben Villarreal, and Brian Taylor who each explained Blackhawk's extensive operations under the Defendant's control. Thus, there is little question that the second prong of § 3B1.1 is met here, and, accordingly, the Defendant is subject to a four-level increase under § 3B1.1(a).

E. The Final Guidelines Range Is 108 to 135 Months' Imprisonment.

The final offense level, considering the appropriate increases under the Sentencing Guidelines (shown in the chart below), is 31. The Defendant has a criminal history category I. Thus, the applicable range under the Sentencing Guidelines is 108 to 135 months' imprisonment.

Sentencing Guidelines Summary

Sentencing Guidelines Provision	Offense Level
Base Offense Level—§ 2B1.1(a)(1)	7
Loss Amount—§ 2B1.1(b)(1)(J)	+18
Sophisticated Means—§ 2B1.1(b)(10)(C)	+2
Role Enhancement—§ 3B1.1(a)	+4
Total	**31**
Criminal History Category	**I**
Sentencing Table Range	**108–135 Months' Imprisonment**

III. THE SECTION 3553(A) FACTORS SUPPORT A GUIDELINES SENTENCE

Once the Court calculates the advisory Guidelines range, it must "impose a sentence sufficient, but not greater than necessary" to achieve the statutory goals set out in 18 U.S.C. § 3553(a)(2), while taking into account the "nature and circumstances of the offense and the history and characteristics of the defendant." *See* 18 U.S.C. § 3553(a). Here, the § 3553(a) factors counsel in favor of a sentence within the Guidelines range of 108 to 135 months.[5]

[5] In this memorandum, the United States intends to address the sentencing factors that are most germane to the Defendant's case. The United States is prepared to address all sentencing factors at the sentencing hearing, should the Court have questions about a matter not discussed here.

A. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant Weigh in Favor of a Guidelines Sentence.

When the Defendant decided to undertake the conspiracy and fraud scheme for which he stands convicted, he was already well versed in the field of federal set-aside contracting. He knew full well the rules governing federal contracting set-aside programs. In fact, through his company MAPCO, he had spent years participating in the SBA's 8(a) program, which sets aside contracts for socially and economically disadvantaged individuals. And yet, he still decided to set up a sham company and install a "token" veteran so that he could win contracts set aside for service-disabled veterans.

This is not a case where a novice businessperson made a series of unfortunate mistakes. This is a case where an experienced federal contractor, though never a veteran, much less a service-disabled veteran, carried out an intricate scheme to cheat the federal government and take away opportunities that should have rightfully gone to service-disabled veterans and small business owners. *See United States v. Hoffman*, 901 F.3d 523, 558 (5th Cir. 2018) (considering the defendant's use of his professional experience and his "leading a sophisticated conspiracy" when discussing the nature and circumstances of the offense and history and characteristics of the defendant under § 3553(a)(1)). The nature of the offense standing alone is immensely serious; the fact that the perpetrator was someone who knew better compounds the seriousness.

B. A Guidelines Sentence Is Necessary to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment for the Offense.

A substantial prison sentence within the Guidelines range is necessary to reflect the seriousness of the Defendant's criminal conduct, promote respect for the law, and serve just punishment. Time and again, the Defendant has dismissed the mission of the contracting programs that he defrauded: to help service-disabled veterans and small business owners compete for federal contracting work. In the Defendant's estimation, it does not matter that he

took opportunities away from service-disabled veterans and small business owners because, in the end, Blackhawk built the buildings that the government wanted.

The sentence that the Court imposes will send a signal about the seriousness of the Defendant's criminal conduct and the need to respect the law. The Defendant's scheme did not involve one, or even a few, contracts intended for service-disabled veterans and small business owners, but rather hundreds of millions of dollars in such set-aside contracts over the span of thirteen years. The Defendant's conduct was immensely serious, it blatantly violated the law, and a substantial custodial sentence within the Guidelines range will provide just punishment.

C. A Guidelines Sentence Is Necessary for General and Specific Deterrence.

The proposed sentence is further necessary to adequately deter others from committing similar crimes, 18 U.S.C. § 3553(a)(2)(B), and deter the Defendant from committing similar crimes again in the future, *id.* § 3553(a)(2)(C). Starting with general deterrence: A substantial prison term will make clear that the justice system will punish serious frauds with serious terms of imprisonment. As the Fifth Circuit noted in *United States v. Hoffman*, minimal sentences in serious fraud cases provide "ineffective deterrence [that] is especially concerning given that scholars believe there is a greater connection in white collar cases between sentencing and future as financial crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity." 901 F.3d at 556 (internal quotation marks omitted). Failing to give a meaningful sentence to "the leader of a sophisticated, multimillion dollar fraud scheme," the Fifth Circuit explained, "perpetuates one of the problems Congress sought to eliminate in creating the Sentencing Commission: that sentencing white-collar criminals to little or no imprisonment . . . creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business." *Id.* (internal quotation marks omitted). The Fifth Circuit also expressed worry that failing to impose a meaningful sentence in "multimillion

dollar fraud cases . . . undermines public confidence in whether the justice system is doing equal right to the poor and to the rich." *Id.* at 556–57 (quotation marks omitted). Given the seriousness of the Defendant's conduct in this case, a term of imprisonment within the 108-to-135-months Guidelines range is necessary to achieve the statutory goal of deterrence.

General deterrence is all the more important here because the federal contracting industry is paying attention to this case. A within-Guidelines sentence will signal to the industry that when someone cheats set-aside programs in order to make a profit at the expense of legitimate business owners, the justice system will see that they are punished accordingly. Anything other than a substantial prison term within the Guidelines range would undercut the deterrent effect that will be achieved through the Defendant's sentence.

A Guidelines sentence is also needed to deter the Defendant. 18 U.S.C. § 3553(a)(2)(C). The Fifth Circuit permits sentencing courts to consider a defendant's lack of remorse when evaluating the § 3553(a) factors. *See United States v. Douglas*, 569 F.3d 523, 528 (5th Cir. 2009); *United States v. Simpson*, 796 F.3d 548, 558 (5th Cir. 2015). The Defendant has never expressed remorse for his criminal conduct. To the contrary, the Defendant has repeatedly shifted blame, refused to accept basic facts, and continually asserted that he did nothing wrong, insisting the testimony of government witnesses was "coerced" or "manufacture[d]" even months after the jury rendered its guilty verdict. *See* ECF No. 177 at 3. The evidence at trial firmly established the Defendant's guilt, yet he is still remorseless. That lack of remorse suggests that the Defendant is a threat to commit further fraud offenses upon his release. A sentence within the Guidelines range, therefore, is needed to protect against further crimes of the Defendant.

IV. THE COURT SHOULD SET RESTITUTION AT $6,299,766

The Mandatory Victim Restitution Act ("MVRA") mandates restitution to victims of offenses under Title 18 that are "committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), which includes wire fraud, *United States v. Williams*, 993 F.3d 976, 980 (5th Cir. 2021). Restitution is limited to the "actual loss directly and proximately caused by the defendant's offense of conviction." *United States v. Mazkouri*, 945 F.3d 293, 306 (5th Cir. 2019) (quotation marks omitted); *see also United States v. Comstock*, 974 F.3d 551, 559 (5th Cir. 2020). Where the loss calculated for purposes of applying § 2B1.1 is the "actual loss" suffered by the victims of the offense, rather than the intended loss, the Court may use that figure as the loss for purposes of restitution. *See United States v. Robinett*, 832 F. App'x 261, 272 (5th Cir. 2020). Here, as explained above, the actual loss to the victim procuring agencies is $6,299,766, which is also the appropriate loss amount for purposes of restitution.

The Court should apportion restitution among the victim agencies based on the percentage of Blackhawk's contracting revenue paid from each victim agency for the duration of the fraud scheme. As represented in the table below, which DCIS analyst Jodi Familo prepared, the United States has identified nine federal agencies that made payments to Blackhawk on account of its small or service-disabled veteran-owned status. Those nine agencies are the victims of the Defendant's conspiracy and fraud scheme.

Blackhawk's BBVA Compass Bank records, which the Court admitted as evidence at trial, *see* GX 156 (summarizing bank records); GX 162 (bank records), showed that Blackhawk received payment for its federal contracting work from three payment centers: (1) the United States Army Corps of Engineers; (2) the Defense Financial Accounting System ("DFAS"); and (3) the United States Treasury ("Treasury").

The Army Corps of Engineers processes its own payments to federal contractors. That means all payments from the Corps were for work performed on Corps contracts, which made up more than half of Blackhawk's contracting revenue. DFAS processes payments for multiple federal agencies. Relevant to Blackhawk, DFAS processes payments for the United States Navy and Air Force. The Treasury also processes payments for multiple agencies. Relevant to Blackhawk, the Treasury processes payments for the Department of Veterans Affairs, Federal Emergency Management Agency ("FEMA"), Financial Management Service, Public Buildings Service, Coast Guard, and Customs and Border Protection.

With respect to payments from the Army Corps of Engineers to Blackhawk, bank records for Blackhawk specify the Corps as the paying agency. Similarly, bank records for payments from the Treasury on behalf of Coast Guard, Public Building Service, and Customs and Border Protection specify the paying agency. Thus, apportionment for those agencies is based on Blackhawk's bank records.

Bank records for payments from the Treasury on behalf of three agencies (Veterans Affairs, Financial Management Service, and FEMA) do not indicate the paying agency. Similarly, bank records for payments from DFAS on behalf of Navy and Air Force do not indicate the paying agency. In order to apportion payments for those five agencies, it was therefore necessary to review contract payment information from the Federal Procurement Data System ("FPDS"). The overall apportionment is shown in the table below. One agency, the Financial Management Service, elected to have its restitution paid to the Crime Victims Fund pursuant to 18 U.S.C. § 3664(g)(2).

Victim Agency	Apportionment Percentage
U.S. ARMY CORPS OF ENGINEERS (Corps Finance Center)	57.94%
DEPT OF VETERANS AFFAIRS (Treasury)	28.73%
DEPT OF THE NAVY (DFAS)	11.94%
U.S. COAST GUARD (Treasury)	1.05%
U.S. CUSTOMS AND BORDER PROTECTION (Treasury)	0.17%
FEDERAL EMERGENCY MANAGEMENT AGENCY (Treasury)	0.11%
DEPT OF THE AIR FORCE (DFAS)	0.04%
FINANCIAL MANAGEMENT SERVICE (Treasury)	0.01%
PUBLIC BUILDINGS SERVICE (Treasury)	0.01%
	100.00%

V. CONCLUSION

A significant prison sentence is necessary in this case. For the reasons stated above, a sentence within the Guidelines range of 108 to 135 months is necessary to meet the goals of sentencing.

Respectfully Submitted,

/s/ Daniel E. Lipton
DANIEL E. LIPTON
DC Bar No. 1022938
TERENCE A. PARKER
PATRICK S. BROWN
Trial Attorneys
Antitrust Division
U.S. Department of Justice
Washington Criminal II Section
450 5th Street, N.W.
Washington DC 20530
Tel: (202) 598-2438
daniel.lipton@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF System, which will transmit notification of such filing to all parties in this action.

/s/ Daniel E. Lipton
Daniel E. Lipton
Trial Attorney
U.S. Department of Justice
Antitrust Division