UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD

Defendant.
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UNITED STATES' RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT AND REQUEST FOR DOWNWARD VARIANCE

The United States of America, through the undersigned Assistant United States Attorney, hereby submits its Response to defendant, Eric Dean Sheppard's Objections to the Presentence Investigation Report ("PSR").

I. Defendant's objections to the Offense Conduct

Paragraph 11:

As to Paragraph 11 of the PSR, the defendant argues that the government mischaracterized his companies as partnerships instead of limited liability companies ("LLC").

The PSR refers to the defendant's companies as LLCs, which were structured as partnerships. In other words, the companies were both. Neal Cupersmith, the defendant's accountant for approximately 25 years, testified about the defendant's companies as follows:

> Q: Did your firm prepare tax returns for a business by the name of HM Management and Development, LLC?
> A: Yes.
> Q: What's [] an LLC?
> A: Limited liability company. It's a partnership. It's a limited – it's a form of a corporation but it's taxed as a partnership.

Q: Why were the Defendant's businesses partnerships?
A: It's just you can select an S corporation, you can select various types. It's an easier way – LLCs are an easy way specially in real estate to have it will transactions through a partnership. Taxes for partnership.
. . .
A: The LLC is a non-taxable entity.

Tr. 12/12/23 A.M., at 71-72. The government has no objection to Paragraph 11 being amended to state that the defendant's companies were limited liability companies that were structured and taxed as partnerships. The defendant's objections to Paragraph 11 should otherwise be overruled.

Paragraph 12:

The defendant objects to the statement in the PSR that HM-UP Development Alafaya Trails, LLC ("Alafaya Trails") owned the Shoppes at Alafaya. The defendant states that Alafaya Trails owned only two parcels of the Orlando Shopping Center during the relevant time period.

Jeffrey Graff, who had degrees in finance and accounting and worked for the defendant's businesses for 20 years, testified that Alafaya Trails owned the Shoppes at Alafaya. Tr. 12/6/23, at 12-13; see Govt Exhs. 3-1, 3-2 (Alafaya Trails deeds showing ownership of the Shoppes at Alafaya), 3-3 (Alafaya's transfer of the Shoppes at Alafaya to 1200 Alafaya in September 2022). More importantly, all of the rental income from active businesses at the Orlando shopping center was paid to Alafaya Trails during the time period at issue in this case.

The government proposes that Paragraph 12 of the PSR be amended to state that Alafaya Trails owned most of the Orlando shopping center, and it received all of the rental income from the Orlando shopping center during the time period that was relevant to the EIDL and PPP loan applications. The defendant's objections to Paragraph 12 should otherwise be overruled.

Paragraph 15:

The defendant objections to the statement in the PSR that tax year 2018 was the last year that HM Management and Development, LLC ("HM Management") reported having employees to the IRS. The defendant points to Defense exhibit Y-1 as evidence that employee W-2s were submitted to the IRS for 2019.

The government's trial exhibits from the IRS and the Florida Department of Revenue showed that the defendant's companies did not report any employees, or pay any employer contributions or employee tax withholdings, to the IRS or to the Florida Department of Revenue after 2018. Furthermore, the existence of a W-2 is not evidence that any W-2s were submitted to the IRS. As Alex Zaslow, the defendant's accountant, testified, a W-2 does not reflect whether any payroll taxes were paid to the IRS, only that payroll taxes were withheld by the employer. Tr. 1/10/24 P.M., at 130-31.

The statement in the PSR that "2018 was the last year that HM Management reported having three employees to the IRS and to the Florida Department of Revenue, and it was the last year in which HM Management withheld income, social security, Medicare and unemployment taxes, and paid those taxes over to the IRS and to the Florida Department of Revenue" is accurate. The government proposes that this statement be amended to state that "2018 was the last year that HM Management reported having three employees to the IRS and to the Florida Department of Revenue, and it was the last year in which HM Management paid income, social security, Medicare and unemployment taxes to the IRS and to the Florida Department of Revenue." The defendant's objections to Paragraph 15 should otherwise be overruled.

Other Offense Conduct:

The defendant objects to Paragraphs 29 to 35 of the PSR that discuss HM Four, but he does not specify what it is about those paragraphs that he finds objectionable. The defendant also objects generally to the offense conduct, which is set forth between Paragraphs 5 and 56 of the PSR, stating that the "recitation of the facts adduced at trial" is "riddled through with factual inaccuracies." Def. Obj. at 2.

The Eleventh Circuit "requires that 'challenges to the facts contained in the PSR must be asserted with specificity and clarity.'" *United States v Funez*, 755 Fed Appx. 871, 873 (11th Cir. 2018) (quoting *United States v. Bennett*, 472 F.3d 825, 832 (11th Cir. 2006)). "'Vague assertions of inaccuracies are not sufficient to raise a factual dispute.'" *Id*. (quoting *United States v. Ramirez-Flores*, 743 F.3d 816, 823-24 (11th Cir. 2014)). "Otherwise, the district court would be required 'to guess whether a challenge is being mounted as well as what [the] defendant wishes to contest.'" *Id.* (quoting *United States v. Aleman*, 832 F.2d 142, 145 (11th Cir. 1987)). "If a defendant fails to object properly, the objection is waived and the burden does not shift to the government to prove the disputed facts." *Id.* (citing *Bennett*, 472 F.3d at 832)).

The defendant's general objection to the "recitation of the facts" does not allow the government to know what specific facts he is challenging and to rebut his assertions with either citations to the trial record, or with the presentation of additional evidence at the sentencing hearing. Except for the specific objections raised regarding Paragraphs 11, 12, and 15, the Court should overrule the defendant's general objection to the Offense Conduct, and adopt Paragraphs 5 through 56 of the PSR as written.

II. The loss amount in the PSR is correct under § 2B1.1.

The defendant argues that the loss amount in this case should be zero, based on his arguments that he did not intend to cause any loss, that much of the loss involves "acquitted conduct" and "uncharged conduct," and that application of the government benefits rule under U.S.S.G. § 2B1.1, cmt 3(F)(ii) reduces the loss amount to zero. As discussed below, the defendant's arguments lack merit and the Court should adopt the loss amount set forth in the PSR.

A. The intended loss amount is the correct loss amount in this case.

The loss amount set forth at Paragraph 57 of the PSR reflects the intended loss amount of $2,816,333 resulting from the defendant's scheme to defraud the SBA and the private lenders through the submission of numerous EIDL and PPP loan applications that contained materially false and fraudulent representations. Indeed, the commentary to the Guidelines explains that "loss" is the greater of the actual or intended loss. U.S.S.G. § 2B1.1 cmt. 3(A)(ii);[1] *United States v. Verdeza*, 69 F.4th 780, 793 (11th Cir. 2023). Consistent with that definition, the Eleventh Circuit has repeatedly affirmed the use of intended loss to calculate loss in the Section 2B1.1 context. *See, e.g.*, *United States v. Verdeza*, 69 F. 4th 780, 793 (11th Cir. 2023); *United States v. Beetle*, No. 22-12677, 2023 WL 7182402, at *4 (11th Cir. Nov. 1, 2023); *United States v. Moran*, 778 F.3d 942, 973-74 (11th Cir. 2015); *United States v. Massam*, 751 F.3d 1229, 1232 (11th Cir. 2014); *United States v. Patterson*, 595 F.2d 1324, 1326–27 (11th Cir. 2010); *United States v. Willis*, 560 F.3d 1246, 1250 (11th Cir. 2009); *United States v. Nosrati-Shamloo*, 255 F.3d 1290, 1291–92

[1] The forthcoming Guideline amendments that will take effect November 1, 2024, will amend this provision by moving this statement from the Commentary to the Loss Guideline itself. Guideline § 2B1.1(b)(1) will state that "[l]oss is the greater of actual loss or intended loss" immediately after the loss table.

(11th Cir. 2001); *United States v. Toussaint*, 84 F.3d 1406, 1407–08 (11th Cir. 1996). Not only do the Guidelines and the Eleventh Circuit case law direct the Court to rely on the intended loss amount for the loss calculation, but in the fraud context, it is the definition of loss that best captures the totality of the defendant's criminal conduct. As the Eleventh Circuit noted in *Massam*, "'[a] criminal pays the price for the ambition of his acts, not their thoroughness.'" 751 F.3d at 1232 (quoting *United States v. Patterson*, 595 F.3d 1324, 1327 (11th Cir.2010)).[2]

Of course, the Guidelines require courts to use the instructions in both the fraud guideline (§2B1.1) and the relevant-conduct guideline (§1B1.3) to determine a defendant's offense level. The language of the relevant-conduct guideline requires that the offense level account for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all harm that resulted from the acts and omissions [committed, aided … by the defendant], and all harm that was the object of such acts and omissions …." U.S.S.G. §§ 1B1.3(a)(1)(A), 1B1.3(a)(3). The relevant-conduct guideline "clearly contemplates harm that actually occurred *and* harm that the person intended to cause." *See United States v. You*, 74 F. 4th 378, 398 (6th Cir. 2023). *Id.* Because in the fraud context, the loss *is* the harm, the relevant-conduct guideline support the application of intended loss so that the intended harm is the conduct for which the defendant is held accountable. *See id.*

The defendant argues that the defendant's "subjective intent" was to pay back the loans and not to cause any loss to the financial institutions. Furthermore, the defendant argues that no

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[2] Limiting loss to actual loss would lead to vastly different sentences for similarly culpable defendants by, for example, rewarding a defendant whose attempt to steal was thwarted before she or he could successfully cause the loss. *See United States v. You*, 74 F. 4th 378, 398 (6th Cir. 2023).

financial institution suffered any actual loss from the "offenses of conviction," and thus, the loss amount should be zero. Def. Obj. at 17-19. These arguments have no merit.

Intended loss is the "'pecuniary harm that was intended to result from the offense,' and actual loss is the 'reasonably foreseeable pecuniary harm that resulted from the offense.'" *Patterson*, 595 F.3d at 1327 (quoting U.S.S.G.§ 2B1.1, cmt. n. 3(A)). In this case, the Court instructed the jury on the elements of the wire fraud charges, requiring the jury to find that (1) the defendant knowingly devised or participated in a scheme to defraud, or to obtain money (in this case loan proceeds) by using materially false representations, and (2) that the defendant "acted with the intent to defraud." (DE 187, at 5). The Court also instructed the jury that "[t]o act with 'intent to defraud' means to do something with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else." *Id.* The defendant was convicted of four counts of wire fraud. Thus, the jury found that the government had proved beyond a reasonable doubt that the defendant knowingly devised or participated in a scheme to defraud, and that he acted with intent to defraud the SBA and the lenders. By paying some of the loans back that the defendant obtained by fraud -- after he's been convicted of the fraud --does not negate the loss the defendant intended when he committed the crime in the first place.

The defendant's argument is also inconsistent with the loss calculations for defendants who participate in a fraud conspiracy or who participate in a scheme to defraud. In a fraud conspiracy, a defendant can be held responsible for the "losses resulting from the reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy." *United States v. Moran*, 778 F.3d 942, 974 (11th Cir. 2015). Likewise, in a fraud scheme, the defendant can be held responsible for the losses attributable to the entire scheme. "Put another way, when a sentencing court is determining the proper punishment for a defendant's fraud, the court uses the reasonable mathematical limit of his scheme, rather than his concrete result." *Patterson*, 595 F.3d at 1327 (describing intended loss); *see also, United States v. Lane*, 323 F.3d 568, 590 (7^{th} Cir. 2003) (quoted with approval in *Patterson;* "[t]he determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct."). The combined amount of all of the loans that formed part of the defendant's scheme to defraud should be the intended loss in this case.

As to whether the lenders – and the SBA – suffered an actual loss, the government addressed that argument extensively in its response to the defendant's motion for judgment of acquittal (DE 214, at 6-9). The lenders suffered a loss by disbursing loans to the defendant's businesses that they should not have paid out. And with carefully crafted language, the defendant entirely ignores the SBA's role here. In particular, in May 2021, the SBA reimbursed WebBank for the April 2020 loan to Alafaya Trails (with interest), which loan the defendant obtained by fraud, and was approved for forgiveness by fraud. *See* PSR at ¶¶ 17-20.

B. <u>The "Acquitted Conduct" does not change the loss amount.</u>

The defendant urges the Court to retroactively apply a Sentencing Guideline amendment that has not yet taken effect, which would revise the relevant-conduct guideline (§1B1.3) to remove consideration of acquitted conduct from the relevant conduct calculation. The defendant asks the Court to remove the HM Four EIDL amount ($150,000) and the Alafaya Trails second draw PPP loan application amount ($203,125) from the loss amount total.

This Court has wide discretion to find and consider facts when determining a sentence to impose within the prescribed statutory range. *See generally, United States v. Watts*, 519 U.S. 148, 156-57 (1997); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). In *Watts*, the Supreme Court held that a court may base a sentence on acquitted conduct "so long as the conduct has been proved by a preponderance of the evidence," and furthermore, "application of the preponderance standard at sentencing generally satisfies due process." 519 U.S. at 156-57; *McMillan*, 477 U.S. at 91. The Eleventh Circuit has followed this Supreme Court precedent by upholding sentences in which the trial court considered and relied upon conduct underlying an acquitted charge in arriving at its ultimate sentence, as long as that conduct was proved by a preponderance of the evidence. *See, e.g., United States v. Cavallo*, 790 F.3d 1202, 1232-34 (11th Cir. 2015); *United States v. Maddox*, 803 F.3d 1215 (11th Cir. 2015) (Eleventh Circuit upheld an enhancement for brandishing a firearm for a defendant who was convicted of robbery, but acquitted of a § 924(c) offense); *United States v. Campbell*, 491 F.3d 1306, 1314 (11th Cir. 2007); *United States v. Barakat*, 130 F.3d 1448 (11th Cir. 1997) (Eleventh Circuit upheld the tax guideline enhancement for defendant who was convicted of tax evasion, but acquitted of mail fraud; court could consider income derived from criminal activity).

The proposed amendment, which is due to take effect November 1, 2024, states as follows:

> (c) Acquitted Conduct – Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

The Commentary to the Guideline amendment states:

> Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.

U.S.S.G. Amendment to §1B1.3 (Effective Nov. 1, 2024).

The defendant's request to this Court to apply this Guideline amendment is extraordinary because: (1) the Guideline amendments have not become effective, which leaves time for Congress to legislate to the contrary; (2) there is no indication that this amendment will be retroactive; and (3) most importantly, asking the Court to disregard acquitted conduct runs counter to binding Eleventh Circuit precedent, some of which is cited above. The Court has an obligation to accurately calculate the applicable guideline range, which is based in large part on the loss amount that – under current Supreme Court and Eleventh Circuit precedent – includes acquitted conduct proved by a preponderance of the evidence. *See United States v. Hamaker*, 455 F.3d 1316, 1336 (11th Cir. 2006) (district court has an obligation to "'calculate correctly the sentencing range prescribed by the Guidelines,'" which involves consideration of "not merely the charged conduct, but rather all 'relevant conduct,'" including "uncharged and acquitted conduct"). At most, the defendant can ask the Court to consider a variance on the basis that he was acquitted of certain charges.

In the Commentary to the Guideline amendment, the Sentencing Commission said, "nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C.§ 3661." That provision states that "[n]o limitation shall be placed on the information concerning the background, character, and 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." In other words, the Sentencing Commission indicated that "acquitted conduct" can be considered as a sentencing factor under Section 3553(a). Indeed, Section 3661 codified the fundamental authority of a sentencing judge to "exercise a wide discretion in the sources and types of evidence used to assist

[her] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *Dillon v. United States*, 560 U.S. 817, 828 (2010) (observing that "[j]udges in this country have long exercised discretion of this nature in imposing sentences within established limits in the individual case.").

<u>Convicted & acquitted conduct in this case:</u>

The defendant was charged with, and was convicted of, devising a scheme to defraud the SBA and private lenders by making materially false and fraudulent representations in order to receive money from PPP and EIDL loans to which his companies were not entitled. The superseding indictment sets forth the defendant's scheme to defraud the SBA and the private lenders. For the purpose of executing that scheme to defraud, the defendant transmitted or caused to be transmitted numerous interstate wire communications, nine of which are described in Counts 1 through 9 of the superseding indictment. The defendant was convicted as to 4 of the 9 wire fraud counts, which required the jury to find the defendant guilty as to an essential element of those counts – that the defendant devised the scheme to defraud described in the superseding indictment. The defendant was also convicted on 2 of 5 aggravated identity theft counts.

The defendant was acquitted of the following charged conduct relating to the HM Four EIDL loan: (1) Count 1, wire transmission of the intake application; (2) Count 2, wire transmission of the false Mattress One lease; (3) Count 3, wire transmission of the false Suntrust Bank letter; (4) Counts 10, aggravated identity theft involving M.S., the purported signer of the

Mattress One lease; and (2) Count 11, aggravated identity theft involving H.B., the purported signer of the Suntrust bank letter.

The defendant's scheme to defraud included conduct associated with the HM Four EIDL loan, which conduct extended over a period of time between October 20, 2020 through the time the loan was funded, November 23, 2020. The conduct included numerous wire transmissions containing false information, some of which conduct the defendant acknowledged when he testified. For instance, the defendant admitted he was the applicant on the HM Four loan using his wife's name. Tr. 1/9/24 A.M., at 83-84. It cannot be disputed that the defendant intentionally deceived the SBA about the actual banking activity of HM Four. It was undisputed that the defendant opened an HM Four bank account on the same day that he applied for the loan, October 22, 2020; that he transferred $60,000 from the Alafaya Trails account to the HM Four account on November 16, 2020, after the SBA requested to see an actual bank statement (as opposed to a banker's letter); that he submitted the bank statement to the SBA on November 17, 2020; and that he transferred $50,000 from the HM Four account back to the Alafaya Trails account on that day, November 17, 2020. Tr. 1/9/24 P.M., at 12-13; Govt Exhs. 58-5, 58-7, 39-12. The defendant also admitted that he sent the November 17, 2020 email to the SBA with the bank statement attached, and that the email contained false information about the HM Four account (e.g., "This account is used for ach or wires to fund either the payroll account and vendor account for the work that is ongoing."). Tr. 1/9/24 P.M., at 13-14; Govt. Exh. 58-4.

The conduct underlying the HM Four EIDL was extensive and encompassed numerous lies, many of which were uncontested, as noted above. Even if this Court were to give the defendant the benefit of the forthcoming amendment, as he requests, the amendment carves out conduct that "also establishes, in whole or in part, the instant offense of conviction." Thus, this Court can and should consider the conduct described above involving the HM Four loan as part of the defendant's scheme to defraud the SBA.

With respect to the Alafaya Trails second draw PPP loan application to PayPal/WebBank, the defendant was acquitted of the following charged conduct: (1) Count 4, wire transmission of the application information; (2) Count 6, wire transmission of the false and forged 2020 tax return; and (3) Count 12, aggravated identity theft involving accountant Neal Cupersmith, the purported preparer of the false tax return.

The evidence relating to this loan application and the defendant's conduct spanned a period of nearly two months, between January 19, 2021, and March 10, 2021, and numerous wire transmissions containing false information. For instance, the jury convicted the defendant on Count 5, which involved the wire transmission of the false Forms 941 to support the payroll figures for this loan application on behalf of Alafaya Trails, a company that never had a single employee. The defendant also submitted a false and forged 2019 tax return, a false "labor report" listing "wages paid," false Florida Department of Revenue forms with the names of purported employees, and multiple SBA forms 2483 with changing employee numbers to fit the processing priorities of the SBA. Govt. Exhs. 19-5, 19-6, 19-9, 19-12, 19-16.

As noted above, the language of the amendment allows acquitted conduct to remain as relevant conduct when "such conduct also establishes, in whole or in part, the instant offense of conviction." With respect to the Alafaya Trails second draw PPP application to PayPal/WebBank, the acquitted conduct in Counts 4 and 6 relates to the offense of conviction involving the transmission of the false Forms 941 (Count 5). The Forms 941 (Count 5) have no connection to the fraud scheme standing alone; they were submitted in support of the PPP loan application to PayPal/WebBank. The submission of the application information, which is the underlying conduct of Count 4, helps to establish the offense of conviction involving Count 5. Thus, if the Court were to remove from consideration acquitted conduct underlying Counts 4 and 6 based on the upcoming amendment, the language of the amendment itself requires the Court to include the conduct underlying Count 4 because such conduct helps to establish the offense of conviction involving Count 5.

The acquitted conduct forms part of the defendant's scheme to defraud the SBA and the lenders. Accordingly, this Court should consider it as part of the defendant's sentence whether or not the Court affords the defendant the benefit of the forthcoming relevant-conduct amendment.

C. What the defendant characterizes as "uncharged conduct" was part of the scheme to defraud and relevant conduct.

The defendant argues that each of the EIDL and PPP loan applications that was not an individual wire fraud count is "uncharged conduct" that was neither charged, nor does it constitute relevant conduct for the Court to include as part of the loss amount. The defendant's arguments lack merit, as he is asking the Court to exclude from the loan amount conduct that was part of the defendant's scheme to defraud and that clearly constitutes relevant conduct under the Sentencing Guidelines.

The loans or loan applications at issue are the following: (1) the April 15, 2020 PPP loan application from Alafaya Trails to PayPal/ WebBank, which was funded in the amount of $146,457, and for which the defendant applied and was approved for loan forgiveness in 2021; (2) the four EIDL applications submitted to the SBA on a single day, July 24, 2020, on behalf of HM Management, Alafaya Trails, Alafaya Trails-TRU, and Sheppard Flagler Holdings, two of which were funded (HM Management and Alafaya Trails); (3) the HM Six EIDL application, submitted to the SBA September 20, 2020, which was denied the day before the defendant applied on behalf of HM Four using his wife's name; and (4) the three EIDL modifications for the three EIDLs that were funded on behalf of HM Management, Alafaya Trails, and HM Four, which loan modifications began in April 2021, and continued for several months, until November 2021, as the defendant continued to submit false documents in an effort to get the loan modifications approved.

The defendant's scheme to defraud included the submission of the EIDL and PPP applications mentioned here, as well as the loan forgiveness application. The superseding indictment charged a scheme to defraud the SBA and the lenders between approximately April 2020 and March 2021. The only conduct that fell outside of that time period were the loan modifications, which were a continuation of the three funded EIDLs. The government's evidence of the charged scheme to defraud involved the defendant's continuous, unrelenting efforts to receive these extremely favorable government-backed loans, with the submission of false information, changing information as needed, all with the single purpose of having the loans approved and funded. Indeed, the Court permitted the government to present evidence of these loans and loan applications during the trial as being part of the defendant's scheme to defraud the SBA and the private lenders. The government refers the Court to its Response to the defendant's motion for new trial (DE 215, pp 7-13), in which the government discussed how the so-called "uncharged" loans and loan applications were intrinsic to the charged scheme to defraud, and were part of the same series of transactions as the charged offenses. In other words, these loans and loan applications were in fact charged in the superseding indictment as forming part of the defendant's scheme to defraud.

Even if this conduct is treated as "uncharged" conduct, it constitutes relevant conduct and is properly included in the loss calculation. The Court "shall" take relevant conduct into account in calculating the applicable guideline range. U.S.S.G. §1B1.3(a). The Eleventh Circuit "broadly interprets the provisions of the relevant conduct guideline." *United States v. Behr*, 93 F.3d 764, 765 (11th Cir. 1996). The relevant conduct guideline provides that the base offense level, specific offense characteristics, and adjustments "shall be determined on the basis of" (1) all acts and omissions committed, aided, or caused by the defendant; (2) all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction; and (3) all harm that resulted from the acts and omissions, and all harm that was the object of such acts and omissions. U.S.S.G. §1B1.3(a).

In calculating the loss amount, "the sentencing court retains broad discretion and may rely upon the defendant's relevant conduct, including all acts and omissions in a common scheme, which the government proves by a preponderance of the evidence. . . . [I]n order for two or more offenses to constitute part of a common scheme, 'they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.'" *United States v. Powell*, 509 Fed. Appx. 958, 968 (11th Cir. 2013) (quoting U.S.S.G. § 1B1.3 cmt. N. 9(A)). For the reasons discussed here and in the government's Response to the defendant's motion for new trial (DE 215), these loans were part of the same course of conduct, and part of the same scheme as the offenses of conviction, even if treated as "uncharged" conduct. The common victim was the SBA, the common purpose was to be approved for SBA-funded or SBA-backed loans to which the defendant's companies were not entitled, and the similar *modus operandi* was to provide false information, primarily about employees, and company revenues or rental income, and the submission of false documents in order to satisfy the lenders and the SBA. The evidence of the "uncharged loans" was presented at trial as evidence of the defendant's scheme to defraud. It was proved by at least a preponderance of the evidence, and it is set forth in the PSR at Paragraphs 17-28, 46-54. Because these loan applications constitute relevant conduct, the PSR has properly included them in the loss amount calculation. *See Powell*, 509 Fed. Appx. at 968 (Court upheld loss amount that included relevant conduct of additional mortgage fraud established by a preponderance of the evidence at sentencing); *Behr*, 93 F.3d at 765-66 (Court upheld sentence in wire fraud conviction, where court included losses outside of statute of limitations period as relevant conduct); *United States v. Cobb*, 571 Fed. Appx. 851, 854 (11th Cir. 2014) (same).

Furthermore, the forthcoming guideline amendment involving acquitted conduct makes no change to the inclusion of "uncharged conduct" as part of relevant conduct. The Sentencing Commission's policy statement explained that "uncharged, dismissed, or other relevant conduct" was expressly excluded from its acquitted-conduct amendment. *See* United States Sentencing Commission Report, 2024 Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (April 30, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

The defendant claims it is unfair for the Court to consider "uncharged" loans or uncharged conduct in the loss amount, especially because some of that conduct was included in the original indictment and then removed in the superseding indictment. According to the defendant, prosecutors could simply "undercharge" a defendant in an indictment and then "inflate" the loss amount with evidence of "relevant uncharged conduct." This fairness argument has no merit, as the defendant's basic complaint is against the concept of allowing relevant conduct to be included in the guidelines calculation in the first place. The Supreme Court and the Eleventh Circuit have rejected a due process claim against the use of acquitted conduct – never mind uncharged conduct – to enhance a guidelines sentence. *See, e.g.*, *Watts*, *supra*, 519 U.S. at 157; *United States v. Merry*, No. 21-12926, 2022 WL 3570925, at *1 (11th Cir. Aug. 19, 2022), cert. denied, 143 S. Ct. 2692, 216 L. Ed. 2d 1257 (2023); *United States v. Faust*, 456 F.3d 1342, 1347–48 (11th Cir. 2006) (rejecting a Sixth Amendment challenge to the use of acquitted conduct to enhance a guidelines sentence).

D. <u>The "government benefits" rule has no application here</u>.

The defendant argues that the proceeds from the PPP and EIDL loans constitute "government benefits" under the guidelines, § 2B1.1(F)(ii), and that because the defendant spent $4,001,962.56 on "permissible purposes" under the PPP and EIDL programs, those $4 million should be credited against the intended loss amount of $2,816,333, resulting in a loss amount of zero. Def. Obj. at 14-17. This argument has no merit and should be rejected.

The Commentary to the fraud loss amount guideline (§2B1.1) has a category of "Special Rules" for determining loss that includes "government benefits." U.S.S.G. § 2B1.1, cmt. 3(F)(ii). It states that "[i]n a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be." It then sets forth a single example that captures the essence of this rule: "if the defendant was *the intended recipient* of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50." *Id.* (emphasis added).

The government has found no case in which PPP or EIDL funds have been treated as government benefits under this specific guideline provision.[3] Assuming, *arguendo*, that PPP and EIDL funds constitute "government benefits" under this provision, the defendant may not deduct a single dollar from the loss amount based on this rule because the defendant was not *an intended recipient* of the loan proceeds in the first place. If the rule applies, the defendant's businesses were "unintended recipients" of the PPP and EIDL funds.

Every lender who testified about the PPP loans for which the defendant's businesses applied testified that the defendant's loan amount would have been zero if the application had contained truthful information that the defendant had no employees and only made payments to independent contractors. The defendant's claim that the forgiveness of the first PPP loan (Alafaya Trails to PayPal/ WebBank) is "further" evidence that the defendant was entitled to those funds is absurd. The defendant's loan forgiveness application contained equally false information that Alafaya Trails had spent the loan proceeds during the six months following disbursement of the loan (the covered period) on employee "wages," when in fact, the evidence established that Alafaya Trails had no employees at any time. *See* PSR at ¶ 20.

As for the EIDL applications, these too were false, as the defendant's businesses had not sustained an economic injury, did not have lost rents, and the applications contained false information about revenues, cost of goods sold, and number of employees. With regard to HM Four, HM Six, Sheppard Flagler Holdings, and Alafaya Trails – TRU, these businesses had no operations and thus, were not entitled to receive any "working capital" EIDL funds from the SBA.

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[3] The government believes that funds that Congress authorized to be spent through the PPP and COVID-EIDL programs do constitute a "benefit" but has found no cases interpreting this guideline provision in the PPP/EIDL context. *See* 18 U.S.C. § 1040.

See PSR at ¶¶ 9, 13-14, 26-31. With respect to HM Four, in particular, this entity was the owner of Alafaya Trails, which had already received an EIDL, and so the defendant disguised HM Four as an independently operating business in order to double-dip into EIDL funds to which his company was not entitled.

III. The Court should impose a sophisticated means enhancement.

The defendant objects to the PSR recommendation to apply a two-level enhancement for the use of sophisticated means under U.S.S.G. § 2B1.1(b)(10)(C). This Court should overrule the defendant's objection and apply the sophisticated means enhancement.

Section 2B1.1(b)(10)(C) of the Guidelines states that if "the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, the offense level is increased by two-levels." The commentary to the enhancement provides that it applies to "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1, note 9(B). It then gives two examples of sophisticated means, one pertaining to the execution of an offense, the other pertaining to the concealment of an offense:

> For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct 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. Each action itself need not be sophisticated; "it is sufficient if the totality of the scheme was sophisticated." *United States v. Barrington,* 648 F.3d 1178, 1199 (11th Cir. 2011) (explaining that "[r]epetitive and coordinated conduct, though no one step is particularly complicated, can be a sophisticated scheme") (quoting *United States v. Finck*, 407 F.3d 908, 915 (8th Cir.2005)). A district court's finding that the defendant used sophisticated means is reviewed for "clear error," and will not be disturbed if the court's "decision is supported by the record and does not involve a misapplication of a rule of law." *Barrington*, 648 F.3d at 1199; *United States v. Rodriguez De Varon*, 175 F.3d 930, 945 (11th Cir. 1999).

In *United States v. Bruey*, 2023 WL 9016349 (11th Cir. Dec. 29, 2023) (unpublished disposition), the Eleventh Circuit upheld a sophisticated means enhancement involving a defendant who had submitted 11 EIDL applications and 12 PPP loan applications totaling approximately $2 million, and had been received approximately $880,000 in funds.[4] The defendant had created false documents, including "fraudulent tax returns for different years claiming business income between $96,000 and $226,540, and income statements that aligned with the income claimed on those tax returns" as well as "a fraudulent 2019 Form 1040 Schedule C tax document," which according to the IRS, she had not filed. *Id.* at *2. In *Bruey*, the district court had concluded that "the totality of what occurred here rises to the level to deserve this enhancement. *Id.* at *3.

Likewise here, the defendant's conduct was coordinated, repetitive, and indeed, sophisticated. The defendant submitted false information and falsified records, including false and forged income tax returns, to support numerous loan applications that warrant a sophisticated means enhancement for the execution of the offense. PSR at ¶¶ 16-50.

[4] The direct issue before the Eleventh Circuit in *Bruey* was whether the district court had incorrectly applied the sophisticated laundering enhancement (§ 2S1.1(b)(3)) instead of the sophisticated means enhancement, because the PSR in that case had incorrectly cited the sophisticated laundering provision. The Eleventh Circuit concluded that the district court had correctly applied a two-level enhancement under the sophisticated means guideline, not the sophisticated laundering guideline. *Id.* at *6.

With respect to the PPP loan applications, the defendant submitted false and forged income tax returns for Alafaya Trails and for HM Management, dated February 2021, many months before accountant Neal Cupersmith began to prepare the real tax returns. PSR at ¶¶ 37, 38, 41-44, 46-49. The defendant prepared those partnership tax returns, with false entries for salaries and wages, and revenues, without the input of his accountants. When PayPal denied Alafaya Trails' second draw loan application on the basis that they "did not do business with this industry type," the defendant changed the business code on the income tax return and applied to a different lender, Northeast Bank, indicating a business code that referenced the construction industry instead. PSR ¶¶ 40-41, 43; Govt Exh. 19-19 (p. 4/ Bates no. 011500). The defendant also prepared and submitted false and fraudulent tax forms 940 and 941s, and false Florida Department of Revenue forms in support of the loan applications. PSR at ¶¶ 37, 39, 42, 46, 48. Finally, the defendant submitted spreadsheets he called "payroll" or "wages" reports listing purported wages paid to employees that recharacterized payments to contractors and suppliers, or that contained a column for "withholdings" with amounts that were never actually withheld. PSR at ¶¶ 18, 20, 37. These were detailed, false documents intended to corroborate the business activity and the amount of wages paid to employees.

For the EIDL applications, there were many fewer documents requested by the SBA or submitted, but these were also false. The defendant submitted several falsified records to Ms. Palancar at Nationwide that were apparently not forwarded to the SBA. For instance, the defendant supplied Nationwide a false and forged 2019 tax return for HM Management with false salaries and wages, and a document reflecting the "Board Members Meeting Minutes" for HM Management purportedly approving the loan modification. PSR at ¶ 53; Govt Exh. Composite

62, Bates 033848. The defendant also supplied Nationwide false profit and loss statements for Alafaya Trails with fake figures for rental income to justify lost rents that did not exist. PSR at ¶24.

The defendant submitted several false documents directly to the SBA in support of the HM Four EIDL application, such as (1) the timeline listing the defendant's wife as majority owner in 2020, and the defendant as 15% owner; (2) the bank statement that resulted from the transfer of funds into and out of the HM Four bank account to create the false impression of banking activity; and (3) the false email of November 17, 2020, stating that the HM Four account was used for ACH and wire transfers and to "fund the payroll and vendor accounts for the work that is ongoing." PSR at 31-32; Govt. Exhs. 58-4, 58-5, 58-12. The submission of false information and documents continued with the EIDL modifications, even after the SBA sent the defendant declination letters, with the submission of false "Resolution and Certification" documents on behalf of HM Management and Alafaya Trails that misrepresented the management of the businesses and contained the forged signature of the defendant's bookkeeper. PSR at ¶ 54.

The defendant generated false business records, tax returns, and payroll records to support the many loan applications, making changes as needed, all with the goal of being approved for loans to which his businesses were not entitled. There is ample evidence in the record from which the Court can and should find that the totality of the defendant's scheme was sophisticated and warrants a two-level sophisticated means enhancement.

IV. An obstruction of justice enhancement is warranted.

The defendant objects to the recommendation at Paragraph 71 of the PSR to impose a two-level enhancement to the offense level based on his obstruction of justice under § 3C1.1. The commentary to the obstruction of justice guideline gives examples of covered conduct, which includes "committing, suborning, or attempting to suborn perjury, . . .if such perjury pertains to conduct that forms the basis of the offense of conviction" U.S.S.G. § 3C1.1, cmt. 4(B). Application of the enhancement "requires that a district court 'make an independent factual finding that the defendant gave perjured testimony on a material matter.'" *United States v. Singer*, 963 F.3d 1144, 1165 (11th Cir. 2020) (*quoting United States v. Vallejo*, 297 F.3d 1154, 1168 (11th Cir. 2002)). The Eleventh Circuit defines perjury as "'false testimony concerning a material matter with the willful intent to provide false testimony.'" *Singer*, 963 F.3d at 1164-65 (*quoting United States v. Duperval*, 777F.3d 1324, 1337 (11th Cir. 2015)). The Eleventh Circuit reviews a district court's factual findings for "clear error" and it "do[es] not second-guess the district court's credibility determination." *Singer*, 963 F.3d at 1164-1166; *United States v. Singh*, 291 F.3d 756, 763 (11th Cir. 2002).

PSR Paragraph 58

The falsified PPP loan applications and supporting documents relating to the wire fraud counts of conviction (Counts 5, 7, 8 and 9) as well as the relevant conduct, involved submitting payroll and employee information and documents that falsely reported employer's payment of salaries, wages and benefits paid to W-2 employees. Payments to independent contractors did not count toward the payroll calculation. The employer/applicant's payroll amount was essential because it was used to calculate the total loan amount.

In connection with Count 5, the defendant submitted false Forms 941 for Alafaya Trails, that falsely reported quarterly employee wages, federal income tax withholdings on those wages, as well as social security and Medicare taxes owed the IRS on those wages. Count 7 relates to the false second draw PPP loan application the defendant submitted to ACAP SME/ Northeast Bank that reported false payroll figures for Alafaya Trails. Count 8 relates to the false and forged income tax return for Alafaya Trails that the defendant submitted with false entries for wages and revenues. Count 9 relates to the false PPP loan application the defendant submitted to Cross River bank on behalf of HM Management with false payroll figures; a false Form 940 that reported false annual wages to employees, and federal unemployment tax amounts, and a false and forged income tax return that falsely reported salaries and wages for HM Management.

The defendant's testimony was intentionally and materially false when he denied that he made decisions regarding who were W-2 employees or contractors at his companies; when he denied that he knew whether the people he paid were his employees or independent contractors; and when he denied that he knew anything about employer withholdings of employee wages and IRS obligations. The defendant repeatedly conveyed to the jury the false notion that he was unaware and uninformed about such matters, when he actually was.

The evidence established that HM Management was the only one of the defendant's companies with employees; that historically, it had only three to four employees; that in the last year of employer payments to the IRS and to the Florida Department of Revenue (2018), it had three employees; and that those three HM Management employees were two people who actually did work for HM Management (bookkeeper and bookkeeper's daughter), and the defendant's housekeeper. It is not credible to suggest that the decision to treat the defendant's housekeeper as an HM Management employee would be made by Jeff Graff or by the defendant's bookkeeper.

<u>Examples of the defendant's false testimony</u>:

On direct examination, the defendant was asked the following questions and gave the following false and misleading answers:

> Q: Do you recall Mr. Graff's testimony that Eric Sheppard, you, decided who was a 1099 and who was a W-2?
> A: I do.
> Q: Is that correct?
> A: No.
> Q: What was – what was the level of your focus on who's a 1099 versus W-2?
> A: I never like thought about it. I've never – that's never about in my wheelhouse about that kind of stuff.
> . . .
> You know, we're not a big corporation. We're just a regular company, and they're employees. I mean, if they're working for myself, or working with the project, or – everyone works together, you know . . . . whether it's on a job site, whether it's here or there, that's what they are, they're – to me, they're workers. They're people. I don't get involved with how they fill out the paperwork or how they – that kind of stuff.

Tr. 12/19/23 A.M., at 35-36.

> Q: Did you know if you had W-2s versus 1099s in your company?
> A: I never – I never asked that question. It's not a topic of conversation.

Id. at 40.

The defendant sought to contradict Jeff Graff's testimony, by stating that it was Mr. Graff's idea and decision to convert himself from a W-2 to a 1099 independent contractor. The defendant said that he remembered Mr. Graff "coming up to me and talking to me about it." *Id.* at 43.

On cross-examination, the defendant denied he made decisions for his company (HM Management) about W-2 employees versus 1099 contractors:

> Q: I'm speaking about let's say 2017, 2018, 2019, 2020, 2021, did Ms. Jeannette Gonzalez decide if she was going to be a W-2 or a 1099 for herself?

> A: I don't know what she decided she was going to be. . . . I wasn't involved with that process.

Tr. 1/8/24 A.M., at 113.

> Q: So your testimony that [you don't] decide whether Maria Ataca is a W-2 employ[ee] o[r] a contractor, an independent contractor?
> A: I don't decide how someone's class[ified]. Whatever they are hired by or work for directly, that's who decides how they're doing it. I don't, I don't decide.
> Q: Elba Baluarte who works in your home has always worked in your home. You don't decide if she's a W-2 or a 1099?
> A: I don't know how she was designated, you know, years and years ago. She gets a gross pay; how it's done, I don't know. I typically just pay the account, the payroll account whether it's ADP or to the company. That's how it usual[ly] works. I don't know how she's classified.

Tr. 1/8/24, P.M., at 51-52.

On direct examination, the defendant was asked about Alafaya Trails' first PPP loan application to PayPal, where he indicated that he had 80 employees. The evidence at trial established that Alafaya Trails never had any employees.

> Q: What about the fact that – what about the issue of W-2 versus 1099? At what part of – did that go into your thinking at all when you were typing in 80 for employees?
> A: Not for a second. I don't think about that kind of stuff.
> Q: Why?
> A: It's just not – again it's employees they are working on the project Jeff was converting these people so I just think about employees that are working directly for us. So that's what I looked at.

Tr. 12/19/23 P.M., at 36.

On cross examination, the defendant was asked about the laborers whom Alafaya Trails paid under the Burlington project, and he falsely denied knowing they were independent contractors:

> Q: You were writing checks that you would provide to Mr. Jeff Vasilas, who would take [them] back to Orlando to pay the laborers, correct?
> A: Correct.

Q: And all those laborers were 1099 contractors, correct?
A: I don't know what they were. They're workers. That's up to Jeff. I just went off payroll reports, the payroll report. I don't know what they were. I never said what they were when I wrote a check. . . .

Tr. 1/8/24, P.M., at 29.

Despite acknowledging that he knew what were employer withholdings of an employee's pay, the defendant claimed not to know anything about the employment status of the Burlington project laborers whom he paid as independent contractors, and whom he falsely claimed as employees on the Alafaya Trails loan applications:

Q: You do know what withholdings are, right?
A: Yes. I know what withholdings are.

Id. at 29-30.

Q: So when you were writing checks during COVID to the laborers in Orlando, it was just a flat check, I mean a flat amount. You, your company HM-UP or HM Management was not keeping any portion of the amount that was owed to that laborer, that's my question.
A: I have no idea. I got a report. I wrote a check to an individual based upon – because we usually used a computer. It was, it's always done by computers because of COVID. There was – either I wrote it or Jeff Vasilas wrote it and whatever the payroll report says, I just wrote a check.
. . .

Q: The payroll report that you saw on the computer that had payments to laborers, it did not have withholdings for laborers who were not your employees, correct?
A: I have no idea what the payroll report says. I – four years ago, what the payroll report says . . ..

Id. at 34-35.

Q: And the tax returns for HM-UP Development Alafaya Trails never reported any wages, correct?
A: I have zero idea how to answer that question because I'm not an accountant. . . .

Id. at 37.

When questioned about the false 2020 labor report submitted in support of the Alafaya Trails forgiveness application, Govt Exh. 18-3, the defendant even denied knowing whether he himself was paid wages, as listed on the report:

> Q: (displaying Govt. Exh. 18-3) Eric Sheppard wages, you never got any wages, Mr. Sheppard?
> A: Okay. If that's what you say. I don't know if that's true or not. I can't tell you that, how she defines it. I don't know. I didn't prepare it.

Tr. 1/9/24 A.M., at 43-44.

<u>Evidence showing that the defendant's testimony was false:</u>

Aside from the inherent absurdity of the defendant's answers to basic questions about his businesses, and the fact that the defendant knew full well that he ran a real estate and management company which historically had three employees, one of whom was his housekeeper, other evidence that the defendant gave intentionally false testimony on the issue of whether he had wage employees is the following:

(1) Government Exhibits 79-1, 79-2, and 79-3, which are excerpts from the defendant's deposition testimony in February 2019, in civil litigation involving his former partner, Leon Wildstein, in which he readily acknowledged knowing who were contractors, who were employees, and the employer obligations to pay payroll taxes on behalf of employees.

(2) Unimpeached testimony of Jeff Graff:.

> Q: Who made the decision to convert you from a W-2 employee to a 1099 independent contractor?
> A: Eric Sheppard
> . . .
> Q: Who decided whether you were – for HM Management -- an independent contractor or a W-2 employee?
> A: Eric Sheppard
> . . .
> Q: Who at HM Management, if you know, decided whether Jeanette Gonzalez was paid as a W-2 or as an independent contractor?

[Objection overruled]
A: Eric Sheppard
Q: Who at the company decided whether Vanessa Gonzalez was a w-2 employee or an independent contractor, if you know?
A: Eric Sheppard
Q: Who at HM Management decided whether Elba was a w-2 or a 1099 independent contractor?
[Objection overruled]
A: Eric Sheppard
. . .
Q: Do you know whether the defendant knew the difference between a w-2 employee and a 1099 contractor?
A: Yes, he knew the difference.
. . .
Q: Did any of the defendant's businesses have any w-2 employees during the time that you worked with the defendant, except for HM Management?
A: No.

Tr. 12/6/23 P.M., at 7, 27, 30-31, 31-32, 37

Q: [Referring to the Burlington project] Did that project require contractors such as electricians, painters, engineers?
A: Yes
Q: Were those folks folded in as W-2 employees of HM Management at any point?
A: Not to my knowledge.
Q: Would they be? I mean?
A: No.

Tr. 12/11/23, at 161.

(3) The defendant's accountant, Neal Cupersmith, testified that none of the defendant's companies had employees, except for HM Management. Mr. Cupersmith's testimony was corroborated by the income tax returns that were admitted into evidence from his files, as well as the IRS records showing the absence of filing Forms 940 and 941 (Govt Exhs. 12-2 through 12-6, 13-4, 13-5, and the Florida Department of Revenue records (Govt Exh. 16-1).

(4) The defendant's letter to counsel handling his visa application matter, Govt Exh. 50-5, in which the defendant makes the unequivocal statement that he had complete authority to

make all decisions for HM Management, and that Mr. Graff was a consultant and not an employee of HM Management.

PSR Paragraph 59:

The jury convicted the defendant of Count 5, the submission of the false Forms 941 to PayPal on behalf of Alafaya Trails' second draw PPP loan application. The defendant was also convicted of Counts 7 and 9, which included the submission of falsified IRS Forms 941 and 940. The defendant's testimony about the Forms 941 (and 940) was materially false and the jury did not believe him.

Examples of the defendant's false testimony:

Q: [Referring to the Forms 941, 940, RT-6s (Florida Department of Revenue forms)] Do you have a memory of ever signing any of those documents?
A: I do not.
Q: If they were given to you by Jeanette Gonzalez or Jeff Vasilas, would you have signed them?
A: yes.
Q: Would of reviewed them first?
A: No.

Tr. 12/19/23 A.M., at 39.

Q: Now, at the time, if – did you understand that 940, and 941s were only for W-2 and that your people didn't have W-2 or didn't have a lot of W-2, did you understand that at the time?
A: I did not.

Tr. 1/8/24 A.M., at 42.

Q: I just want to clarify for this jury, Mr. Sheppard, are you telling this jury that Jeanette Gonzalez prepared – provided to you in some way the false Forms 941, the false Forms 940, the false Florida Department of Revenue forms that you've, that you found and that you reviewed later, and that appeared in the loan documents that re[late] to this case?
A: . . . I'm not saying that she did anything yes or no. . . . However, when I – after I was arrested, then I was put – then they did discovery; it was the first time

> I've ever seen those documents. . . . I'm not saying yes, no, I don't know who, what, or where did that.

Tr. 1/8/24 P.M., at 17-18.

> Q: And are you saying Mr. Sheppard, that you – before this case came along and before you were arrested, you had never heard of or seen forms 941 and the forms 940? Something you had never seen before?
> A: I have never looked at a 940 or 941 with regards to like – sat there and looked at it or understood it. . . . So to answer your question, no. I do not get involved or never looked at these 940 or 41s to analyze it prior to the day when I received the information after I got arrested.

Id. at 39-40.

> Q: All right. Now, on February 11, there were – with respect – going back to the PayPal loan application from January 2021 for HM-UP Development Alafaya Trails, you know that on February 11, 2021, there were these Forms 941 provided to PayPal, right?
> A: I don't know what was provided to PayPal, and – on February 11th, 2021, I don't know what was actually provided to them.
> . . .
> Q: [Referring to defense exhibit P-1, email to PayPal dated 2/11/2020] that's your email address, correct?
> A: Correct.
> Q: And you told PayPal: I received the 941s, from 2020 from our accounting department and submitted them to the portal, right, that's what you wrote?
> A: Well, I didn't write that, but that's what I see here, correct.
> Q: Someone else wrote that for you?
> A: … I didn't handle this. Jeff handled it. I was involved when he asked me questions. And that's my involvement with it.
> . . .
> Q: And then the false 941s, that we've seen were submitted on that day to PayPal, correct?
> A: I don't know when they were submitted because I didn't submit them, so I don't know when they were submitted, but I did see those – what you're talking about, those 940s or 41s, whichever they are.

Tr. 1/9/24 P.M., at 17-19.

The defendant was then shown the Forms 941 that were submitted as part of the Alafaya Trails second draw PPP application to PayPal (Govt. Exh 19-8), and he falsely denied that they contained his handwriting or his signature. *Id.* at 19-20.

Evidence showing that the defendant's testimony was false:

Evidence of the defendant's false testimony was the defendant's own exhibit, P-1, his email to PayPal on February 11, 2020, telling PayPal that he had just submitted the Forms 941 to them. The PayPal witness, Jammie Hutcheson, testified that the Forms 941 were electronically submitted to PayPal on February 11, 2020. Tr. 11/30/23 A.M., at 33.

In addition, Jeff Graff testified that he recognized the defendant's handwriting and signature on the Forms 941 (Govt Exh. 19-8). Tr. 12/6/23 P.M., at 57-58, 59; Tr. 12/12/23 A.M., at 46-47. The jury was also shown bank withdrawal slips and checks written by the defendant to compare for themselves the handwriting and signature of the defendant against the Forms 941. Govt. Exh. 39-9; Tr. 12/6/23 P.M., at 54-57; Tr. 1/11/24, at 72.

More generally as to the Forms 941 and 940 that the defendant submitted in support of the Northeast Bank and Cross River Bank loan applications (Counts 7 and 9), the defendant's signature appeared on those forms as well. *See* Govt. Exhs. 20-8, 22-4. The defendant gave intentionally false testimony, and the jury did not believe the defendant when he said that he saw the false tax forms for the first time when he reviewed the discovery in this case.

PSR Paragraph 60:

The defendant gave intentionally false testimony that he had received advice from his accountants in April of 2020 the PPP, and specifically about which of his companies should apply for PPP, and the year for which he should provide employee data. Furthermore, the defendant testified that the accountants did not flag for him any issue regarding W-2 employees (or the absence of W-2 employees), falsely suggesting to the jury that he had received approval from his accountants to apply for PPP loans.

> <u>Examples of the defendant's false testimony:</u>
>
> Q: In terms of getting assistance generally for the first PayPal loan application process, who did you speak to get help? Who do you recall speaking to?
> A: Well, I spoke to Neal Cupersmith, Alex Zaslow. And I was taking information from what Jeff Graff told me.

Tr. 12/19/23 P.M., at 39-40.

> Q: Did you have – did you speak to the accountants around this time period?
> A: yes.
> Q: What do you recall about that?
> A: I recall they emailed – we emailed back and forth about setting a time to call because I'm trying to get guidance about this application. And we set up a phone call and had a phone call regarding that. . . .
> Q: And what do you recall about the discussion with the accountant about – as reflected here – or about this?
> A: I don't remember all the conversation.
> [Objection overruled]
> A: (Continued) I asked him about the 2019, compared to 2020, and that's when they said you have to use 2019 workers and he said you can get – Jeanette knows all about this stuff, and I said okay. And he also said from – how do you call it, an LLC, he was telling me that it really should be HM Management.
> [Govt. Counsel asks for clarification, as to who the defendant is talking about]
> A: I'm sorry, I apologize. Neal Cupersmith and Alex Zaslow, we were on the phone and they specifically told me you can't use – HM-UP is 2020; like I told you before, it's 2019. You have to use those people from then. And that was the end of the conversation. . . .
> Q: At any point in the conversation, did either CPA tell you: Eric, what are you talking about, you don't have W-2, you shouldn't be doing this?
> A: No.
> Q: Had they told you that, what would you have done?
> A: If my accountants told me that it was W-2, then I would just have gone back to my normal business.

Id. at 42-44.

> Q: [Referring to defense Exh. Q34- email setting up call with accountants on 4/22/2020]

> And your testimony is that that conversation had to do with government loans, PPP loans?
> A: Government loans. I don't – I – I don't know the exact detail of the conversation. But that was the intent of the conversation. That was the intent.

Tr. 1/9/24 A.M., at 12-13.

> Q: All right. So I just want it to be clear for this jury. During that call [with Mr. Cupersmith and Mr. Zaslow], you asked them for advice regarding PPP loan applications?
> A: I believe that was our conversation. More about the structure of the company and the PPP loan and whatever was out in the market because it was brand new. I asked them about it. Yes.
> . . .
>
> Q: So you asked them whether you qualified for any PPP loans?
> A: Yes. I was asking – again, I cannot tell you exactly the specific conversation, but it was regarding the PPP loans with the PayPal stuff.
> Q: And they gave you advice that you could apply for PPP loans, and that you qualify for PPP loans, and that you should do it?
> [Objection overruled]
> A: Again, simple, I called the accountants, along with other people. I asked what am I allowed to do with my company, my company for that PPP loan. That's all I asked.

Id. at 17-18.

> Q. So you told the accountants that you had applied on behalf of HM-Up for this PPP loan application and their advice back to you was: No. You should have applied on behalf of HM Management. Is that what they told you?
>
> A. Again, I don't know the exact conversation from four years ago, but it was -- the only thing I remember talking about was HM Management is the company that should apply for the -- the PPP loan. That's my recollection. And –

Id. at 18-19.

> Q: So did you tell them that you were applying on behalf of 80 employees?
> A: I told them that I am supposed to apply for workers in 2020. And I was told no, it was 2019. And that's why they said you had to adjust it from – forget the 80 in 2020. You had to adjust it to 11 in 2000 [sic] – eleven or 5, I don't remember the exact number … But they said no, you have to use the data from 2019. Okay, and you can't use your workers in 2020 that you're paying. You have to use past workers.

Id. at 20.

Evidence showing that the defendant's testimony was false:

Both Neal Cupersmith and Alex Zaslow testified unequivocally that they never had a conversation with the defendant about government loans, the PPP or EIDL loan programs. For instance, Mr. Cupersmith testified as follows:

> Q. Did the Defendant at any point when COVID began reach out to you to ask about how to qualify for a PPP loan?
> A. No, he did not.
> . . .
> Q: Did the defendant reach out to you to ask how to apply for an EIDL loan?
> A: No he did not.

Tr. 12/12/23 P.M., at 18-19.

During Mr. Zaslow's testimony, he explained Government Exhibit 81, which was an email from April 21 2020, setting up the call that he and Mr. Cupersmith had with the defendant the following day. As set forth above, the defendant testified that the accountants had given him advice about his PPP loan application during the call. Mr. Zaslow testified as follows:

> Q: What was the situation you discussed in that call with the Defendant?
> A: That he had not paid us for the returns that we prepared and we weren't going to release them until he did.
> Q: All right. In that conversation, did Mr. Sheppard ask you anything about Paycheck Protection Program loans?
> A: No. He did not.
> Q: Did he ask you anything about Economic Injury Disaster Loans?
> A: No. He did not.
> Q: Did he ask you anything about any government loans?
> A: No he did not.
> Q: Did he ask you whether you know as to what company should be applying for any type of government loan?
> A: No he did not.
> Q: Did he ask you about what tax year or what year – what year's figures or number of laborers he should be using for any type of loan?
> A: No he did not.

> Q: Did you provide him – you or --was Mr. Cupersmith on that call as well?
> A: yes.
> Q: Did you or Mr. Cupersmith provide him or offer him any advice given the time frame we were talking about, April of 2020, did you provide him – irrespective of whether he requested it – did you provide him any advice regarding applying for any government type of loan?
> A: No. We provided no advice on the government loans.
> Q: Did you subsequent to that conversation that occurred shortly after this email – did you at any point in 2020 or in 2021 provide Mr. Sheppard any advice regarding any COVID related government loan?
> A: No we did not.

Tr. 1/10/24 P.M., at 137-38.

The juxtaposition of the defendant's testimony and the accountants' testimony forecloses the possibility that the defendant had a faulty memory. It demonstrates that the defendant made up the entire conversation and the advice that his accountants purportedly gave him about the PPP, which company should apply, which year's figures he should be using, etc. The defendant gave intentional and materially false testimony in order to convey to the jury that he had acted on his accountants' advice. The obstruction of justice enhancement should be applied on the basis of this testimony alone. *See U.S. v Vera*, 639 F.App'x 580 (11th Cir. 2016) (affirming obstruction-of-justice enhancement were defendant took the stand and flatly denied engaging in drug trafficking, despite two witness's testimony to the contrary).

<u>PSR Paragraph 61:</u>

The defendant made materially false statements denying that he took any part in the preparation or submission of the loan applications and the false supporting tax documents that were submitted to the lenders in 2021. The defendant falsely denied knowing that falsified tax documents were submitted in support of the loan applications, and falsely blamed Jeff Vasilas for being the person who submitted those documents without the defendant's knowledge. The jury did not believe the defendant and convicted him as to Counts 5, 7, 8, and 9, which involve the submission of loan applications with false supporting documents. The jury also found the defendant guilty of aggravated identity theft as to the use of Mr. Cupersmith's identity on the falsified tax returns submitted to Northeast Bank on behalf of Alafaya Trails, and submitted to Cross River Bank on behalf of HM Management.

Examples of the defendant's false testimony:

The defendant testified that it was Jeff Vasilas' idea to apply for the PPP loans in 2021, and furthermore that it was Mr. Vasilas' idea to apply on behalf of both Alafaya Trails and HM Management in 2021 at the same time.

> Q: How did the idea of applying for PPP loans in 2021 – how did that come up?
> . . .
> A: It came up based upon the forgiveness – is what triggered the whole thing with the forgiveness of debt with the PayPal. And when Jeanette and Jeff were doing – putting together the workers, whatever, the schedules or something, I had a conversation with Jeff about the PPP. He suggested like – why don't you, there's a second round thing going on, you can get that. Or you can increase the PPP loan from the people you paid in 2020. Something like that. Just –

Tr. 1/8/24 A.M., at 20; *Id.* at 35.

> Q: What happened next? Mr. Vasilas raises the issue with you. How does it go from there to applying for loans?
> A: He said he knows how to do it. He had some accounting guy, this guy Tim. And that he knows how to do it and it's available. Why wouldn't you do it? I said: . . . If you know how to do it, great. You have all the data. You have all the information. You and Jeanette, you figure out whatever you got to figure out. If you need me, let me know.

Id. at 21.

The defendant testified that he docusigned the loan applications in 2021 (with Northeast Bank and Cross River Bank), but that he did not know Mr. Vasilas had submitted false documents in support of those loan applications.

> Q: . . . were you comfortable signing this when you had de[legated] what you had delegated to Mr. Vasilas?
> A: Because the, it was the second round of the original PPP loan. So I was comfortable with that. And he also discussed it with me prior to. He told me what he was doing. So I was fine with it.
> Q: Did you have any reason to believe he was doing improper or submitting fraudulent documents?
> A: No.

Id. at 43-44.

The defendant also denied having anything to do with the preparation of the false tax returns, or the forgeries of Mr. Cupersmith's signature on the false tax returns. And the defendant denied that he directed anyone else to prepare or sign the fake returns. *Id.* at 77-78. Instead, he falsely pointed the finger at Mr. Vasilas.

> Q: So you mentioned her name [referring to Jeanette Gonzalez] in your direct testimony, but you don't think that she was involved in preparing any false documents in your – that made it to your loans, correct?
> A: What I'm saying is: I do not know exactly who would have prepared something of that nature. I know I didn't prepare it and I know the only people that were involved with that was Orlando and Miami in those departments. Either Jeff Vasilas or her. That's all I'm telling you. . . .
> A: She [referring to Jeanette Gonzalez] never told me she did anything. She said that Jeff is the one who was working on the loans, and Jeff's the one who handles all that because he handles payroll . . . . I can't answer you – Jeff Vasilas is the guy who handles all the employees. . . .

Tr. 1/8/24 P.M., at 19-20.

Regarding the submission of the false Forms 941 that are the subject of Count 5, the defendant said again that Mr. Vasilas was the person who handled the second round loans, and was the one who handled this. Tr. 1/9/24 P.M., at 18. The defendant denied that he submitted the application information and false tax returns involving the Northeast Bank and Cross River Bank loans (Counts 7 through 9). *Id.* at 28, 30-32. The defendant testified falsely that Mr. Vasilas was the one who had committed all this fraud.

> Q: So in his last message [referring to Mr. Vasilas' text message, Govt. Exh. 80-4], he's referring to you as his buddy, right? You're his buddy?
> A: I don't know if it's his last message; I can't tell you that. But this message says bud, yes.
> Q: That's – your, you're his buddy right?
> A: Yes, I was friends with him.
> Q: Which is ironic because your buddy is committing all this fraud behind your back and not telling you, right?
> A: Clearly.
> . . .
> A: When you see actual evidence of what's happened here, it's clear as day and so that I'm – I'm disturbed beyond and trying to ruin my reputation and family by the evidence, not about hearsay. That's upsetting, but it's mixed emotions because I did really, he was my friend, he really was so.

Id. at 54-55.

Evidence showing that the defendant's testimony was false:

The defendant testified falsely, intentionally and by design, when he blamed Mr. Vasilas for the 2021 false loan applications and supporting documents. It is the totality of the evidence against the defendant that supports this conclusion: the fact that the defendant was the sole beneficiary of the fraud; the fact that all of the communication with the lenders occurred with the defendant's email address; the fact that all of the IP addresses captured originated from the defendant's home (aside from the loan applications submitted through the Nationwide portal); the fact that the defendant's signature was reflected on numerous false documents; and the fact that the purported "evidence" from the defendant against Mr. Vasilas involved Mr. Vasilas doing his work as a contractor.

Lastly, the EIDL modification files from the SBA showed that the defendant continued to submit false and forged documents to support his loan applications after Mr. Vasilas died. Mr. Vasilas' last text message to the defendant was dated July 14, 2021 (Govt. Exh. 80-4), and the "Resolution and Certification" documents submitted for the HM Management and Alafaya Trails

EIDL modifications were dated in September 2021. Govt. Exhs. 62-7, 63-5. These documents misrepresented the management of those companies, listing the defendant's wife as a manager. The same documents also contained the purported signature of the defendant's bookkeeper, Jeanette Gonzalez, which looked vastly different from Ms. Gonzalez's signature and handwriting that are on the companies' checks. *See* Govt Exhs. 39-5; 39-9, at 2. The defendant denied knowing what these document were, testified that he would never list his wife as manager of HM Management, or of any company, and that the signature of Ms. Gonzalez on the documents did not look like her signature. Tr. 1/9/24 P.M., at 59-60.

The jury did not believe the defendant's testimony blaming the deceased Mr. Vasilas for the fraud, as reflected in its verdict. The jury found the defendant guilty of wire fraud counts (5, 7, 8, 9) having to do with the loans for which the defendant testified that Mr. Vasilas had handled, as well as the aggravated identity theft counts (13 and 14) involving the use of Mr. Cupersmith's identity on forged tax returns submitted for those same loans.

The defendant testified over the course of three days. He gave perjured testimony on the subjects discussed in Paragraphs 58 through 62 of the PSR, including the examples set forth above. The Court should impose the obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1.

V. Victim impact/ Victim's expenses

<u>Paragraph 62:</u>

Neal Cupersmith is a victim of aggravated identity theft in this case. The government recently received from Mr. Cupersmith an itemized list of expenses he incurred in connection with this case. The government believes that Mr. Cupersmith is entitled to recover attorney's fees and other expenses that he and his partner, Alex Zaslow, incurred in connection with this case and preparing their trial testimony. The government requests that Probation include these expenses in Paragraph 62 of the PSR and that these amounts be added to the restitution amount.

The Mandatory Victims Recovery Act requires the Court to order restitution to a victim for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4). Attorney's fees related to government investigations and prosecutions are generally recoverable under 18 U.S.C. § 3663A(b)(4). *See United States v. Avenatti*, 81 F.4th 171, 208 (2d Cir. 2023); *United States v. Afriyie*, 27 F.4th 161, 171-74 (2d Cir.), cert. denied, 143 S. Ct. 326 (2022); *United States v. Fiorentino*, 149 F. Supp. 3d 1352, 1364 (S.D. Fla. 2016) (awarding attorney's fees to MVRA victim). Mr. Cupersmith incurred approximately $131,550.44 in attorney's fees directly relating to this case.

In addition, the "lost income" or time spent by a victim and his employees in assisting the government's investigation or prosecution can be included in a restitution order under both 18 U.S.C. §§ 3663A(b)(4) and 3663(b)(4). *See, e.g., United States v. Douglas*, 525 F.3d 225, 254 (2d Cir. 2008) (Court affirmed award of restitution under the MVRA, which included the victim's leave of absence from his job in order to testify at trial and assist the government). In this case, Mr. Cupersmith, Mr. Zaslow, and their associates should be reimbursed for their time assisting the government, which consisted of the preparation for Mr. Cupersmith and Mr. Zaslow's trial testimony and the time spent away from their firm's work. These costs total $93,350.

The government has provided copies of invoices from Mr. Cupersmith's counsel and will likewise provide them to the defendant.

VI. Section 3553(a) Factors and Defendant's Request for Downward Variance

The PSR calculates the total offense level to be 25, with an advisory guideline range of 57 to 71 months in prison, plus a two-year consecutive sentence for each aggravated identity theft count (Counts 13 and 14). PSR at ¶ 118. Under the government's calculation, an additional two levels should be added under U.S.S.G. § 2B1.1(b)(12), because the offenses involved conduct described in 18 U.S.C. § 1040, which in turn prohibits fraud involving any benefit paid in connection with a major disaster declaration, such as the funds that Congress authorized to address the COVID-19 pandemic. *See* Govt. Obj. to PSR (DE 235). As a result, the government believes that the total offense level is 27, with an advisory guideline range of 70 to 87 months in prison, plus the mandatory, two-year consecutive sentence for the aggravated identity theft convictions.

The government believes that a sentence within the advisory guideline range is a fair sentence, and not greater than necessary to comply with the purposes set forth under 18 U.S.C. § 3553(a). Looking at the nature and circumstances of the offenses, this case involved fraud upon programs that Congress funded to address a once in a century global pandemic – the PPP and COVID EIDL programs. The defendant sought to take advantage of these programs for businesses that, by the defendant's own admission, did not need the money. The defendant had other sources of income; the defendant had access to credit lines and other loans. The loan proceeds were funds that the defendant simply folded into the same accounts and cash flow that he used to cover his business and personal expenses, with little concern for their repayment, as they were either forgivable, or carried 1% interest, or were otherwise below-market loans (EIDLs).

The Court is already very familiar with the defendant's conduct; the repetitive and unrelenting efforts to qualify for these loans. When the funding for the PPP loans temporarily ran out in late spring of 2020, the defendant turned to the EIDL program in the summer of 2020, and then back to the PPP program the first three months of 2021, and then spent many months attempting to qualify for the EIDL increases/loan modifications in 2021. It is true that the defendant did not create new companies that had not previously existed in order to apply for these loans, but he applied for loans on behalf of several companies that existed only on paper, as owner entities of other companies. In fact, the defendant had to open brand new bank accounts for HM Four, HM Six, Sheppard Flagler Holdings, and Alafaya Trails – TRU, when he applied for loans on their behalf. When the SBA denied the HM Six application on October 21, 2020, stating that their review had "caused the SBA to question the validity of certain information" he had submitted, the defendant waited a whole day – until October 22, 2020 -- to apply for another EIDL on behalf of yet another owner entity, HM Four, this time using his wife's name.

For the same reasons, a sentence within the advisory guideline range will reflect the seriousness of the offenses, will promote respect for the law, and provide just punishment for the offenses. Reflecting on the seriousness of the offenses, the defendant committed fraud to obtain pandemic-relief funds that were designated for others. He submitted false and fraudulent documentation that contained forgeries, including by submitting falsified income tax returns for his two operating companies – Alafaya Trails and HM Management – using the identity of his accountant who had served him and all of his businesses for 25 years.

The defendant, like every defendant, had a constitutional right to take this case to trial and test the government's evidence against him. The defendant also had a right to testify at the trial if he elected to do so. The defendant did not have the right, however, to give false testimony, which he did over the course of three days. The government already argued above that the Court should apply an obstruction of justice enhancement for the defendant's materially perjurious testimony. Looking more broadly at the defendant's testimony, and his defense at trial, it involved blaming others, but not random, anonymous others; these were people who were close to him, who had worked with him and served him for many years. The defendant testified falsely that his long-time accountants gave him advice about the government loans, and the PPP loans in particular, to suggest to the jury that he had relied on their advice when he applied for PPP loans without having any employees. The defendant also suggested that his long-time bookkeeper may have been involved in generating false documents for the loan applications without his knowledge. The defendant attempted to smear the reputation of his lifelong friend and former business associate, Jeff Graff, by falsely accusing him of having committed tax fraud. Lastly, the defendant used the tragic event of his friend and business associate, Jeff Vasilas, succumbing to COVID-19 at age 43, to advance the ultimate empty chair defense; blaming Mr. Vasilas for carrying out this fraud. While Mr. Vasilas could not defend himself at this trial, the notion that he committed this fraud behind the defendant's back, and for the defendant's benefit was likely too much for the jury to believe.

The defendant argues that he should receive a downward variance to avoid unwarranted sentencing disparities with other similarly-situated defendants who have been convicted of PPP/EIDL loan fraud. The government is not requesting anything extraordinary here; only that the defendant receive a sentence within the advisory guideline range, which takes into account the defendant's lack of acceptance of responsibility for his criminal conduct, the sophisticated means he employed in executing these offenses, the obstruction of justice he engaged in, and the fact that this was a fraud to unlawfully obtain funds from government programs meant to address the global crisis that was the COVID-19 pandemic. The defendant's request for a downward variance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2024, I electronically filed the foregoing Objections to the PSR with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
Aimee C. Jimenez
Assistant United States Attorney