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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA **v.** **ROBERT J. JESENIK,** **ANDREW N. MacRITCHIE, and** **BRIAN K. RICE,** **Defendants.**	**3:20-cr-00228-SI** **GOVERNMENT'S SENTENCING MEMORANDUM**

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For at least twenty months before it was taken into receivership, Aequitas was a fraud: a Ponzi scheme posing as a thriving finance company. In perpetuating that fraud, the above-named defendants conspired with each other and with fellow Aequitas executives Brian Oliver and Olaf Janke to defraud hundreds of Aequitas investors out of hundreds of millions of dollars. The enormity of their crimes—the financial and emotional distress they caused—is hard to fathom and nearly impossible to assess fully. One of the defendants' former colleagues—himself a victim of the scheme—nevertheless put it succinctly in his own submission to the Court: "There are hundreds of victims strewn across the country, and many of them were highly dependent upon the money [the defendants] stole. There is no doubt that [the defendants] ruined countless lives, and . . . [their] crimes took an incalculable toll on many families."

The Court has received letters from many of the victims who were duped by the defendants. Several describe how their losses derailed long-awaited retirements. Indeed, Aequitas's largest individual investor "continues to work hard in an effort to recover the losses Aequitas's fraud caused." He lost not only his own retirement funds but those of his employees. He is 87 years old and nearly blind.

Another Aequitas investor wrote about having to work "well into [his] 70's"—stopping only when he lost his job in March. A married couple recounted how their loss of $600,000 deferred their retirement, "jeopardize[d their] relocation plans, [and] compromise[d]" their ability to pay for a parent's "long-term care needs."

At least two victims wrote about having to sell their homes. Another had to refinance his home—twice—to pay for the education of his two children after losing the money he had set aside for their tuition. A retired couple feared for their ability to maintain their home in their golden years. And the conservator for a disabled investor wrote about how the loss of the

victim's investment in Aequitas, which had been funded by the sale of her home, may leave her "basic needs" unmet.

The losses, of course, were not only monetary. The senses of violation, shame, and distrust spawned by the defendants' crimes are perhaps even more pervasive, persistent, and debilitating. At least one investor, who was also an RIA, contemplated suicide because she was so ashamed of her role in recommending Aequitas to others. Other victims reported being "sick with stress," unable to "eat or sleep," and suffering "much pain and anguish." A couple who lost half of their retirement funds described their loss as "emotionally and financially vast." Another couple described how their young adult child, observing the impact of this swindle on them, became almost paralyzed by cynicism and depression.

Several of these victims have explicitly urged the Court to impose on the defendants the "maximum sentence" and to "punish[them] to the fullest extent of the law." That result would entail life sentences for all three of the defendants. The victims' desire for such an outcome is readily understandable. But the Court must weigh other factors as well. The government's obligation is to assist the Court in determining, as to each defendant individually, the sentence that best vindicates the sentencing considerations Congress has enumerated in 18 U.S.C. § 3553(a).

Those considerations militate for long sentences. For Defendants Jesenik and MacRitchie in particular, the § 3553(a) factors demand prison terms exceeding any previously imposed in this district for a fraud scheme. Defendant Rice comes before the Court in a somewhat different posture. He was bamboozled into joining Aequitas when the conspiracy was well under way (though he eventually joined in with his eyes wide open). And he participated in inflicting fewer fraud losses on victim investors than his coconspirators (though they

nevertheless exceeded the losses from any other fraud scheme this Court has confronted). In light of these considerations and as discussed more thoroughly below (and in Supplemental Sentencing Memoranda for each defendant), the government recommends that the Court impose the following sentences on these defendants.

- Robert J. Jesenik: 20 years in prison and forfeiture of $1,806,056.30.
- Andrew N. MacRitchie: 17.5 years in prison and forfeiture of $905,630.36.
- Brian K. Rice: 10 years in prison and forfeiture of $568,296,67.

The forfeiture amounts reflect monies the defendants personally received out of the proceeds of their scheme. (Gov't Ex. 608A.) All of the defendants must also be ordered to pay restitution to the victim investors (or their estates) in amounts totaling approximately $368 million.

I. PROCEDURAL BACKGROUND

In July 2020—following a lengthy investigation into events culminating in Aequitas's collapse, a civil lawsuit by the SEC, and guilty pleas from cooperating witnesses Brian Oliver and Olaf Janke—a federal grand jury indicted the defendants and former Aequitas chief financial officer N. Scott Gillis on numerous fraud and money-laundering charges. (ECF No. 1.) At the defendants' behest and over the government's objection, trial in the matter was ultimately continued for nearly three years, to April 3, 2023. (ECF No. 70.)

In July 2022, after Defendant Gillis pleaded guilty to lying on a loan application as charged in Count 34 of the original indictment, a second grand jury returned a superseding indictment against Defendants Jesenik, MacRitchie, and Rice. (ECF No. 171.)

Defendants Jesenik, MacRitchie, and Rice proceeded to trial on the superseding incitement. The trial spanned six weeks and featured 763 exhibits and the testimony of 33

witnesses. Two of those witnesses were cooperating defendants Brian Oliver and Olaf Janke.[1] The only defendant to testify on his own behalf was Defendant MacRitchie, who perjured himself repeatedly. Following several days of deliberations, the jury found each of the defendants guilty as charged on all fraud-related counts but acquitted all of the defendants of the money-laundering conspiracy.

The Court set sentencing on this matter for September 7, 2023, with Defendant Jesenik's hearing to commence at 10:00 a.m., followed by Defendant MacRitchie's at 10:30 a.m. and Defendant Rice's at 11:00 a.m. (ECF No. 638.) Because the government anticipates presenting testimony on loss, the government expects these hearings may extend beyond the Court's morning session. This sentencing memorandum addresses issues common to all three defendants convicted at trial. Supplemental sentencing memoranda will be filed separately addressing unique issues that the Court should consider in fashioning the sentence for each defendant.

II. OFFENSE CONDUCT

The evidence at trial proved the defendants conspired with each other and with Brian Oliver and Olaf Janke to defraud investors by selling promissory notes issued by Aequitas. From June 2014 through the firm's collapse in March 2016, the conspirators raised nearly $295 million in new cash (Gov't Ex. 606) by way of false and misleading statements and half-truths. The investments were solicited through various funds, of which ACF Private Note ("ACF PN"), Income Opportunity Fund II ("IOF II"), and Aequitas International Opportunities LP fund (the "Lux Bond") were the largest. (*Id.*)

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[1] Mr. Oliver has since died, leading to the dismissal of charges against him; Mr. Janke awaits sentencing.

Mr. Oliver, who spearheaded in-person fundraising, testified that he and Defendant Jesenik consistently depicted Aequitas as a growing and financially healthy enterprise and that they typically used a "win, win, win, win" sales pitch with new prospective investors. This pitch showcased Aequitas's purported use of investment proceeds to buy discounted medical receivables backed by recourse agreements. (4/4/23 Tr. at 253-55.) Oliver and Jesenik purported to have extended the uses of investor proceeds to other types of receivables. Quarterly tear sheets and PPMs misleadingly reinforced that impression. (Gov't Exs. 57, 497, 600-01.) The defendants thereby cultivated a sense that investors would be putting their money in relatively safe, profitable, and socially beneficial financial products. (4/4/23 Tr. at 255-56.) All the investors and RIAs the jury heard from testified that defendants led them to believe their investments would fund the purchase of receivables and would be secured by the value of those receivables, as well as ACF's superfluity of other assets.

But that impression was false.

Defendant Oliver admitted he "lied" to investors (4/5/23 Tr. at 504) and "misled investors . . . [by] not being more clear on the liquidity crisis of the company and what their investment funds were actually going to" (4/6/23 Tr. at 546). Indeed, he admitted that Aequitas's debt funds were a "Ponzi scheme" and a "fraud." (4/7/23 Tr. at 800.) Former CFO Olaf Janke and forensic accountant Charles Bradley Foster corroborated that characterization. They testified that investors' funds during this period went almost exclusively to defraying Aequitas's extravagant operating expenses and paying principal and interest to earlier investors. Aequitas's last general counsel, Bob Holmen, testified about his efforts to get the defendants to disclose this fact in the final ACF PN tear sheet, issued just before Aequitas collapsed. (Gov't Ex. 386.) Mr. Foster explained that Aequitas was insolvent throughout the conspiracy and

bought almost no receivables other than those that were funded by (and committed to securing) institutional lines of credit.

Witness testimony made clear that all of the conspirators participated in misleading solicitations in these funds, either directly or indirectly, through in-person pitches and the approval of misleading marketing materials and formal offering documents. Defendant MacRitchie was primarily responsible for approving the misleading marketing and offering documents as Aequitas's chief compliance officer. He also took the lead in soliciting investments in the Lux Bond—raising $15 million from European investors after July 28, 2015, by falsely claiming their funds would be used to purchase receivables held in "bankruptcy remote" trusts rather than to defray Aequitas's expenses and to fund Ponzi payments to prior investors. Olaf Janke testified that the Lux Bond was simply an extension of the overarching Ponzi scheme: Aequitas "w[as] consistently missing [its] fundraising goals[and] w[as] looking for other sources of cash[,] and so the idea was born to go to the next continent." (4/19/23 Tr. at 2946.)

In addition to soliciting new investments, the defendants also took great pains to dissuade existing investors from cashing out their investments upon maturity. Defendant Rice and Mr. Oliver took the lead on these efforts, under the demanding oversight of Defendant Jesenik. (Gov't Ex. 345 (Jesenik telling Oliver and Rice to "get their facts summarized" so they could meet and "agree on actions" to defer investor payouts).) Mr. Oliver testified that the defendants' calls and in-person meetings with investors to encourage them to roll over their investments into new promissory notes generally involved "another sales pitch." (4/5/23 Trial Tr. at 413.) Each of those pitches perpetuated the fraud and magnified the resulting losses.

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III. U.S. SENTENCING GUIDELINES CALCULATIONS

The Court, "in determining the particular sentence to be imposed," is required to consider the "sentencing range established" by the U.S. Sentencing Guidelines. 18 U.S.C. § 3553(a)(4). "The Guidelines are 'the starting point and the initial benchmark,' . . . and are to be kept in mind throughout the process." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (quoting *Kimbrough v. United States*, 552 U.S. 85, 108 (2007)) (cleaned up). "All sentencing proceedings are to begin by determining the applicable Guidelines range." *Id.* "One of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes." *United States v. Davis*, 537 F.3d 611, 617 (6th Cir. 2008).

There is no dispute that the applicable offense Guideline is § 2B1.1 and that the proper base offense level for all three defendants is 7. USSG § 2B1.1(a)(1). The defendants contest, however, many of the enhancements recommended in their Presentence Investigation Reports ("PSRs").[2] As discussed below, the defendants' objections are unfounded. Indeed, the government submits the offense levels in the PSRs—at least for Defendants Jesenik and MacRitchie—are too low.

A. *The Actual Loss Resulting from the Conspiracy Exceeds $350 Million.*

Section § 2B1.1 enhances the applicable offense level for "the financial loss caused by the fraud." *United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007); *see* USSG § 2B1.1(b)(2). In the context of this case, the proper measure of loss is "actual loss," which is "the reasonably

[2] *See* Letter from Conor Huseby, Asst. F. Pub. Def., to Theresa Fuchs, Sr. U.S. Probation Officer (Aug. 22, 2023) [hereinafter "Jesenik Obj. Ltr.]; Letter from Michael Tremonte, Esq., to Theresa Fuchs, Sr. U.S. Probation Officer (Aug. 23, 2023) [hereinafter "MacRitchie Obj. Ltr."]; Letter from Angelo Calfo, Esq., to Theresa Fuchs, Sr. U.S. Probation Officer (Aug. 23, 2023) [hereinafter "Rice Obj. Ltr."].

foreseeable pecuniary harm that resulted from the offense" or, in other words, the "pecuniary harm that the defendant[s] knew or, under the circumstances, reasonably should have known, was a potential result of the offense." USSG § 2B1.1 cmt. n.3(A)(i), (iv). The government need only establish the extent of the resulting losses by a preponderance of the evidence. *See, e.g.*, *United States v. Berger*, 587 F.3d 1038, 1048 (9th Cir. 2009) ("[W]here sentencing enhancements for financial loss are based on the extent of the fraud conspiracy[,] . . . disputed enhancements need only be found by a preponderance of the evidence."). "The court need not make its loss calculation with absolute precision; rather, it need only make a *reasonable estimate* of the loss based on the available information." *Zolp*, 479 F.3d at 719 (citing USSG § 2B1.1, cmt. n.3(C)) (emphasis added).

In this case, the amount of money the defendants "reasonably should have known" investors would "potential[ly]" lose as a result of the defendants' conspiracy was the sum of the new cash they fraudulently induced investors to pay for promissory notes and the total amount of preexisting investments the defendants fraudulently induced investors to roll over into new promissory notes during the conspiracy period. The first amount *alone* was proven at trial to be $294,834,367. (Gov't Ex. 606.) Indeed, the defendants never challenged that number.

Defendants Jesenik and MacRitchie nevertheless protest that even this limited amount should not be used as the basis for calculating "actual loss," because it includes funds about which relatively little evidence was presented to the jury. (Jesenik Obj. Ltr. at 12 (claiming only ACF PN and IOF II should be considered because only investors in those two funds testified at trial); MacRitchie Obj. Ltr. at 4 (objecting to loss attributable to investments in "Direct Notes and Aequitas Enhanced Income Fund, LLC").) Defendants cite no authority for the proposition that losses attributable to a conspiracy must be constrained by the trial evidence, and the

government is aware of none. To the contrary, the Guidelines specifically provide that the relevant offense level "shall be determined on the basis of . . . all harm that resulted from the acts and omissions" falling "within the scope of jointly undertaken criminal activity," USSG § 1B1.3(a)(1)(B), (a)(3), and "[n]o limitation shall be placed on the information concerning the . . . conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" 18 U.S.C. § 3661.

The defendants were charged with, and the jury found them guilty of, conspiring to defraud Aequitas investors by soliciting investments through "material misrepresentations and half-truths about the uses of investor money, the financial health and strength of Aequitas, Aequitas's investments and investment strategies, and the inherent risks of those investments and investment strategies." (ECF No. 171 at 3.) There is ample evidence from which the Court may find that all promissory notes sold during the conspiracy period, except to the conspirators themselves, were tainted by such misrepresentations and half-truths.[3]

1. Direct Notes

The history of the investments in so-called "Direct Notes"—representing approximately $35.7 million in cash raised during the conspiracy (Gov't Ex. at 606)—is recounted in the government's expert witness report for Charles Bradley Foster, CPA. (ECF No. 257-3 at 93-107.) Mr. Foster's report indicates that these 33 investments were in promissory notes issued by Aequitas's special purpose entities ("SPEs"), which were the entities that "owned" the

[3] The only material controversy is whether funds raised through EIF and Direct Notes should count toward loss as do Private Note, IOF II, and the Lux Bond. Aequitas's three remaining promissory note funds (IOF, Income Protection Fund, and Private Client Fund) brought in a total of only $2.5 million during the conspiracy and thus would not have any impact on the Guidelines calculation. The marketing of all the debt funds, however, rested to varying degrees on the same core misrepresentations.

receivables in which Aequitas purported to invest. The first Direct Note investment at issue was sold to an entity associated with Integrity Bank and Trust on November 17, 2014—more than four months into Aequitas's insolvency. (*Id.* at 96.)

Consistent with their other solicitations, the defendants characterized Direct Note investments as being first and foremost for the purchase of receivables. (*E.g.*, Gov't Ex. 238 (Brian Oliver's offer of up to $5 million in Direct Note investments purportedly to finance "$7MM - $10MM" in CarePayment receivables).) In addition, as Mr. Foster testified, because the obligations were "closer to the collateral" in the issuing SPEs, Direct Note investments were held out as safer than the rest of Aequitas's promissory notes. (4/18/23 Trial Tr. at 3654-55.)

Neither of these representations was true. As Mr. Foster's report indicates, only 23% of the cash raised through Direct Note investments was utilized by the issuing SPE at all—most of the cash was swept up for corporate purposes, including redeeming investors in other funds. (ECF No. 257-3 at 93). Accordingly, Mr. Foster testified that funds raised through Direct Notes did not go to the purchase of receivables to any significant degree. (4/18/23 Trial Tr. at 2655.) And because Aequitas was already insolvent when it started selling the Direct Note investments, the enhanced security they purportedly offered was entirely illusory. The Direct Note investors were thus lumped together with every other defrauded investor following Aequitas's collapse. *See SEC v. Aequitas Mgmt., LLC, et al.*, Case No. 3:16-cv-00438-JR, ECF No. 787 (D. Or. Dec. 31, 2019) [hereinafter "Receiver's Dist. Plan"] at 53-54 n.157 ("[T]he Direct Investors are similarly situated to other Defrauded Investors . . . .").

2. Enhanced Income Fund, LLC

The Enhanced Income Fund ("EIF"), through which the conspiracy fraudulently raised nearly $6.5 million, was a garden-variety execution of the scheme presented at trial. This is

evident from the Private Placement Memorandum ("PPM") for the fund. The PPM (attached hereto as Exhibit 1) is dated October 1, 2014—the same date as the IOF II PPM (Gov't Ex. 57). It reveals that EIF was purported to operate in exactly the same manner as IOF II. Indeed, the PPMs use nearly identical language to describe their "use of proceeds." The EIF PPM explains:

> The Fund will invest in promissory notes issued to the Fund by the Special Member or applicable SPE, on senior or subordinated terms, as determined by the Manager in its sole discretion (each, a "Special Member Loan"), *the proceeds of which the Special Member or SPE will use to acquire portfolios of Credit Strategy Receivables.*

(Ex. 1 at 8 (emphasis added)). This language differs from the analogous section of the IOF II PPM only by referring to ACF as the "Special Member" rather than simply the "Member." (Gov't Ex. 57 at 8.) Several pages later, under the rubric "About the Fund," both PPMs indicate that "Aequitas has formed the Fund to take advantage of the current opportunities *to purchase or finance the purchases of receivables* . . . ." (Ex.1 at 19; Gov't Ex. 57 at 15 (emphasis added).)

As both Mr. Foster and Olaf Janke testified at trial, this language in both PPMs was pure fiction. No significant amount of money from either fund—or, indeed, any investment fund Aequitas operated during the conspiracy—went to purchase receivables. The incoming cash went instead to operating expenses and payments to prior investors. Because all of the new cash that defendants raised through the sale of promissory notes was raised under the same fraudulent pretenses, the total amount of cash raised is a valid, albeit partial, measure of the "reasonably foreseeable pecuniary harm" that could "potential[ly] result" from their conspiracy. USSG § 2B1.1 cmt. n.3(A)(iv). Accordingly, the "actual loss"—before offsets—was *at least* the $294 million in new cash raised through the sale of promissory notes during the conspiracy.

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3. Roll-Overs Added Significantly to the Actual Losses.

The government commissioned the Aequitas Receiver's accounting firm, FTI Consulting ("FTI"), to identify which victim investors rolled over their investments in Aequitas promissory notes, and by what total amounts, during the conspiracy period. For purposes of this calculation, the government deemed funds to have been rolled over if they were transferred from one investment vehicle to a different investment in Aequitas promissory notes—for example, from Income Protection Fund ("IPF") to IOF II[4]—or were maintained in a promissory note whose maturity was extended. FTI's accounting is filed herewith as Exhibit 2. According to FTI's tabulations, roll-overs between funds during the conspiracy totaled more than $132 million. Roll-over extensions of existing promissory notes totaled another $117 million. The defendants solicited these $249 million in roll-over investments over and above the new cash investments summarized in Government Exhibit 606. As a result, the true measure of actual loss, before offsets, is $543 million.

4. Only the Payments to Victim Investors from Aequitas or the Receiver, Totaling Approximately $190 Million, May Be Counted as Offsets Against Actual Loss.

Against the more than half a billion dollars the defendants swindled out of investors, there is no dispute that the Court must credit both "[t]he money returned . . . by the defendant[s] . . . to the victim[s] before the offense was detected" and "the amount the victim[s] ha[ve] recovered at the time of sentencing from the disposition of the collateral" that the defendants pledged in support of the fraudulently peddled promissory notes. USSG § 2B1.1 cmt. n.3(E)(i)-(ii).

[4] Eric Davis testified that, after Aequitas closed IPF in 2014, Integrity Bank and Trust ("IBAT") turned to offering the newly created IOF II as a "senior secured" investment on its platform. IBAT raised more than $100 million in IOF II investments, but only about $68 million constituted new cash.

For purposes of calculating the money returned "before the offense was detected," the Court should use March 10, 2016, the date the SEC filed its civil complaint against Aequitas and its officers. *SEC v. Aequitas Mgmt., LLC, et al.* Case No. 3:16-cv-00438-JR, ECF No. 1 (D. Or. Mar. 10, 2016) [hereinafter "SEC Complaint"]. The amount that Aequitas's Receiver returned to the victim investors from the disposition of Aequitas's assets fairly represents the victims' "recover[y] at the time of sentencing from the disposition of the collateral." USSG § 2B1.1 cmt. n.3(E)(ii).

The government commissioned FTI to calculate both of these sums using Aequitas's books and records for the first sum and the Receiver's distribution records for the second. FTI calculated that Aequitas paid victim investors approximately $75 million in cash during the conspiracy period, without regard to whether those payments were styled as accrued interest or return of principal.[5]

After Aequitas collapsed, the Receiver paid the victim investors another $96 million and anticipates distributing another $10 million from the receivership entity's remaining assets. In addition to those amounts, the Receiver returned to the Lux Bond investors $9 million of income from receivables funded by the Lux Bond investments in settlement of their claims against the receivership entity. (ECF No. 567-1 at 7 (excerpt of Receiver's filing of proposed settlement).) As result, all offsets properly credited against actual loss stemming from the conspiracy total approximately $190 million.

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[5] "Interest" paid from a Ponzi scheme is effectively the return of capital, because any profits from the scheme are illusory. Accordingly, interest in excess of principal is not an offset against total loss under the Guidelines. *See* USSG § 2B1.1 cmt. n.3(F)(iv).

a. No Offset for Investments from Victims Who Did Not Testify to Their Personal Reliance on Misrepresentations

Defendants Jesenik and MacRitchie contend that the "actual loss" amount must be reduced by the total amount of investments from investors for whom the government has not adduced evidence of personal reliance. MacRitchie argues that, "[a]bsent that evidence, there is no basis to conclude that hundreds of nameless investors relied on alleged misrepresentations as opposed to fully evaluating all the risks in the PPMs and financial statements and investing in light of those disclosed risks." (MacRitchie Obj. Ltr. at 4; Jesenik Obj. Ltr. at 19 ("The PSR should limit the estimated loss to the amounts that were invested by persons who testified . . . .").)

The fallacy of the defendants' argument is apparent on its face. The misrepresentations were not "alleged," as Defendant MacRitchie would have it. They were proven beyond a reasonable doubt at trial. In addition, the misrepresentations were not limited to one-off statements by the defendants (as was primarily the case in *United States v. Holmes,* No. 5:18-CR-00258-EJD-1, 2023 WL 149108 (N.D. Cal. Jan. 10, 2023)). As the jury heard, the misrepresentations and half-truths permeated Aequitas's marketing materials, including quarterly tear sheets and slide decks, and the PPMs themselves. *There was no accurate information available to investors on which they could have relied.* Indeed, the outside lawyer who advised Aequitas on the drafting of the funds' PPMs, Kurt Ruttum, testified that even he was misled—indeed, "lied to"— about the Defendants' pervasive use of investor funds to cover Aequitas's operating expenses and payments to prior investors. (5/4/23 Rough Tr. at 168, 177.)

The Court has more than enough evidence to find that each investment in promissory notes made during the conspiracy was the result of the defendants' misrepresentations and half-truths. Indeed, the Ninth Circuit has squarely rejected the defendants' claim that there must be

proof of causation for every victim of a fraud scheme. *See United States v. Laurienti*, 611 F.3d 530, 557 (9th Cir. 2010) ("Defendants argue that the district court could not have concluded, without more evidence, that those clients were victims of the conspiracy. We disagree. . . . [I]t is reasonable to infer that all clients of Defendants who purchased the house stocks were duped by the conspiracy.").

b. No Offset for the Receiver's Costs or to Account for His Failure to Recover More for Aequitas's Assets

Defendant Jesenik and MacRitchie also protest that the "actual loss" amount must be reduced by the "$40,286,004 in fees and expenses paid to the Receiver, FTI, and its various high-priced lawyers through December 31, 2022." (Jesenik Obj. Ltr. at 13; MacRitchie Obj. Ltr. at 10.) In Defendant MacRitchie's telling, such expenses were "supervening and unforeseeable." (*Id.*)

Defendants cite no authority for the proposition that fraud losses should be reduced by receivership expenses, and the government is aware of none. In any event, it could not have been "unforeseeable" that Aequitas's continued operation while it was winding down would cost many millions of dollars. As the jury heard at trial and the defendants well knew, they were spending $5 million every *month* on operating expenses in excess of earnings in 2015. (Gov't Ex. 226.)

The defendants also complain that there must be an offset for what they think Aequitas's assets were worth rather than what they actually sold for. (Jesenik Obj. Ltr. at 14; MacRitchie Obj. Ltr. at 11.) According to the defendants, the fact that the government did not contest Aequitas's own asset valuations at trial establishes that those were the actual values. That is incorrect. The extent of investors' ultimate losses and the post-receivership value of Aequitas's assets were not issues at trial. (ECF No. 535 at 4.)

The untenability of the defendants' position is most obvious from their reliance on the testimony and report of Defendant Jesenik's expert witness, Serena Morones, CPA, to establish the value of Aequitas's assets when the Receiver assumed them. (Jesenik Obj. Ltr. at 14; MacRitchie Obj. Ltr. at 11.) The first problem is that Ms. Morones testified that she did not conduct her own evaluation of the assets. (5/2/23 Rough Tr. at 169 ("I don't have my own opinion of value. I did not conduct my own valuation.").) Defendant Jesenik points to Ms. Morones's endorsement of Deloitte's valuation of the Corinthian portfolio at $208.3 million, but that valuation occurred ten months *before* the Receiver was appointed. (Gov't Ex. 164 (Deloitte Audit Report dated May 31, 2015).) That value also included the half that Aequitas was not entitled to keep. Defendant MacRitchie emphasizes that Ms. Morones's report notes an implied valuation of $242.7 million for CarePayment Technologies "as of December 31, 2021," (MacRitchie Obj. Ltr. at 11), but that date is more than half a decade after the Receiver's 2016 sale of CarePayment to a third party for $55 million (Jesenik Obj. Ltr. at 16 n.5). Nothing in Ms. Morones's testimony or report substantiates the defendant's claim that the Receiver's recovery was an unreliable indicator of the value of the assets at the time of Aequitas's collapse.

c. No Offset for Victim Investors' Recoveries from Third Parties

Finally, Defendants Jesenik and MacRitchie claim that "actual loss" should be reduced by the amounts that the victim investors recovered through lawsuits against outside professional firms. (Jesenik Obj. Ltr. at 16; MacRitchie Obj. Ltr. at 12.) This contention is groundless.

Defendant Jesenik contends that Guideline Application Note 3(E)(i) provides for such a result, but it does not. That provision permits offsets only for "the property returned . . . before the offense was detected." USSG § 2B1.1 cmt. n.3(E)(i). The investors' claims against the outside professional firms were their own. The claims were never "returned" by the

defendants—to say nothing of having been returned before the defendants' fraud was detected. Defendant Jesenik suggests that the claims were tantamount to negligence actions that Aequitas itself could have brought (Jesenik Obj. Ltr. at 16 & n.6), but there is no basis for finding that Aequitas could have prevailed on such a negligence theory. The evidence at trial indicated that Deloitte's audits were reliable (as far as they went) and that the lawyers were affirmatively misled by the defendants and other Aequitas personnel.

For his part, Defendant MacRitchie simply asserts that "ignoring this enormous sum would amount to engaging in a counterfactual fallacy" and points to the Ninth Circuit's admonition that sentencing courts "should take a 'realistic, economic approach" to assessing loss. (MacRitchie Obj. Ltr. at 12 (citing *United States v. Allison*, 86 F.3d 940, 943 (9th Cir. 1996)).) But Defendant MacRitchie cites no authority for the novel proposition that losses defrayed by someone *else* reduces the loss "result[ing] from" the defendants' crimes, and there is no "economic" reason to believe that it should. Whether the ultimate loss was borne by the victims, their insurers, or third parties with deep pockets, the loss is the same—and it is the magnitude of the loss (not who ultimately bears it) that the Guideline directs this Court to determine.

B. The Actual Losses Resulting from the Conspiracy During Defendant Rice's Participation Far Exceeded $150 Million.

Defendant Rice correctly notes that the loss amount for purposes of his Guideline calculation must be limited to the period during which he was a member of the conspiracy. (Rice Obj. Ltr. at 11-12 (citing USSG § 1B1.3 cmt. n.3(B).) As argued more thoroughly in the Supplemental Sentencing Memorandum Relating to Defendant Rice, he joined the conspiracy not later than February 5, 2015. By then he was receiving cash dashes that made clear the money he was raising through RIAs—particularly including investments from RIAs Fariba Ronassi and

Sica, as well as other investments through IBAT—were being diverted to defray operating expenses and to pay prior investors. (Gov't Ex. 93 (Email from Olaf Janke detailing intended uses of incoming funds).)

Accordingly, the government commissioned FTI to tabulate the new investor cash raised and roll-overs made after February 5, 2015. The government also asked for the sum of the allowable offsets described above. Those calculations are attached as Exhibit 3. They show that the actual losses, with offsets, during Defendant Rice's participation in the conspiracy totaled $232 million before including the Lux Bond investors' actual losses of at least $3.8 million more. As a result, the PSR's calculation of Defendant Rice's loss, for purposes of his offense level enhancement under USSG § 2B1.1(b)(1), is properly calculated to exceed $150 million but not $250 million. (Rice PSR ¶ 63.)

C. The Actual Losses Resulted in "Financial Hardship" for More Than Five Victims.

The Victim Impact Statements submitted to date establish that USSG § 2B1.1(b)(2) should result in a four-level enhancement under subparagraph (B) (for offenses "result[ing] in substantial financial hardship to five or more victims").

In determining whether the "substantial financial hardship" enhancement applies with respect to any victim, the court is directed by the relevant Guidelines commentary to consider "among other factors, whether the offense resulted in the victim['s] . . . suffering a substantial loss of a retirement, education, or other savings or investment fund" or "making substantial changes to his or her employment, such as postponing his or her retirement plans." USSG § 2B1.1 cmt. n.4(F)(iii), (iv). In *United States v. George*, the Ninth Circuit confirmed that these concrete factors properly "reinforce[d]" its conclusion that the court "must consider how the loss

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affects the victim" in his or her "individual circumstances." *United States v. George*, 949 F.3d 1181, 1185 (9th Cir. 2020).

At least five of the victims who have submitted VISes have indicated that the defendants' fraud scheme caused the victims significant losses in their retirement accounts in a manner that materially affected their retirements.

D. The Scheme Involved Sophisticated Means and Extraterritorial Conduct.

The defendants also object to the application of the recommended two-level enhancement under USSG § 2B1.1(b)(10). (Jesenik Obj. Ltr. at 23; MacRitchie Obj. Ltr. at 13-15; Rice Obj. Ltr. at 13-14.) Their objections are misplaced. This provision applies to defendants' offenses for at least two independently sufficient reasons, as noted in the PSRs.

First, as established by evidence proving the "Lux Bond" part of the scheme—for which the defendants had set [a] target of $70M" in 2015 (Gov't Ex. 138)—"a substantial part of [the] fraudulent scheme was committed from outside the United States." USSG § 2B1.1(b)(10)(B). Defendant Jesenik does not even acknowledge (much less dispute) this basis for the enhancement. Defendant MacRitchie objects that "[t]he government failed to establish that the Lux Bondholders were defrauded" (MacRitchie Obj. Ltr. at 14), but that's just wishful thinking. Nicholas Mavroleon's testimony established that Defendant MacRitchie consistently misrepresented the Lux Bond investment in order to get investors' money. He thus defrauded those investors. *United States v. Kuzmenko*, 775 F. App'x 272, 275 (9th Cir. 2019) ("Actual reliance is not an element of mail fraud or wire fraud." (citing *United States v Blixt*, 548 F.3d 882, 889 (9th Cir. 2008))).

Defendant MacRitchie also protests that "there was nothing about the Lux Bond that made the conduct more difficult for law enforcement to investigate." (MacRitchie Obj. Ltr. at

14-15.) That is untrue, of course, for many witnesses to the solicitations were consequently beyond the subpoena power of this Court. (Nicholas Mavroleon was thus able to decline to appear without a safe-passage letter, which Defendant MacRitchie used to impeach him.) In any event, "evad[ing] law enforcement" is a predicate for application of the enhancement under subparagraph (A) (pertaining to relocating a fraudulent scheme)—not for subparagraph (B).

Defendant Rice insists that he "*himself*" did not engage in or cause the Lux Bond aspect of the scheme. (Rice Obj. Ltr. at 13-14.) That fails for two reasons. First, he participated in the Lux Bond scheme as a member of the AMLLC executive team that set the $70 million target and followed Defendant MacRitchie's progress in pitching it. (Gov't Ex. 138.) Second, subparagraph (C) limits its application to the conduct that "the defendant intentionally engaged in or caused," but subparagraph (B) does not.

Second, the offense conduct triggered the enhancement for the additional and independent reason that it involved "sophisticated means" under USSG 2B1.1(b)(10)(C). The Guideline commentary defines "sophisticated means" as "[c]onduct such as hiding assets or transactions, or both, through the use of . . . corporate shells." USSG § 2B1.1 cmt. n.9(B).

The defendants' off-books spending on excessive operating expenses and Ponzi payments, funneled through Aequitas Holdings, plainly satisfies this definition. As the PSRs explained, the defendants "concealed [Aequitas's] increasing insolvency through an intercompany loan called the Holdings Note" (*e.g.*, Jesenik PSR ¶ 69), which allowed them to misleadingly characterize their diversion of investors' funds as investments in "corporate debt" on tear sheets. (Gov't Ex. 600.) Because they withheld from investors the Holdings financials, which were never audited by Deloitte, the ultimate disposition of the funds siphoned off through

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the Holdings Note was deliberately obscured behind a clean audit opinion for ACF, the defendants' fundraising entity.

Defendant Jesenik pretends that the defendants did not, in fact, withhold the Holdings Financials (Jesenik Obj. Ltr. at 23), but the testimony from Messrs. Oliver, Janke, and Zamarripa proved otherwise. He also protests that there was no legal requirement "to share [a] parent's financial statements" (*id.*), but the enhancement is not reserved for sophisticated means that are themselves illegal.

Defendant MacRitchie also objects that he should not be subjected to this enhancement because it was not provided for in plea agreements for Brian Oliver or Olaf Janke. (MacRitchie Obj. Ltr. at 15.) Plea agreements do not bind the Court, however, and nothing entitles Defendant MacRitchie to concessions from the government that were extended to coconspirators who pleaded guilty.

Finally, Defendant Rice claims that the Holdings Note accounting scam predated his arrival at Aequitas (Rice Obj. Ltr. at 14-15), but subparagraph (C) does not require the defendant to have created or masterminded the "sophisticated" conduct. Defendant Rice was a member of the AMLLC executive team that tracked the ever-deepening chasm of undercollateralized indebtedness hidden in the Holdings Note, and he pretended, like all the conspirators, that Aequitas was using the diverted funds to buy receivables. He thus "intentionally engaged in" the sophisticated conduct.

E. The Offense Plainly Involved a "Violation of Securities Law."

The defendants all oppose application of a four-level enhancement under USSG § 2B1.1(b)(20)(A), which applies to offenses that "involve a violation of securities law" by defendants who are "associated with an investment adviser." (Jesenik Obj. Ltr. at 23-24;

MacRitchie Obj. Ltr. at 15-16; Rice Obj. Ltr. at 14.) "A conviction under a securities law . . . is not required." USSG § 2B1.1 cmt. n.16(B). It is necessary only that the defendants' "*conduct* violated a securities law," *id.* (emphasis added), which is any "law referred to in . . . 15 U.S.C. § 78c(a)(47)," *id.* cmt. n.16(A), including "the Securities Act of 1933 (15 U.S.C. 77a *et seq.*)." The defendants' objections to this enhancement are groundless.

As Defendant Jesenik acknowledges, he was personally named in the SEC's March 2016 civil action against Aequitas and its officers. (Jesenik Obj. Ltr. at 23.) The SEC Complaint alleged that Aequitas—including specifically Aequitas's registered investment adviser AIM—and several of its officers "violate[d] Sections 17(a)(1) and 17(a)(3) of the Securities Act." SEC Complaint ¶ 82. The SEC alleged that the defendants in the civil action violated these provisions in precisely the same manner the government proved the defendants in this criminal case conspired to defraud investors:

> [B]y at least July 2014, instead of using investors' money to invest in the portfolio of trade receivables as described in the offering materials, Jesenik and Oliver were using the vast majority of investor money to cover redemptions and interest payments to prior investors and to pay the operating expenses of the entire Aequitas enterprise.

(SEC Complaint ¶ 55.) The SEC Complaint explained how the defendants acted through AIM, the registered investment adviser they controlled:

> AIM is registered as an investment adviser with the Commission and is the manager of the Aequitas Funds. As the manager of the Aequitas Funds, *AIM is responsible for the overall operations of the Aequitas Funds*, including the management of their loan and investment portfolios, for which it received a management fee of 2% of the assets of each Aequitas Fund.

(SEC Complaint ¶ 19 (emphasis added).) As the SEC Complaint laid out, Jesenik and his fellow Aequitas officers controlled AIM through their ownership and control of Aequitas Management,

LLC, which "exercise[d] exclusive control over Aequitas Holdings" and its wholly owned subsidiaries, which included AIM. Even though neither MacRitchie nor Rice was named in the SEC Complaint, they were thus "associated with" AIM as executive vice presidents—and, in MacRitchie's case, part owner—of AMLLC.[6] The government's evidence at trial clearly established the legitimacy of the SEC's allegations that Aequitas—and thus the defendants—committed securities violations.

Both Defendant Jesenik and Aequitas (through the Receiver) settled the lawsuit without admitting or denying the allegations. Defendant Jesenik also agreed to the entry of an injunction barring him from "directly or indirectly soliciting any person or entity to purchase or sell any security" and to pay a "civil penalty" of $625,000. *SEC v. Aequitas Capital Mgmt., et al.*, Case No. 3:16-cv-00438-JR, ECF No. 83 at 5-6 (Apr. 13, 2020). In light of his settlement and agreement to pay a fine, Defendant Jesenik's objection to the application of this enhancement is particularly meritless.

But the enhancement applies equally to all the defendants. Defendant Jesenik (along with Defendant Rice, who adopts his argument) protests that "[t]here was no evidence that [he] or AIM derived compensation from individual investors for the provision of investment advice" (Jesenik Obj. Ltr. at 23), but that contention fails for two reasons.

First, it is irrelevant. The Guideline provision nowhere requires that the associated investment adviser be compensated by the victims for the enhancement to apply. Second, it is

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[6] For purposes of this enhancement, a "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), *or any person directly or indirectly controlling* or controlled by such investment adviser, including any employee of such investment adviser . . . ." 15 U.S.C. § 80b-2(a)(17) (emphasis added); USSG §2B1.1 cmt. n.(16)(A) (defining term by reference to 15 U.S.C. § 80b-2(a)(17)).

false. The PPMs that the defendants caused to be presented to investors *did* establish that AIM derived its compensation from their funds. As the PPM for IOF II (which Defendant Rice personally oversaw) provides:

> Aequitas Investment Management, LLC, an Oregon limited liability company and wholly-owned subsidiary of Aequitas Capital Management, Inc., will serve as the Fund Manager (the "**Manager**") and has been engaged to act as the investment adviser of the Fund (the "**Investment Adviser**"). Aequitas Investment Management, LLC is registered with the SEC as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").
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> The Fund will pay the Manager in arrears at the end of each calendar quarter a management fee (the "**Management Fee**") equal to 0.5% (2% annualized) of the aggregate principal of all Senior Notes outstanding on the first day of the quarter.

(Gov't Ex. 57 at 5, 12.) As a result, the evidence proved that investors were paying for AIM's (corrupt) services through the two-percent management fee. Unbeknownst to the investors, the defendants were taking much more than that.

Defendant MacRitchie objects that the PSR "fails to explain how" he was associated with Aequitas's network of RIAs (MacRitchie Obj. Ltr. at 16), but this is a red herring. Defendant MacRitchie was more involved than any other defendant in the creation and oversight of AIM. As he testified, he personally prepared and submitted Aequitas's application to register AIM with the SEC and assumed the title of "chief compliance officer" at Aequitas because an RIA was required to have one. (5/3/23 Rough Tr. at 98 (explaining he originated the role because "one thing is you need to appoint a chief compliance officer").)

All three of these defendants controlled AIM and used it to bilk investors in violation of the securities laws. The enhancement applies to all of them.

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F. *Each Defendant Warrants an Enhancement Based on His Supervisory Role in "Extensive" Criminal Activity.*

The PSRs recommend enhancements of three or four levels for each of the defendants under USSG § 3B1.1 due to their aggravated role in "criminal activity that involved five or more participants or was otherwise extensive." (*E.g.*¸ Jesenik PSR ¶ 73 (recommending four-level enhancement).) All of the defendants object to these enhancements, but their objections are groundless.

That there were "five or more participants" in the charged conspiracy has already been established beyond any reasonable doubt. Indeed, five men have been convicted of or have pleaded guilty to conspiring to defraud investors as charged in Count 1: Defendants Jesenik, MacRitchie, and Rice along with Messrs. Oliver and Janke. *See United States v. Brian Oliver*, Case No. 3:19-cr-00132-SI; *United States v. Olaf Janke*, Case No. 3:19-cr-00237-SI, ECF No. 12 (D. Or. June 10, 2019). Accordingly, Defendant MacRitchie's claim that "the government has failed to establish that there were sufficient participants in the offense" (MacRitchie Obj. Ltr. at 16) because of insufficient proof that Scott Gillis participated is, at best, misplaced. In any event, Scott Gillis pleaded guilty to lying to Wells Fargo Bank at Bob Jesenik's behest specifically for the purpose of getting money for interest payments. Since those payments were to perpetuate Aequitas's Ponzi scheme, his role in that scheme is readily apparent.

The fraud scheme was also "otherwise extensive," because it required the services of dozens of others, including Aequitas employees and professional outsiders who unwittingly assisted in continuing the fraud. *See* USSG § 3B1.1, cmt. n.3; *United States v. Young*, 537 F. App'x 777, 782 (9th Cir. 2013) (approving sentencing enhancement for defendant's role in "otherwise extensive" offense because he used the unknowing services of many outsiders); *United States v. Rose*, 20 F.3d 367, 374 (9th Cir. 1994) (noting relevant factors include number

of knowing participants and unwitting outsiders, number of victims, and amount of fraudulently obtained funds). The hundreds of Aequitas's victim investors, their fraud losses of hundreds of millions of dollars, and the scores of Aequitas employees and outside professionals used to perpetuate the fraud clearly render the offense "otherwise extensive."

The evidence at trial also established that Defendant Jesenik was the "organizer" and "leader" of the fraud. *See* USSG §3 B1.1(a) & cmt. n.4. Specifically, his decision-making authority, direct participation in the fraud, recruitment of accomplices, higher salary, and degree and control over others involved are all factors identified in the Guideline as warranting a four-level upward role adjustment.

Defendant MacRitchie's conduct warrants a three-level upward role adjustment pursuant to USSG § 3B1.1(b). Defendant MacRitchie was a partial owner of the Aequitas enterprise and its chief compliance officer. He supervised Aequitas compliance staff and was personally responsible for reviewing and approving all investor-facing communications. Evidence at trial established that he approved (at least tacitly) the PPMs, tear sheets, and other marketing materials that were used to defraud investors. Defendant MacRitchie also spearheaded development of the Lux Bond program with outside counsel and retained agents, including Nicholas Mavroleon, to help him pitch the investment in Europe.

Defendant Rice's conduct also warrants a three-level upward role adjustment. He, and Aequitas employees he supervised, managed the relationships with the RIAs who peddled Aequitas's fraudulent investments —including Private Note and IOF II. As Brian Oliver, Chris Bean, Jeff Sica, and Fariba Ronassi testified, Defendant Rice interacted directly with the RIAs to sustain the fraud on their clients.

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G. Defendant MacRitchie's Perjury Compels an Obstruction Enhancement.

As explained in the Supplemental Sentencing Memorandum Relating to Defendant MacRitchie, he perjured himself repeatedly, willfully, and materially at trial. Accordingly, his offense level should be enhanced by two levels under USSG § 3C1.1.

H. The Resulting Offense Levels Support Life Sentences for Each Defendant.

Application of the foregoing enhancements yields the total and adjusted offense levels calculated below for each defendant:

	Robert Jesenik	**Andrew N. MacRitchie**	**Brian K. Rice**
Base offense level, § 2B1.1(a)(1)	7	7	7
Loss, § 2B1.1(b)(1)(N), (O)	28	28	26
Financial hardship > 5 victims, § 2B1.1(b)(2)(B)	4	4	4
Sophisticated Means/Foreign Operation, § 2B1.1(b)(10)(B)-(C)	2	2	2
Securities Law Violation, § 2B1.1(b)(20)(A)	4	4	4
Role Enhancement, § 3B1.1(a), (b)	4	3	3
Obstruction, § 3C1.1	0	2	0
TOTAL	**49**	**50**	**46**
ADJUSTED OFFENSE LEVEL	**43**	**43**	**43**

The Sentencing Guidelines provide that "[a]n offense level of more than 43 is to be treated as an offense level of 43." USSG Ch. 5 Pt. A cmt. n.2. The Guideline sentence for an adjusted offense level of 43 is life in prison, regardless of the defendant's criminal history category. USSG Ch. 5 Pt. A.

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IV. OTHER OBJECTIONS TO THE PSRs

In addition to objecting to the Sentencing Guidelines calculations, all three defendants object to, or seek "clarification" of, the descriptions of their offense conduct in the PSRs. (Jesenik Obj. Ltr. at 1-12; MacRitchie Obj. Ltr. at 22-40; Rice Obj. Ltr. at 9-11.) As a general matter, the Court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute." Fed. R. Crim. P. 32(i)(3)(B); *see United States v. Standard*, 207 F.3d 1136, 1143 (9th Cir. 2000) ("Failure to make the necessary findings requires that the sentence be vacated and the defendant be resentenced."). The Court need not, however, resolve disputes that "will not affect sentencing." Fed. R. Crim. P. 32(i)(3)(B).

Defendants' objections and requests for clarification of their offense conduct largely rehash their preferred glosses on the evidence at trial. The sentencing hearing is no occasion to retry the case. The Court should expressly decline to resolve, as irrelevant to its sentencing determination, any objections that do not bear directly on the proper Guideline calculation. *United States v. Sarno*, 73 F.3d 1470, 1503 (9th Cir. 1995) ("There is no right to an evidentiary hearing so long as the facts that prove dispositive at sentencing find support in the record.").

V. SENTENCES IMPOSED IN COMPARABLE CASES

In fashioning its sentences in this case, the Court must account for "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The government is aware of only one other fraud prosecution in this district of comparable magnitude, *United States v. Harder*. The 15-year sentence this Court imposed in *Harder*, 144 F. Supp. 3d 1233, 1241 (D. Or. 2015), militates for even longer sentences in this case. Sentences from other districts also support sentences in excess of 15 years in the absence of mitigating circumstances.

The scheme in *Harder* was broadly similar to the conduct at issue here. As this Court found, from January 2006 to July 2008, the defendant in *Harder* "intentionally misled numerous investors . . . about the nature and risks of their investments in Sunwest senior housing facilities" by commingling investment proceeds from such facilities while suggesting to investors they "were investing in single-purpose entities" with independent financial results and by emphasizing Sunwest's consistent history of generating rent payments for investors while concealing the enterprise's "substantial monthly losses." 144 F. Supp. 3d at 1237-38. The defendant ultimately resorted to "borrow[ing]" investments in newer facilities to make rent payments to investors in other facilities, engaging in tactics redolent of a "Ponzi scheme." *Id.* at 1238. The scheme inflicted more than $120 million in losses on "more than 1,200 investors," who "in some cases" suffered "life-altering injuries." *Id.* This Court also found that the widespread commingling of funds was used to support the defendant's lavish lifestyle and projects that would benefit the defendant and other insiders but not the investors themselves. *Id.* at 1239. Despite all that, the Court concluded that the defendant in *Harder* "did not want anyone to lose their investment." *Id.* at 1240.

In the foregoing respects, these defendants' conduct mirrored the defendant's in *Harder*. The wholesale commingling of funds, Ponzi payments, misleading claims about profitability and uses of investment proceeds, diversion of funds to investments benefiting insiders (such as the defendants' "loans" to the perennially money-losing CarePayment Technologies in hopes it would someday be worth $500 million), and lavish spending were common to both. So were the defendants' lack of criminal history and chart-busting offense level under the Guidelines. And so too were the perpetrators' contributions to the community and apparent hope—in defiance of all common sense—that the investors would not suffer any losses.

There were conspicuous differences, however, that cast the defendants here in a harsher light. First, the actual losses in this case were substantially higher than in *Harder*, with losses closer to $250 million than $120 million. Second, the defendant in *Harder* pleaded guilty in exchange for the government's agreement to recommend no more than 15 years' imprisonment (which it did), *id.* at 1234, whereas the defendants here went to trial—at which Defendant MacRitchie perjured himself—and all three continue to deny their culpability. A final distinction, at least in relation to Defendant Jesenik, is the Court's finding that the defendant in *Harder* "cooperated . . . in the related civil lawsuit brought by the [SEC]" and that "without [his] cooperation, it would have taken more time and more expense for the investors to recover" whatever they could. *Id.* at 1240.

On balance, the government contends that *Harder* must stand for the proposition that a sentence of less than 15 years for any of these defendants would require substantial mitigating facts absent from that case. As seen in the table below, results in cases in other districts involving similar Ponzi-like schemes reinforce the conclusion that a sentence of more than 15 years would be appropriate here absent mitigating factors.

Defendant (Fundraising Entity)	**Case Number (District)**	**Plea/Trial Cooperation**	**Est. Actual Losses**	**Sentence**	**Year**
Antonio Carlos De Godoy Buzaneli (Providence Financial)	0:17-cr-00284-MJD-HB (D. Minn.)	Plea	$51 million	20 years	2019
Kevin D. Merrill (Delmarva Capital and Global Credit Recovery)	1:18-cr-00465-RDB (D. Md.)	Plea	$190 million	22 years	2019
Lewis Wallach (Professional Financial Investors)	3:20-CR-00365 MMC (N.D. Cal.)	Plea & Cooperation	$109 million	12 years	2022
Gina Champion-Cain	20CR2115-LAB (S.D. Cal.)	Plea	$183 million	15 years	2021

James Clark Nix (AMIG and NECO)	4:20-cr-00355-ALM-CAN (E.D. Tex.)	Trial	$6.6 million	48 years	2022
Michael J. DaCorta (Oasis Int'l Group)	8:19-cr-00605-WFJ-CPT (M.D. Fla.)	Trial	$53 million	23 years	2022
Claud R. Koerber (Founders Capital)	2:17-cr-00037-FB-PMW (D. Utah)	Trial	$45 million	14 years	2019
Michael J. Stewart (Pac. Prop. Assets)	8:14-cr-00014-CJC (C.D. Cal.)	Trial	$9.2 million	14 years	2016
Duane Hamblin Slade (Mathon)	2:13-cr-00460-ROS (D. Ariz.)	Plea	$2.5 million	15 years	2013

The cases in the foregoing table, which appear to involve defendants with no scorable criminal histories, should inform the Court's effort to avoid unwarranted sentencing disparities. Taking the results in these nine cases (and *Harder*) together, the median sentence was 15 years, while the median financial loss inflicted on the victims was substantially less that the $364 million at issue here. Absent mitigating factors, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), militates for sentences ranging, roughly, from 15 to 20 years.

VI. LENGTHY SENTENCES ARE NECESSARY FOR DETERRENCE

In fashioning sentences for these defendants, the Court is required to account for the need "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). This imperative is particularly acute in a case such as this, involving the clandestine diversion of hundreds of millions of dollars. "Where the profits to be made from violating a law are higher, the penalty needs to be correspondingly higher to achieve the same amount of deterrence." *United States v. Cavera*, 550 F.3d 180, 196 (2d Cir. 2008).

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Historically, there was a tendency to impose lighter sentences on fraudsters and other so-called "white collar" defendants, because they were often regarded as more upstanding members of the community and the wounds they inflicted were less visceral. But Congress has rejected that reasoning. "One of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes." *Davis*, 537 F.3d 617.

If anything, there is a more compelling case to impose longer sentences to deter fraud crimes than to deter more violent ones. "Because economic and fraud-based crimes are 'more rational, cool, and calculated than sudden crimes of passion or opportunity,' these crimes are 'prime candidate[s] for general deterrence.'" *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (quoting Stephanos Bibas, *White–Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 724 (2005)). "Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it." *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994).

The Ponzi scheme in this case was precisely the sort of "lucrative [and] difficult to detect" crime that calls for a longer sentence. *Id.* It continued for an extended period, victimizing hundreds of people. It evaded detection by Aequitas's own lawyers and auditors, as well as—at least temporarily—the SEC. During that time, the defendants took home millions of dollars while maintaining bloated expense accounts and lavish lifestyles. (Gov't Ex. 608A.) Only the most serious sentences would realistically deter others who want to live the high life (complete with private jets), willing to gamble on the hope that that they will escape detection

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long enough to make it worthwhile. This Court must endeavor to deter such individuals from rolling the dice.

VII. DEFENDANTS MUST FORFEIT THEIR RECEIPTS FROM THE SCHEME

The government will be requesting orders of forfeiture in the form of criminal money judgments against each of the defendants in an amount reflective of the monies they personally received from the proceeds of their criminal actions during the charged conspiracy.

Where the government establishes the existence and a defendant's receipt of proceeds of a crime, and the lawful forfeitability of those proceeds, forfeiture of the assets is mandatory. *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011). In this case, the moneys that Defendants Jesenik, MacRitchie, and Rice personally received from the operation of the conspiracy, which inevitably came from investors' funds, constitute forfeitable proceeds, as set forth in the forfeiture allegations in the superseding indictment. (ECF No. 171 at 11.) At trial, the Court admitted Government Exhibit 608A through the testimony of Charles Bradley Foster, CPA. That exhibit reflected the amounts the defendants received from fraud proceeds during the conspiracy. Those amounts are detailed below:

Defendant Robert J. Jesenik:	
Payroll & Allowances	$ 1,532,947.57
Expenses	$ 123,108.73
Member Distribution & Advances	$ 150,000.00
TOTAL	**$ 1,806,056.30**

Defendant Andrew N. MacRitchie:	
Payroll & Allowances	$ 689,662.37
Expenses	$ 215,967.99
TOTAL	**$ 905,630.36**

Defendant Brian K. Rice:	
Payroll & Allowances	$ 530,492.48
Expenses	$ 37,804.19
TOTAL	**$ 568,296.67**

For each of these defendants, the government is seeking a forfeiture order in the form of a criminal money judgment in the subtotal amounts listed above. Prior to the sentencing hearings, the government will be filing a Motion for Entry of Preliminary Orders of Forfeiture and Money Judgment and Final Orders of Forfeiture with proposed orders. "If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)(a). Indeed, "(w)hen the government seeks a money judgment, Rule 32.2(b) does not permit the court to do anything other than 'determine the amount of money that the defendant will be ordered to pay', which is specified by statute." *Newman*, 659 F.3d at 1242.

Rule 32.2(e) and 21 U.S.C. § 853(p) allows the government to seek "substitute property" when the proceeds of the criminal activity cannot be located or otherwise traced. In this case, the government is asking the Court to order a criminal money judgment in the amounts set forth above against each of these defendants as substitute property, representing the proceeds of the offenses committed here.

Finally, the government's requested remedies of restitution and forfeiture in this case are not an impermissible "double recovery," as the courts have widely recognized that criminal restitution serves an entirely different purpose from forfeiture. *Newman,* 659 F.3d at 1241. The court in *Newman* explained the distinction between restitution and criminal forfeiture in this way:

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> "Congress conceived of forfeiture as punishment for the commission of various [crimes]." *Libretti* [*v. United States*], 516 U.S. [29,] 39 [(1995)] (emphasis added). "The purpose of restitution . . . however, is not to punish the defendant, but to make the victim whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." *United States v. Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (emphasis added).

Newman, 659 F.3d at 1241.

VIII. CONCLUSION

As discussed above and in supplemental sentencing memoranda relating to each defendant, the Court should overrule the defendants' objections to the Guideline calculations in the PSRs, find that the defendants' other objections to the PSRs need not be resolved, impose prison sentences of 20 years on Defendant Jesenik, 17.5 years on Defendant MacRitchie, and 10 years on Defendant Rice, and order each defendant to forfeit his receipts from the offenses of conviction and to pay full restitution, jointly and severally, to the victim investors in the total amount of $367,844,472.

Dated: August 30, 2023

Respectfully submitted,

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