No. 09-4018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PAUL M. WILKINSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Judge William M. Nickerson)

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The final judgment of the district court was entered on December 4, 2008. The United States filed a notice of appeal of the final judgment on December 31, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b).

ISSUES PRESENTED

Application Note 3(A)(v)(II) to § 2B1.1 of the United States Sentencing Guidelines ("U.S.S.G.") provides that, in procurement fraud cases, the "loss" to the government includes the "administrative costs . . . of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved," if those costs were reasonably foreseeable. Here, appellee pleaded guilty to procurement fraud, and the government presented evidence of $592,922 in such costs, but the district court found no loss to the government.

This appeal presents three related issues:

1. Whether the district court committed significant procedural error by failing to apply Application Note 3(A)(v)(II) in calculating the government's loss from the fraud.
2. Whether the district court committed significant procedural error by finding, clearly erroneously, that the government suffered no loss from

the fraud, affecting the district court's calculation of the offense level under the U.S.S.G. and the Guidelines sentencing range.

3. Whether the district court abused its discretion in failing to award restitution to the government under the terms of the plea agreement and the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A.

STATEMENT OF THE CASE

On December 5, 2007, the United States filed a three-count indictment against Paul M. Wilkinson, charging him with one count of conspiring to defraud the United States in violation of 18 U.S.C. § 371, one count of conspiring to commit wire fraud in violation of 18 U.S.C. § 1349, and one count of conspiring to steal trade secrets in violation of 18 U.S.C. § 1832(a)(5). The charged offenses involved the theft of confidential bid information from Avcard, LLC ("Avcard"), pertaining to certain fuel-supply contracts used to service United States military and civilian activities in Eastern Europe and Asia.

Wilkinson pled guilty to all three counts and was sentenced on November 26, 2008, to three-years probation, 800 hours of community service, a $20,000 fine, and a $300 special assessment. The court also ordered Wilkinson to pay restitution to Avcard but ordered no restitution to the government, finding that the government suffered no loss from the fraud.

This appeal is limited in scope. The sentencing proceedings in the district court raised several complex economic issues regarding the amount of actual and intended loss to Avcard under U.S.S.G. § 2B1.1. This appeal does not challenge the district court's resolution of any of those issues. Instead, this appeal focuses solely on the district court's failure to apply Application Note 3(A)(v)(II) in determining the government's loss from the fraud and its clear error in finding no loss to the government in this case.

STATEMENT OF FACTS

1. The Offenses

Wilkinson and Christopher Cartwright co-founded and operated two companies, Far East Russia Aircraft Services ("FERAS") and Aerocontrol, Ltd. ("Aerocontrol"), which competed with Avcard for certain "into-plane" and Posts, Camps & Stations fuel-supply ("PC&S fuel-supply") contracts in Asia and Eastern Europe. A8-A10.[1] These contracts are administered by the Defense Energy Support Center ("DESC"), an agency of the Department of Defense ("DOD"), through a competitive bidding procedure. A8-A9 (¶¶1, 2). The into-plane contracts require the supplier to deliver aviation fuel into authorized aircraft, including military and civilian DOD aircraft, at particular commercial airports. *Id.* (¶1). The

[1] "A" refers to the Appendix.

PC&S fuel-supply contracts require fuel delivery to various authorized storage facilities. A9 (¶2). The bidding process for such contracts has two stages: an initial bid and a revised "best and final" bid. *Id.* Offerors are not allowed to view other companies' initial bids in preparing their best and final bids. *Id.*

The indictment charged that, beginning in February 2005, Wilkinson and Cartwright entered into a conspiracy with Matthew Bittenbender, the contract fuel manager for Avcard, to share with them Avcard's bid information (including initial bids and best and final bids) for various solicitations and the data underlying those bids. A11-A13 (¶¶9, 12, 13). The conspirators agreed to pay Bittenbender "a flat fee, plus a commission of 10% of the profits at every into-plane location where" FERAS or Aerocontrol bid successfully and Bittenbender was also "to be paid a percentage of the fuel sales for PC&S fuel supply contracts won by" FERAS or Aerocontrol. A13 (¶13D).

The indictment charged that Bittenbender conveyed Avcard's bid information to Wilkinson and Cartwright on multiple occasions. A13-A17 (¶14). On some occasions, Wilkinson and Cartwright used the misappropriated information to lower their bid and beat Avcard. A16 (¶14M). However, on other occasions, Bittenbender told Wilkinson and Cartwright that they could increase their bid and that "even Wilkinson's increased bid would defeat [Avcard's] bid at

[a particular] location." A16 (¶¶14N, O); *see also* A15 (¶14G).

The indictment contained three counts: Count One charged Wilkinson with conspiring "to defraud the United States and an agency thereof, to wit, DESC, by impeding, impairing, obstructing, and defeating the lawful function of DESC's full and open competitive procurement process for into-plane and PC&S fuel supply contracts" in violation of 18 U.S.C. § 371. A11-A12 (¶¶11-12). Count Two charged Wilkinson with conspiring to commit wire fraud in violation of 18 U.S.C. § 1349 by depriving Avcard of the intangible right of Bittenbender's honest services and by using false pretenses to obtain the bid information. A17-A18 (¶¶15-19). Count Three charged Wilkinson with conspiring to steal Avcard's confidential bid information (and the underlying data) in violation of 18 U.S.C. §§ 1832(a)(1), (3), (5). A20-A22 (¶¶22-26).

2. The Plea Agreement

The United States and Wilkinson entered into a plea agreement on July 29, 2008. A25-A36. Wilkinson pled guilty to all three counts, "admit[ting] as fact the allegations contained in the Indictment." A26-A28 (¶¶2-4). The plea agreement provided that the November 2007 edition of the Guidelines applies. A30 (¶10(a)).[2]

[2] All citations to the Guidelines are to the November 2007 edition unless otherwise designated.

The parties also agreed that the controlling Guideline was U.S.S.G. §2B1.1, that the base offense level is 7, and on various adjustments to that base offense level. A30-A32 (¶¶10-12). In addition, the parties "agree[d] to contest the amount of loss intended or occasioned by this conduct, and thus leave to the judgment of the Court the appropriate Guidelines enhancement under U.S.S.G. §2B1.1(b)(1)," and that the United States "will not argue that the loss results in more than an eighteen-level increase pursuant to U.S.S.G. §2B1.1(b)(1)(J)." A30-A31 (¶10(e)). Finally, Wilkinson agreed to provide restitution for the full amount of the victims' actual losses pursuant to 18 U.S.C. §§ 3556, 3663A(c)(1)(A)(ii), 3664(f)(1)(A), as determined by the district court at sentencing. A32-A33 (¶15).

3. Sentencing

The government and Wilkinson submitted sentencing memoranda on October 20, 2008. A48-A268. The government calculated the actual losses to DESC itemized as follows:

Loss to DESC from administrative costs	$26,813
Loss to DESC from higher spot fuel purchases	$91,423
Loss to DESC from higher contract prices	$474,686

A50.[3]

[3] While not at issue in this appeal, the government's sentencing memorandum also calculated the intended and actual losses to Avcard.

The government used Application Note 3(A)(v)(II) to U.S.S.G. § 2B1.1 to calculate loss to DESC. A53. First, the government calculated DESC's costs in correcting the procurement action affected. *Id.* It calculated $26,813 in such costs, "consist[ing] largely of personnel costs in preparing new solicitation packages and in evaluating and re-awarding contracts at each of the seven infected locations." *Id.*; A65 (Table 1). Second, the government calculated DESC's increased costs in reprocuring fuel. A53. The government calculated both the increased costs from purchasing fuel on the spot market, because "DESC had no competitively bid procurement vehicle in place at these locations" when cancelling the tainted contracts, and the increased costs from purchasing fuel under the reawarded contracts. *Id*. For the increased costs from spot purchases, the government multiplied "the difference between the spot price and the [contract] price [on the date of the transaction]" by "the number of gallons uplifted." *Id.*; A66 (Table 2). For the increased costs under the reawarded contracts, the government multiplied the difference between "the re-awarded contract delta and the original contract delta" – with "delta" equal to the difference between the contract price for fuel and the indexed price of fuel on a particular date – by the amount of fuel under the new contracts (using actual fuel liftings for FY 2008 and estimated fuel liftings for FY

2009 and 2010). A54; A67 (Table 3).[4]

Wilkinson's sentencing memorandum, by contrast, estimated no loss to DESC. A84. He presented no evidence regarding losses to DESC. Instead, he argued that it was reasonable to assume that DESC incurred no loss from the fraud because fuel prices were indexed and that the cost to reawarding the affected contracts was "de minimis," because "it did not involve additional overtime or other avoidable costs attributable solely to the offense conduct." *Id.* He also argued that the government was not overcharged because DESC received the lowest cost bid. *Id.* n.3.

Wilkinson expanded on some of his arguments in a subsequent response to the government's sentencing memorandum. A269-A290. He argued, *inter alia*, that the court should disregard DESC's administrative costs of $26,813, because the government "submit[ted] no evidence, such as time and wage reports, to support this figure. In the absence of evidence of outlays for overtime or temporary employees, the Court should presume that this administrative agency had the extra capacity to perform the modest quantity of work required and did so at no additional cost to the government." A273. He also denied that any increased

[4] Each contract specified an index; the indexed price of fuel was the price of fuel according to that index on a particular date. The delta was a margin on top of that indexed price. For a hypothetical example, see note 7, *infra.*

costs from spot purchases should be attributed to the conspiracy, because "[t]he relevant contracts were *mutually* terminated by DESC and FERAS/AC," and the claimed spot purchases in Burgas, Bulgaria and in Kuwait were "hard to square with what is known about these locations." A273-A274 (citing A349-A366). He also argued that the government made a calculation error regarding the reawarded contracts at Burgas and that correcting for the error reduced the loss to DESC from higher contract prices from $474,686 to $50,246. A274 (citing A367-A370).

The court held a two-day sentencing hearing on November 25-26, 2008. Dr. Charles Untiet testified for the United States. A435. He first discussed the loss to DESC, using information provided to him by DESC personnel. A438. He explained that DESC "terminated a number of contracts held by Aerocontrol [and] FERAS" after learning of the criminal activity because of DESC's "policy not to deal with criminals whenever possible." A439. Thus, "DESC needed to resolicit and rebid and reaward those contracts." *Id.* Using information from DESC, he testified that "each solicitation would cost about $5,000[, and] each location would cost about $2,400" based on "[t]he wage value of the man hours entailed in issuing a new solicitation and a new location award." A440.

Dr. Untiet also computed the higher cost for DESC to reprocure fuel on the spot market "[i]n the interim period between the termination of the contract and the

eventual reaward." A440-A441. He testified that "I got data on spot sales from the DESC. I asked them for each spot sale record. What was the date, what was the quantity. What was the spot price the DESC paid. And what would have been the Aerocontrol FERAS contract price had it still been enforced." A441.

Dr. Untiet also testified about the increased cost of procuring fuel under the reawarded contracts. A442. To calculate that increase, he computed "the difference between the reaward price and the original price" and multiplied that difference by actual fuel liftings for FY 2008 and projected liftings for FY 2009 and 2010. A442-A443. He explained that Wilkinson was wrong in suggesting that the government made an error with respect to the reawarded contract at Burgas. A445. Dr. Untiet noted that "there were two reaward contracts" at Burgas: one from March 2008 to April 2008, another starting sometime in April 2008. *Id.* Dr. Untiet testified that, while Wilkinson appeared to rely on the award prices from the first reaward contract in claiming the government erred, the government's loss calculations were based on the second reaward contract. A445-A449.

Wilkinson cross-examined Dr. Untiet about why DESC paid more for fuel under the reawarded contracts if fuel prices were indexed and why his "calculation [as to those losses was based on] the defendant's award bid, instead of the bid that [Avcard] originally made." A494. Dr. Untiet responded by explaining that the

indexing did not prevent losses because the reawarded contracts had different deltas from the original contracts, *id.*, and that, under the Guidelines' methodology, "the loss to the DESC is the per gallon increase in price the DESC must pay for contract fuel," which could only be determined by using the previous contract price as a baseline, A497. Wilkinson asked Dr. Untiet no questions about the administrative costs DESC incurred or its spot purchases.

Dr. Glenn Meyers testified in support of Wilkinson's loss calculations. A505-A558. To the limited extent he testified about DESC's losses, he opined that the government miscalculated DESC's increased fuel costs under the reawarded contracts by assuming, unrealistically, that "Avcard would have performed under the contract, but at Aerocontrol's prices." A512.

The parties argued about the amount of loss the next morning. The government noted that it had introduced evidence that DESC incurred administrative costs of around $27,000. A607. "There's no contrary testimony on that point and there were no questions asked of Mr. Untiet on cross-examin[ation]. I think that that number is basically uncontested." *Id.* "Similarly, uncontested is the fact that the government bought spot fuel between the time that it canceled the contracts held by FERAS and Aerocontrol, and the time they reawarded the contracts. . . . Again, no contrary evidence put on by the defense and no questions

[were] asked of Dr. Untiet on cross-examin[ation on the subject]." *Id.* Turning to higher contract prices to DESC, the government pointed out that "Dr. Untiet testified and we submitted to the Court amendment 005, which showed that, in fact, his calculation [regarding Burgas] was correct. [Again,] there were no questions asked about that in cross-examin[ation]." A608. Thus, there was no "serious dispute" that "the total loss to DESC is $592,922." *Id.*

Wilkinson responded by arguing that, "[w]ith respect to actual loss to DESC, the Government has given no evidence whatsoever, just conclusions and argument." A637. "DESC is a government agency on a fixed budget. Its employees get paid the same whether they're working on one project or another. Its budget doesn't change. The only way that DESC could have had extra costs is if they paid overtime for the resolicitation or hired new temporary employees specifically for that one project. There's no evidence [such as wage reports and overtime sheets] that DESC did any of that." *Id.* Wilkinson also argued that the administrative and spot market costs were not attributable to the conspiracy because "[t]he defendants had already started to transition out of these contracts before they were arrested, before they found out about this indictment." A638. Wilkinson criticized the government for relying on "hearsay" instead of introducing actual fuel uplift tickets and invoices, and reiterated his challenge to

the spot fuel charges at Burgas and Kuwait. A639-A641; *see also* p. 9, *supra*.

The court then announced its conclusions on the amount of loss. The court stated that it found both of the expert witnesses "knowledgeable" and "credible" but that it agreed with Dr. Meyers that "the defendant's calculations [on Avcard's losses] are probably as accurate as one could hope for in situations like this" and therefore accepted Wilkinson's calculations on the losses to Avcard. A657-A659.

The court then turned to losses to DESC. A659. The court held:

> The Government's claim of additional losses to DESC, of course, is discussed at considerable length in the sentencing memoranda, spoken to at considerable length here yesterday and today. The Government relies on figures that are set out in tables 1 through 3 of Appendix A to its initial memorandum. My assessment of these claimed losses is that they are simply not sufficiently supported by facts to persuade me that they constitute losses that more likely than not were caused by this defendant's conduct. Even assuming that loss was caused to the Government, my conclusion is that I would have to engage in speculation to assess any dollar value to it.

Id.

Based on these conclusions, the district court determined that the amount of loss under U.S.S.G. § 2B1.1 was $39,741, the intended loss to Avcard, which "adjust[ed] the base offense level upward by six levels" to 13 and corresponded to a Guidelines sentencing range of 12 to 18 months. A659-A660. The court ordered Wilkinson to pay restitution to Avcard. A663. The court did not order any restitution to DESC, however, having found no loss to DESC. *Id.*

The government objected to "the Court's findings of no loss to DESC" and to the court's "application of the guidelines to the evidence presented." A664-A665. Both sides then argued about the appropriate sentence and presented additional testimony. A665-A727. After considering the factors listed in 18 U.S.C. § 3553, the district court imposed a non-Guidelines sentence of three-years probation, 800 hours of community service, a $20,000 fine, and a $300 special assessment. A735-A737; *see also* A794-A798 (Judgment).

SUMMARY OF ARGUMENT

Application Note 3(A)(v)(II) to U.S.S.G. § 2B1.1 governs the calculation of "loss" to the government for sentencing purposes in procurement fraud cases, "such as a fraud affecting a defense contract award," as here. That Application Note provides that loss to the government includes the "administrative costs . . . of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved," if those costs were reasonably foreseeable. Though the government brought Application Note 3(A)(v)(II) to the district court's attention and clearly described its application to this case, the district court does not appear to have applied this Application Note: the court did not reference the Application Note or discuss either of its enumerated types of costs. While it is possible that the district court applied this Application Note

implicitly, it is difficult to believe that the court could have done so yet still concluded that the government suffered no loss from the admitted fraud given the evidence that DESC had to reaward the tainted contracts because of its policy not to deal with criminals, thus incurring costs "of repeating or correcting the procurement action affected," and that DESC had to pay more for fuel under the reawarded contracts (and in spot purchases) than before, thus incurring "increased costs to procure the product or service involved." The court's failure to apply this Application Note constitutes "significant procedural error," *Gall v. United States*, 128 S. Ct. 586, 597 (2007), requiring resentencing.

The district court also committed significant procedural error by finding that DESC incurred no loss from the fraud. That finding is clearly erroneous. The government presented evidence of $592,922 in such costs to DESC – $26,813 in administrative costs and $566,109 in increased reprocurement costs ($91,423 from fuel purchases on the spot market and $474,686 from fuel purchases under the reawarded contracts) – and they were attested to and clearly explained by Dr. Untiet, whom the district court found both "knowledgeable" and "credible."

Though Wilkinson criticized Dr. Untiet's testimony as "hearsay," Dr. Untiet testified about his own calculations and conversations based on data and records provided to him. Even if some parts of his testimony were hearsay because they

were not based on personal knowledge, that fact is irrelevant. Hearsay evidence is commonplace in sentencing proceedings.

Wilkinson could have asked questions testing the reliability of the information Dr. Untiet provided but did not do so except for a few questions about why DESC incurred increased reprocurement costs if fuel prices were indexed and why the government used the former FERAS or Aerocontrol contract price as the baseline in determining the amount of increased reprocurement costs instead of Avcard's previous bid. Neither of these sets of questions undermined the government's evidence in any way: DESC had to pay more for fuel under the reawarded contracts, even though fuel prices were indexed, because the "delta" on the contract (the margin added to the indexed price) changed between the reawarded and original contracts. In addition, commentary to a prior edition of the Guidelines and case law demonstrates that the increased reprocurement costs to the government under Application Note 3(A)(v)(II) are a form of consequential damages that should be calculated by comparing the replacement and contract price. Resentencing is required because the district court's failure to apply Application Note 3(A)(v)(ii) and its clear error in finding no loss to DESC affected its determination of Wilkinson's offense level and Guidelines sentencing range and its decision not to award restitution to DESC.

STANDARD OF REVIEW

In reviewing a sentence, an appellate court must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, . . . selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence . . . ." *Gall*, 128 S. Ct. at 597. If the district court committed a "significant procedural error," resentencing is required. *United States v. Matamoros-Modesta*, 523 F.3d 260, 265 (4th Cir. 2008).[5]

The Court reviews a decision not to award restitution for abuse of discretion. *See United States v. Vinyard*, 266 F.3d 320, 333 (4th Cir. 2001). Reliance on a clearly erroneous factual finding is an abuse of discretion. *United States v. Juvenile Male*, 554 F.3d 456, 465 (4th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT COMMITTED SIGNIFICANT PROCEDURAL ERROR REQUIRING RESENTENCING.

Application Note 3(A)(v)(II) to U.S.S.G. § 2B1.1 provides that loss to the government in procurement fraud cases, "such as a fraud affecting a defense contract award," includes the "administrative costs . . . of repeating or correcting

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[5] Resentencing also may be required if a sentence is substantively unreasonable. *Gall*, 128 S. Ct. at 597.

the procurement action affected, plus any increased costs to procure the product or service involved," if those costs were reasonably foreseeable. The evidence in the record clearly establishes that (i) Wilkinson and his co-conspirators defrauded DESC; (ii) after learning of the fraud, DESC had to rebid and reaward several contracts FERAS or Aerocontrol previously won because of DESC's policy not to deal with criminals; and (iii) DESC paid more for fuel under the reawarded contracts (and spot purchases in the interim) than under the prior contracts. While the opacity of the district court's opinion makes it impossible to know precisely why it found no loss to the government in this case, the only reasonable conclusions are that the court did not apply Application Note 3(A)(v)(II) or applied it incorrectly. Either way, the district court committed "significant procedural error," *Gall*, 128 S. Ct. at 597, and resentencing is required.

A. The District Court Failed To Apply Application Note 3(A)(v)(II) To U.S.S.G. § 2B1.1 In Calculating The Loss To The Government From The Procurement Fraud.

In finding no loss to DESC, the district court explained:

> The Government's claim of additional losses to DESC, of course, is discussed at considerable length in the sentencing memoranda, spoken to at considerable length here yesterday and today. The Government relies on figures that are set out in tables 1 through 3 of Appendix A to its initial memorandum. My assessment of these claimed losses is that they are simply not sufficiently supported by facts to persuade me that they constitute losses that more likely than not were caused by this defendant's conduct. Even assuming that loss was caused to the Government, my conclusion is that I

would have to engage in speculation to assess any dollar value to it.

A659. There is nothing in this discussion expressly indicating or even indirectly implying that the district court applied Application Note 3(A)(v)(II): the district court did not mention the Application Note by name or discuss either of its two enumerated types of costs – "administrative costs . . . of repeating or correcting the procurement action affected" and the "increased costs to procure the product or service involved." While it is of course possible that the district court applied this Note implicitly without signaling that application in any way, that possibility is highly implausible in light of the evidence in this case (discussed below).

Application Note 3(A)(v)(II) is "binding" on the calculation of loss to the government in procurement fraud cases, and its enumerated costs must be considered in calculating the offense level and Guidelines sentencing range. *See, e.g.*, *United States v. Hudson*, 272 F.3d 260, 263 (4th Cir. 2001) ("the Application Notes in the Sentencing Guidelines are binding"); *United States v. Harris*, 128 F.3d 850, 852 (4th Cir. 1997) ("we accept the Application Notes as authoritative"); U.S.S.G. § 1B1.7 ("Failure to follow [Application Notes] could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."). The district court's failure to apply Note 3(A)(v)(II) is a "significant procedural error," *Gall*, 128 S. Ct. at 597, requiring resentencing. *Cf. United States*

v. Green, 436 F.3d 449, 458-60 (4th Cir. 2006) (holding that misapplication of Guidelines was a "legal error" and vacating a sentence that was "imposed as the result of an incorrect application of [the Guidelines]").

B. The District Court Clearly Erred In Finding That DESC Suffered No Loss From The Fraud.

1. The government incurred loss from the fraud.

The government presented evidence of $592,922 in losses to DESC from the fraud pursuant to Application Note 3(A)(v)(II): $26,813 in "administrative costs" "repeating [and] correcting the procurement action affected" and $566,109 in "increased costs to procure the product or service involved" ($91,423 from fuel purchases on the spot market and $474,686 from fuel purchases under the reawarded contracts). *See* pp. 6-8, *supra*. Dr. Untiet clearly testified as to each of these costs and how they were derived: for the administrative costs, he used DESC data concerning "[t]he wage value of the man hours entailed in issuing a new solicitation and a new location award"; for the spot purchases, he used DESC records from actual spot sales; and for the higher costs under the reawarded contracts, he multiplied the volume of fuel needed (using actual liftings for FY 2008 and estimated liftings for FY 2009 and 2010) by the difference between the contract and replacement price. *See* pp. 9-11, *supra*.

The district court concluded that there was inadequate factual basis to

conclude that these costs "constitute losses that more likely than not were caused by this defendant's conduct." A659. But it provided no explanation for that conclusion. *Cf. United States v. Montes-Pineda*, 445 F.3d 375, 380 (4th Cir. 2006) (district courts "are obligated to explain their sentences" in sufficient detail to allow for meaningful appellate review).

While Wilkinson criticized the government's evidence as "hearsay," *see* p. 12, *supra*, Dr. Untiet testified about his own calculations and conversations based on data and records provided to him. Even if some parts of his testimony were hearsay because they related to facts for which he did not have personal knowledge, "it is well-settled law that 'hearsay is not only an acceptable basis for a sentencing determination,' it is often an 'integral part of the sentencing process.'" *United States v. Hankton*, 432 F.3d 779, 790 (7th Cir. 2005) (citations omitted). Reliance on hearsay evidence is commonplace at sentencing. *See, e.g., United States v. Love*, 134 F.3d 595, 607 (4th Cir. 1998) (noting that "there is no bar to the use of hearsay in sentencing" and relying on hearsay evidence). Here, the district court expressly found Dr. Untiet to be "knowledgeable" and "credible." A657-A659. If Wilkinson doubted the veracity or reliability of Dr. Untiet's testimony, Wilkinson should have questioned Dr. Untiet about that testimony on cross-examination.

Indeed, while Wilkinson raised a number of theories in his sentencing memoranda, *see* pp. 8-9, *supra*, he cross-examined Dr. Untiet only on two points with respect to DESC's losses: (i) why fuel prices increased under the new contracts if fuel prices were indexed; and (ii) why Dr. Untiet compared the new contract price for fuel to the price of fuel under the former contract, instead of using Avcard's previous bid as the baseline. *See* pp. 10-11, *supra*.[6] Neither set of questions undermined Dr. Untiet's testimony in any way.

First, as Dr. Untiet explained, prices increased under the reawarded contracts despite being indexed because DESC paid "the value of the price index plus the delta," and almost all the reawarded contracts had higher deltas. A494; *see also* A67. "It's the incremental delta that would be bottom line cost to DESC." A494.[7]

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[6] Wilkinson asked Dr. Untiet no questions about the administrative costs in rebidding and reawarding the tainted contracts or about the spot fuel purchases.

[7] The following hypothetical illustrates Dr. Untiet's testimony concerning the delta:

> The original contract had a delta of $0.25 per gallon of fuel.
> The reawarded contract had a delta of $0.50 per gallon of fuel.
> The indexed price of fuel for June 1, 2008, was $2 per gallon.
> On June 1, 2008, the military used 10,000 gallons of fuel under the contract.
>
> Under the original contract, the price for fuel on June 1, 2008, would be $2.25 per gallon, or $22,500 overall. Under the reawarded contract, however, the price for fuel on June 1, 2008, would be $2.50 per gallon, or $25,000 overall – an increase of $0.25 per gallon, or $2,500.

In the aggregate, these increased reprocurement costs were substantial.

Second, the government correctly used the former contract price, instead of Avcard's prior bid, in calculating the amount of increased fuel costs from higher contract prices under Application Note 3(A)(v)(II). The commentary to a former edition of the Guidelines makes clear that the "increased costs to procure the product or service involved" are a form of "consequential damages" that are included in the "actual loss" calculation in addition to the "direct damages" caused by the fraud. Application Note 8(c) to U.S.S.G. § 2F1.1 (2000 ed.);[8] *see also United States v. Silver*, 245 F.3d 1075, 1081-82 (9th Cir. 2001) (noting that losses to the government in procurement fraud cases "'frequently are substantial'" and include consequential damages "over and above [the government's] expectation damages") (quoting Application Note 8(c)).[9] These costs represent the consequence of DESC having to find a replacement for fuel (the contracted good) after learning that the former contract was tainted; they are calculated, as a contractual measure of damages, by comparing the contract and cover price. *Cf.*

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[8] Section 2F1.1 of the Guidelines was consolidated with § 2B1.1 in November 2001. U.S.S.G. App. C, Amend. 617.

[9] This is "[i]n contrast to [most] other types of cases," in which loss does not include consequential damages. Application Note 8(c) to U.S.S.G. § 2F1.1 (2000 ed.).

U.C.C. § 2-712(2), "Cover"; Buyer's Procurement of Substitute Goods ("The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, together with any incidental or consequential damages [as defined in a separate section] less expenses saved in consequence of the seller's breach."). It was reasonably foreseeable to Wilkinson at the time of the fraud that DESC would have to rebid the contracts if the fraud were uncovered because of DESC's policy not to deal with criminals and that the subsequent contract price would be higher, and indeed Wilkinson never argued to the contrary.

Wilkinson's other challenges to the government's evidence of loss to DESC were either belied by the evidence (*e.g.*, his claim that FERAS or Aerocontrol started to transition out of the contracts *before* the indictment, *see* p. 12, *supra*), or defied common sense (*e.g.*, his claim that the administrative costs in rebidding and reawarding the tainted contracts should not count because the government is "presumed" to have extra capacity, *see* pp. 8, 12, *supra*). Thus, they do not reasonably support the district court's finding of no loss to DESC.[10]

As an alternative holding, the district court stated: "Even assuming that loss

[10] Indeed, some of Wilkinson's arguments presumed some loss to DESC, such as his claim that the government made a calculation error at Burgas and that correcting for the error reduced the loss to DESC from higher contract prices from $474,686 to $50,246. See p. 9, *supra*.

was caused to the Government, my conclusion is that I would have to engage in speculation to assess any dollar value to it." A659. But this Court has emphasized that "[a] court should not refuse to calculate the loss because it appears to be too speculative to resolve." *United States v. Bota*, No. 92-5530, 1993 WL 321585, at *7 (4th Cir. Aug. 23, 1993) (unpublished); *see also United States v. James*, No. 92-5344, 1993 WL 174140, at *2 (4th Cir. May 25, 1993) (unpublished) ("Calculating the amount of loss is not abandoned because it may appear too speculative an exercise.").[11] Application Note 3(C) to U.S.S.G. § 2B1.1 states that "[t]he court need only make a reasonable estimate of the loss." The amount and quality of the evidence of loss to DESC presented at the sentencing hearing was more than sufficient for the court to make a reasonable estimate of DESC's loss from the fraud. Accordingly, resentencing is required. *Cf. United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) (remanding for resentencing because the district court erred in concluding that "actual loss" was too speculative; the evidence "was sufficient to permit the district court to calculate 'a reasonable estimate of [loss]'") (citation omitted).

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[11] These unpublished opinions are included as an addendum to this brief in accordance with Federal Rule of Appellate Procedure 32.1(b) and Fourth Circuit Rule 32.1. The United States believes that they "ha[ve] precedential value in relation to a material issue in [this] case" and "no published opinion . . . would serve as well." 4th Cir. R. 32.1.

2. The district court's clearly erroneous factual determination that DESC incurred no loss from the fraud affected its determination of Wilkinson's offense level and Guidelines sentencing range.

Under the Fraud Guideline, the amount of loss caused by the fraud determines the appropriate adjustment to the offense level:

If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $30,000	add 6
(E) More than $70,000	add 8
(F) More than $120,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $1,000,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,000,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26
(O) More than $200,000,000	add 28
(P) More than $400,000,000	add 30

U.S.S.G. § 2B1.1(b)(1). Here, the district court added six levels to Wilkinson's offense level based on its finding of $39,841 in intended loss to Avcard, leading to an adjusted offense level of 13 and a Guidelines sentencing range of 12-18 months. Both Wilkinson's adjusted offense level and Guidelines sentencing range would likely increase by a substantial amount if this Court vacated the district court's

finding of no loss to DESC and directed the district court to apply Application Note 3(A)(v)(II) on remand: If the court found $592,922 in loss to DESC on remand, for instance, Wilkinson's adjusted offense level would increase to 20,[12] and his Guidelines sentencing range would increase to 33-41 months. *See* U.S.S.G. Ch. 5, Pt. A.

II. RESTITUTION TO DESC IS REQUIRED UNDER THE TERMS OF WILKINSON'S PLEA AGREEMENT AND THE MANDATORY VICTIM RESTITUTION ACT, 18 U.S.C. § 3663A.

Under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, a district court "shall" order restitution to all "victims" of "offenses against property," including "any offense committed by fraud." *Id.* § 3663A(c)(1)(a)(ii). The Act defines a victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," *id.* § 3663A(a)(2), and includes the government, *United States v. Ekanem*, 383 F.3d 40, 43-44 (2d Cir. 2004).

In Wilkinson's plea agreement, he agreed "to the entry of a restitution order for the full amount of the victims' actual losses pursuant to [the Mandatory Victim Restitution Act and other statutes], as determined by the Court at sentencing." A32

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[12] Wilkinson would qualify for a one-level deduction under § 3E1.1(b) because his offense level was "16 or greater." The court previously refused to grant this deduction because Wilkinson's offense level was too low. A660.

(¶15). The district court acknowledged this requirement, A660-A661, but did not award restitution to the government because it found no loss to DESC in this case, A663. As discussed above, that finding is clearly erroneous; by relying on that finding in awarding no restitution to DESC, the district court abused its discretion. *See* p. 17, *supra*. Restitution to DESC is required so that the taxpayers do not have to bear the expense of DESC's losses from the fraud.

CONCLUSION

For the foregoing reasons, the court should reverse Wilkinson's sentence and the district court's decision not to award restitution to DESC, instruct the district court to calculate DESC's loss under Application Note 3(A)(v)(II), and order resentencing and restitution based on the amount of DESC's loss.

REQUEST FOR ORAL ARGUMENT

The United States requests oral argument in this case. The United States believes that oral argument will assist the Court in understanding the factual and legal issues presented in this appeal.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,386 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Times New Roman 14-point font.

Dated: March 13, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES OF AMERICA with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I also filed eight copies of the brief with the Clerk of the Court by first-class mail.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Nickolai G. Levin
Dated: March 13, 2009 Nickolai G. Levin

ADDENDUM

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals,
Fourth Circuit.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
Christian Liviu BOTA, *Defendant-Appellant.*
No. 92-5530.

Argued: March 5, 1993.
Decided: August 23, 1993.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Samuel G. Wilson, District Judge. (CR-91-47-A)
Argued: Louis Dene, Dene & Dene, Abingdon, Virginia, for Appellant.

Jean Barrett Hudson, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

On Brief: Hope Dene, Dene & Dene, Abingdon, Virginia, for Appellant.

E. Montgomery Tucker, United States Attorney, Thomas L. Eckert, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

W.D.Va.

AFFIRMED.

Before MURNAGHAN and NIEMEYER, Circuit Judges, and HILL, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

OPINION

PER CURIAM:

***1** Defendant-appellant Christian Liviu Bota has appealed his conviction and sentence for making a false statement in order to obtain a loan in violation of 18 U.S.C. §§ 2 and 1014. Bota was charged with falsely representing to Central Fidelity Bank in Abingdon, Virginia, the "true" purchase price of a hosiery mill he was seeking to acquire. On appeal Bota has asserted that there was insufficient evidence to prove several elements essential for a conviction under 18 U.S.C. § 1014. He contends that the government presented insufficient evidence to prove (1) that the bank from which he sought the loan was a federally insured bank; (2) that he made a statement that was false; and (3) that the alleged statement was false as to a "material fact." Bota also has challenged the district court's computation of his sentence and its refusal to depart downward from the guidelines.

Bota worked in the real estate business primarily in Canada. Sometime in 1989, he and Jorge Goncalves, also involved in the real estate business in Canada, joined forces to pursue the purchase of the Damascus Hosiery Mill in Damascus, Virginia. Cecil Howell, a real estate broker from South Carolina, had informed Bota

that the Mill, owned by brothers Ben and Carl Murphy, was for sale. According to the trial testimony, both Bota and Goncalves flew to Virginia and met with the Murphy brothers to inspect the property and to begin negotiations. Bota, however, essentially took the lead in all negotiations for the purchase of the Mill.

Much of the government's case-in-chief consisted of oral testimony from various participants in the negotiations. The Murphys testified that, at some point during the acquisition process, they and Bota decided on a purchase price of $1.25 million. According to realtor Howell, he was to receive 5% of that sale, or $62,500, as his brokering fee. Before a contract was signed, however, Bota, according to the testimony, added a $250,000 "consulting fee" to the $1.25 million. The Murphys testified that the "real purchasing price" of the Mill always remained $1.25 million. Bota asked the brothers not to reveal to Goncalves, whom they believed to be Bota's partner in the purchase of the Mill, the reasons for the $250,000 increase.

In addition, Bota arranged to have the substantial consulting fee paid out to a firm called Mid-Atlantic Consultants, Inc. Ben Murphy described the firm as the "fictitious company arrived" at by Bota. Mid-Atlantic had no employees and generated no business save for $50,000 deposited by Bota in May 1989, for the "commission on a sale." Howell arranged for an answering service for Mid-Atlantic in South Carolina, and Bota's friend Alan Power, chief officer of MidAtlantic, controlled the checking account. (Bota, according to the testimony, had no check cashing authority.) Bota further arranged for realtor Howell to "represent" Mid-Atlantic at the closing and thus to receive its check for the consulting fee. Howell attended the closing and in fact took the check for Mid-Atlantic as well the payment of $62,500 for his own services. Bota, however, met Howell outside by his car immediately following the meeting. There the realtor turned over to Bota the sizeable check made out to Mid-Atlantic. Bota shortly thereafter had Power deposit the money in Mid-Atlantic's account.

***2** According to the testimony of the key parties involved in the sale, neither Goncalves nor the bank officials knew at the time of the closing that Bota had any association with Mid-Atlantic. Goncalves testified that he always believed the purchase price of the Mill was $1.5 million and that Cecil Howell was to receive $250,000 out of that money for his consulting work for the Murphys. Goncalves stated he was unaware of Bota's connection to Mid-Atlantic and to the $250,000 fee until several months after the closing.

The written contract signed by the parties and later introduced at trial showed only a total sale price of $1.5 million. In December 1989, Bota and Goncalves began negotiating with Central Fidelity Bank for a loan to finance the purchase. Although Goncalves considered Bota to be his equal partner in the purchase of the Mill, he agreed to present himself to the bank as the sole investor. Bota, on the other hand, represented to the bank that he would be working for Goncalves not as an agent or broker but as the plant manager of the Mill. According to Goncalves' testimony, Bota had told him that they could not use his name to obtain a loan because he had "bad credit" in Canada. As a result of the plan, only Goncalves and his wife became legally obligated under the loans.

Charles Brown and David Farris, officers of the bank, negotiated the loan with Bota and Goncalves. A total of $859,450 and a $50,000 line of credit ultimately were dispersed to Goncalves and to Bota. Under the arrangement with the bank, Goncalves also was to invest $200,000 in buyer financing into the project. Because Goncalves did not have extra cash, however, Bota told Goncalves that they would borrow the $200,000 from his mother. Both bank officers testified at trial that they had no knowledge prior to the closing that $250,000 of the purchase price was a consulting fee going

directly to Bota. Perhaps most significantly, the bank also was given to understand that the transaction was one in which the purchaser, Goncalves, would participate in making up the purchase price. Actually, as things developed, because of Bota's $250,000 undisclosed commission, money flowed the other way.

In October, 1991, a federal grand jury returned an indictment against Bota, charging him with violating 18 U.S.C.§§ 1344 and 2. On March 20, 1992, a federal grand jury returned a superseding indictment against Bota which charged him with two counts of making a false statement to obtain a loan in violation of 18 U.S.C. §§ 1014 and 2.[1] Following a jury trial and a guilty verdict, Bota filed objections to the presentencing investigation report and also filed with the court a list of factors in support of a downward departure from the Sentencing Guidelines. The court overruled the objections. Bota was sentenced to 30 months imprisonment and a three-year period of supervised release. His appeal followed.

I.

We must first address the jurisdictional question of whether there was sufficient evidence offered to prove that Central Fidelity Bank was a federally insured institution, as required for a conviction under 18 U.S.C. § 1014.[2] *See, e.g.*, *United States v. Platenburg*, 657 F.2d 797, 799 (5th Cir. 1981) (proof of federal insurance is not a mere formality but is a jurisdictional issue). At trial, no document showing FDIC status at the time of the alleged crime apparently was offered into evidence by the government. The government, however, called to the stand Charles Brown, Vice President and Commercial Banking Manager for Central Fidelity Bank. Brown was asked if Central Fidelity *is* federally insured. Brown responded"yes, it is." Bota raised no objection at that time to the relevancy of Brown's statement. Further, at the close of its case, the government discussed with the trial court the last-minute details remaining to be addressed. When the trial court reminded the prosecuting attorney that the government needed to establish "that the deposits were federally insured," the attorney responded: "We already did."

***3** In view of existing authority on the issue, we find that there was sufficient evidence presented to support a jury finding that Central Fidelity was a federally insured institution at the time of the alleged crime. That is true even though the only evidence presented was the oral testimony of a bank official and even though the testimony referred to the current time-frame (*i.e.*, that the bank "is" federally insured, not that it "was" federally insured). The sufficiency of the evidence is, of course, to be viewed in a light

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[1]Count 2 of the superseding indictment charged Bota with falsely representing to Central Fidelity that the Mill had, at that time, valid government contracts and was actively engaged in producing socks pursuant to government contracts. After the jury returned guilty verdicts on both counts, Bota filed a motion for judgment of acquittal. The court subsequently entered a judgment of acquittal as to Count 2 but denied the motion as to Count 1. The government has not appealed the grant of acquittal for Count 2.

[2]Section 1014 states in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance, discount, ... commitment, or loan ... shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

most favorable to the government. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Although the evidence presented was brief, the testimony of the bank official that the bank "is" federally insured is sufficient evidence to permit a jury inference and finding that the deposits "were" federally insured at the time of the alleged offense. In *United States v. Safley,* 408 F.2d 603, 605 (4th Cir.), *cert. denied,* 395 U.S. 983 (1969), we concluded that, when "viewed in context," a bank employee's testimony that the deposits "are" insured could permit a jury inference that the deposits "were" insured at the time of the alleged robbery. In the instant case, the time frame between the trial and the charged offense was roughly two years. The interval therefore between the present and the past, between "is" and "was," was not a great one, and a jury reasonably could have inferred FDIC status at the time of the false statement.[3]

Other courts also have permitted a finding that the deposits were federally insured at the time of the alleged crime on the basis of brief testimony. *See, e.g., United States v. Sliker,* 751 F.2d 477, 482-85 (2d Cir. 1984) (Oral testimony was offered that the bank's deposits "are" FDIC insured, and the court held that, when oral testimony is that the bank "is" FDIC insured, and the time-frame between the crime and the trial is not great, it is reasonable for a jury to conclude that the bank was federally insured at time of crime.), *cert. denied,*470 U.S. 1058, 471 U.S. 1137 (1985); *United States v. Knop,* 701 F.2d 670, 672-73 (7th Cir. 1983) (The court found evidence of FDIC status sufficient even though the alleged crime had been committed over two years before the trial and even though the testimony was that the bank "is" federally insured.).

Although we are constrained to apply the law as it is, we warn that we also are not to stretch the law beyond its boundaries. The government, when prosecuting, probably runs no risk in producing testimony that the condition at the time of the alleged crime"was" the same as it now "is." A finding, however, that "is" includes "was," standing alone, is not only grammatically illogical, but it necessitates effort, in the way of searching the record, that could be more profitably spent on devotion to the merits of the case. Moreover, presenting clear evidence that a bank *was* federally insured at the time of the alleged crime simply should not prove to be one of the more difficult aspects of the government's case-in-chief. In short, this time the risk of reversal has been avoided, but we advise that, in the future, it would be wise not to take such a great yet easily avoidable gamble.

II.

***4** We next turn to the question of whether the government proved beyond a reasonable doubt that Bota made to Central Fidelity a false statement as to a material fact. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The evidence should, of course, be viewed in a light most favorable to the prosecution.*Id.* Furthermore, we will consider both direct and circumstantial evidence and grant the government the benefit of reasonable inferences arising from the evidence presented. *See, e.g., United States*

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[3]We also note that in *Safley* the court commented on the fact that the defendants objected in their motions for judgment of acquittal and on appeal only to the paucity of the government's proof on the FDIC issue. They had not objected at trial that the employee's testimony simply was irrelevant-a logical argument if the testimony had been taken literally. *Safley,* 408 F.2d at 605. Similarly, Bota did not object at trial that Brown's testimony that Central Fidelity "is" federally insured was irrelevant. In fact, based on the record, the issue of the bank's FDIC status does not appear to have been specifically raised until the instant appeal. In the proceedings below, Bota's attorney stated only in her motion for acquittal after discharge of the jury that the government had "failed to show all the aspects of the burden of proof."

v. George, 568 F.2d 1064, 1069 (4th Cir. 1978) ("[C]ircumstantial evidence may support a verdict of guilty, even though it does not exclude every reasonable hypothesis consistent with innocence.").

In order to obtain a conviction under 18 U.S.C.§ 1014, the government must prove beyond a reasonable doubt (1) that the defendant made a false statement to a federally insured bank; (2) that he did so for the purpose of influencing the bank's actions; (3) that the statement was false as to a "material" fact; and (4) that the defendant made the false statement knowingly.*See United States v. Whaley,* 786 F.2d 1229, 1231 (4th Cir. 1986); *United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied*, 455 U.S. 951 (1982). Bota's position on appeal has been that the statement at issue was neither false nor material.

Count 1 of the indictment charged that Bota did represent to Central Fidelity the following: "[t]hat the purchase price of the Beaver Creek Hosiery Mill, 'a/k/a' Damascus Hosiery Mill was 1.5 million dollars when, in fact, the purchase price was 1.25 million dollars."Had the government been arguing a contract claim before a court, it would have been waging a tough battle, for a signed purchase and sales contract existed and was introduced showing a purchase price of $1.5 million. Bota, seeking in effect to utilize the parol evidence rule, has relied on that contract to show that the $1.5 million price was indeed the negotiated and the correct price. Moreover, he has asserted that there is no law prohibiting commission fees from the proceeds of a sale and that one cannot deduce therefore that the defendant's $250,000 consulting fee establishes a basis upon which to make the inference that the true sale price of the Mill was in fact $1.25 million.

The government, however, presented primarily testimony from the parties involved in the negotiations to demonstrate to the jury that the purchase price on the contract was, in effect, a"sham" price and that the "true" negotiated sale price for the Mill was $1.25 million. The jury thus was presented with evidence upon which it could have properly found that the document showing a $1.5 million sale price was in fact untrue and invalid. The testimony indicated that Bota and the Murphys had settled on a $1.25 million price *and then* agreed to inflate that price by $250,000 and to label the increase as a consulting fee for Bota's mock corporation, Mid-Atlantic Consultants. Ben Murphy, for example, testified at trial under an immunity agreement with the government and stated on direct and on cross-examination that the negotiated sales price had been $1.25 million. Bota, Murphy testified, told him that, as a "sales agent," he was adding $250,000 to the price. Murphy described Mid-Atlantic as the "fictitious company arrived at" by Bota and stated that Bota directed him not to mention the $250,000 increase for the "consulting fees" to his partner Goncalves. Murphy conceded that at the closing he made no mention to anyone of the arrangement. Carl Murphy also testified pursuant to an immunity agreement and confirmed the essential elements of his brother's story. In addition, Goncalves also confirmed the brothers' story. Goncalves testified that he had no knowledge that Bota was associated with MidAtlantic until several months after the closing.

***5** Cecil Howell, the realtor who also was involved in the negotiations, testified that the parties agreed he was to receive as his brokering fee 5% of the purchase price, or $62,500, 5% of $1.25 million.

Howell testified he simply could not recall when or how the parties came to a $1.5 million sale price. In addition, Howell identified several documents introduced by the government. The correspondence between Howell and Bota shows a purchase price of $1.25 million and ultimately reveals the $250,000 consulting fee for Bota. Howell testified that, according to one of the documents, he agreed to represent Mid-Atlantic/Bota at the closing for the purposes

of accepting the company's payment. Although he attended the closing, Bota thus did not take his consulting fee during the meeting. Instead, after the meeting, Bota met Howell outside as the realtor prepared to leave. At that time, Howell gave to Bota a check made out to Mid-Atlantic for $50,000.[4]

[4]According to Howell's testimony, the $50,000 represented the debt difference still owed to Mid-Atlantic at the time of closing. The government presented during Howell's testimony an invoice on Mid-Atlantic Consulting letterhead for a $250,000 consulting fee. The invoice noted a $200,000 payment received from Jorge Goncalves and credited to the account. That left outstanding only $50,000 to be paid at closing.

> Jorge Goncalves' testimony confirmed that at the closing Mid-Atlantic was "owed" only $50,000. Goncalves stated that he first learned of the Mid-Atlantic consulting fee prior to the closing and that Bota told him the company operated under Cecil Howell. Goncalves said he "raised his eyebrow" at the $250,000 fee, but Bota explained to him that Howell had been consulting for the Murphys and the Mill for almost three years and that the Murphys had agreed to pay that amount. Goncalves concluded therefore that it was "none of his business" what the Murphys owed or did not owe because for him, as the buyer, the purchase price of the Mill simply remained $1.5 million. According to Goncalves, he was told by Bota that the $200,000-which they allegedly had borrowed from Bota's mother-already had been deposited in the Mid-Atlantic account. Thus, at the closing, Goncalves believed that the $200,000 which he and Bota had told Central Fidelity was going into the project had gone straight into the Mid-Atlantic account.

Finally, the loan officers involved in the loan application for the purchase of the Mill testified that they knew nothing of the above transactions. Both men thought the purchase price for the entire Mill was $1.5 million and stated they did not know that $250,000 of that money was not based on the value of the Mill but was being returned to Bota as a fee. Therefore the bank provided a loan of $859,450, erroneously believing that the sale price of the Mill was $1.5 million and that Goncalves would invest $200,000 into the project.

In short, despite the purchase and sales agreement, a rational jury could have found beyond a reasonable doubt that Bota made a false statement to Central Fidelity by misrepresenting to the bank that it was financing a project worth $1.5 million. A higher sales price, if anything, indicated that Goncalves, as the borrower, would have to come up with more financing, or at least not come up with less. In fact, Bota managed to reroute $50,000 to himself by directing $250,000 of the sham sales price to the Mid-Atlantic account. Accordingly, Bota's assertion that his statement was not false must fail.

Bota also has challenged the materiality of his statement to the bank. Whether a false statement is material is a question of law to be determined by the court. *Whaley*, 786 F.2d at 1231. Moreover, the bank need not have actually relied on the statement in order for the statement to be material."Instead, the requirement of materiality is satisfied if the misstatement had the capacity to mislead the lending institution." *Id.* at 1232;*see also Bonnette*, 663 F.2d at 498 (actual reliance not required).

With regard to the false statement, the district court concluded that the statement was material. It further commented that the "purchase price obviously influences the decision as to what is to

be loaned" and also that a jury therefore easily could have found that the statement "was made for the purpose of influencing the bank."Based on the testimony presented in the instant case, we agree with the district court that Bota's representation to the bank was material. Vice President and Commercial Banking Manager Charles Brown testified that Central Fidelity never knew of a $1.25 million price for the Mill until sometime after the closing. Further, he was unaware that a $250,000 consulting fee for Bota had been built into the Mill's purchase price. Brown also testified that the bank looked at many factors in reaching its decision to finance the purchase of the Mill, including the purchase price, the appraisals, the equity going into the loan, the presence of government contracts, and the value of the mill. Brown stated that, had the bank known that $250,000 of the purchase price was a consulting fee for Bota, it would have "questioned" the fee and the financing. Accordingly, the price, he concluded, would have been a material fact relevant to the decision to make the loan. In the totality of the circumstances, a true knowledge of what was falsely presented would have, in all probability, doomed the loan.

***6** David Farris, a commercial loan officer at Central Fidelity at the time Bota and Goncalves sought financing, also testified for the government, and his testimony supported that of Brown. He, too, stated that it was the bank's understanding that it was financing a project valued at $1.5 million. Farris indicated that had Central Fidelity known of the real price of $1.25 million, the bank probably would have approved a loan but would have offered a smaller amount. Farris also testified that the bank's copy of the closing statement did not show a $250,000 consulting fee, minus a $200,000 deposit, for MidAtlantic. Instead, the bank's form showed only a total of a $50,000 fee for Mid-Atlantic. Further, the bank was told at the closing that Cecil Howell would be picking up the check for $50,000. Finally, Farris concluded that the substantial consulting fee would have made a difference and that the bank clearly "would not have wanted to" finance such a fee.

In short, according to the testimony, knowledge of the $250,000 consulting fee would have made a difference in the bank's decisionmaking process. In addition, the testimony of Brown and Farris that knowledge of the $250,000 augmentation in the price, alone, may not have foreclosed the entire loan but would have changed its amount does not take into account the numerous other falsities, which, if known, likely would have scotched the entire deal. The fact that the substantial consulting fee was undisclosed, for example, accompanied another key undisclosed piece of information: namely, that the fee was going to Bota, one of the key players in the purchase of the Mill. Even if Central Fidelity still would have agreed to provide some lesser amount of funding had they been informed of the $250,000 increase, that fact does not undermine the finding of materiality.*See, e.g., Whaley*, 786 F.2d at 1232. The false statement regarding the purchase price clearly "had the capacity to mislead," and thus we find that the requirement of materiality was established.

III.

Bota's primary objection to the presentencing report and to his ultimate sentence was the calculation of the total loss for the purposes of determining the appropriate offense level under the Sentencing Guidelines.*See*United States Sentencing Commission, *Guidelines Manual,* § 2F1.1 (Nov. 1991)."When the offense involves making a false statement, the inquiry to determine loss must focus on the amount of loss related to the false statement." *United States v. Wilson*, 980 F.2d 259, 262 (4th Cir. 1992); *see also*U.S.S.G. § 2F1.1, comment. (n.7(b)) (noting that generally, "the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan").

At sentencing, the district court calculated the total loss flowing from Bota's false statement to be $549,268.70.[5] Relying on the testimony of Central Fidelity Officer Charles Brown, the court reduced the first loan ($429,725) in light of the payment of $15,181.30 received by the bank. It further reduced the total by $145,000, which represented Central Fidelity's anticipated sale of equipment at the Mill. In addition, the court reduced the second loan ($429,725) by $200,000 in light of the bank's anticipated sale of the real estate at the site of the Mill. Finally, the court included in its calculations the loss of the $50,000 line of credit. The total loss of $549,268.70 required the addition of 10 levels to the base offense level of six.*See*U.S.S.G. § 2F1.1(b)(1). Further, the court accepted the presentence report's recommendation to add two more levels because the offense involved "more than minimal planning" by Bota-a finding amply supported by the record. *See*U.S.S.G. § 2F1.1(b)(2). Based on the above computations, Bota's final offense level was 18. With a Criminal History Category of I, Bota was eligible for 27 to 33 months imprisonment.

***7** We do not find error in the district court's computation of the total loss. A court should not refuse to calculate the loss because it appears to be too speculative to resolve. The Application Notes to U.S.S.G. § 2F1.1 state that a "court need only make a *reasonable estimate* of the loss, given the available information."U.S.S.G. § 2F1.1, comment. (n.8) (emphasis added); *see also United States v. Rothberg,* 954 F.2d 217, 219 (4th Cir. 1992) (stating the same). In the instant case the district court made a reasonable estimate of the loss that could be attributed to Bota's scheme to include a $250,000 fee in the sale price of the Mill. The bank did not know at the time it agreed to finance the purchase that $250,000 of the final purchase price of the Mill was to be directed as a consulting fee for Bota. The document it was shown at the closing showed only a *$50,000* consulting fee going to Mid-Atlantic Consultants. Moreover, the bank believed that Goncalves had no other partner in the project and that he was investing his own $200,000 into the Mill. Under Bota's plan, the $200,000 in buyer financing was to come from the supposed loan from his mother. The money, however, never appeared. Charles Brown clearly stated at trial that had the bank "known all the circumstances in the purchase," it would have "questioned the financing." In light of the totality of the evidence, the bank's entire loss, minus any amount recouped, therefore could be properly considered.

Finally, Bota has asserted that there should have been a downward departure after he presented in writing and at the sentencing hearing mitigating circumstances he felt warranted a departure from the Guidelines. He has contended, moreover, that the district court did not merely refuse to depart

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[5]Central Fidelity actually dispersed to Goncalves and Bota two loans, each for the amount of $429,725. Central Fidelity had agreed to participate in the deal on a 50/50 basis with the Virginia Department of Housing and Community Agreement Agency. Both the loan from Central Fidelity and the loan from the state agency, known as an Industrial Development Authority Loan or a "bridge loan," were negotiated at the same time. At the closing Central Fidelity agreed to provide one loan to Goncalves and Bota for $429,725 and another loan of $429,725 on behalf of the state agency.

> At the same time, Central Fidelity also closed on another loan, also in Goncalves' name, for $50,000. That loan was a line of credit which was funded sometime after the closing. In calculating the loss, the district court found that all of the loans had been negotiated as part of the same transaction and were thus relevant conduct under the Guidelines.

downward but failed even to consider his request. In general, a district court's refusal to depart downward from a sentencing range calculated pursuant to the Guidelines is not reviewable.*See, e.g., United States v. Meitinger*, 901 F.2d 27, 29 (4th Cir.), *cert. denied*, 498 U.S. 985 (1990). The only exception to the general rule is for those cases in which the refusal to depart downward was based on the sentencing court's mistaken view that it lacked the authority to depart.*See United States v. Bayerle*, 898 F.2d 28, 31 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990). Defense counsel has not contended nor is there evidence in the record to suggest that the district court thought it lacked authority to depart. Moreover, we note that, contrary to Bota's assertions, the district court at the sentencing hearing specifically explored the defense counsel's objections to the presentence report and the appropriate Guidelines range. It indicated to Bota's counsel that it had reviewed the lengthy objections made by the defense and stated that it also understood counsel's view that there were factors to consider in favor of a downward departure from the Guidelines. The district court listened as Bota made a lengthy statement "relative to [his] motion for a downward departure."Although the court at sentencing did not explicitly go through and reject each of the mitigating factors for downward departure filed by the defendant, that is not evidence that the court did not *consider* the defense's arguments for downward departure.

***8** Accordingly, the judgment of guilt and the sentence imposed are

AFFIRMED.

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Kenny Joe JAMES, *Defendant-Appellant.*
No. 92-5344.

Submitted: December 16, 1992
Decided: May 25, 1993

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, District Judge. (CR-91-72)
H. Gerald Beaver, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant.

Margaret Person Currin, United States Attorney, Peter W. Kellen, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

E.D.N.C.

AFFIRMED.

Before WILKINSON and HAMILTON, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

PER CURIAM:

OPINION

***1** Kenny Joe James, a North Carolina resident and a former vicepresident of First Southern Financial Corporation (FSF) of Fayetteville, North Carolina, pled guilty to making a false statement to a financial institution, the then North Carolina National Bank (NCNB), in violation of 18 U.S.C.A. § 1014 (West Supp. 1992). James appeals his sentence, arguing that the district court erred in calculating the amount of the loss incurred as a result of his criminal activity.United States Sentencing Commission, *Guidelines Manual,* § 2F1.1(b) (Nov. 1991). We find that the district court did not clearly err in calculating James's offense level, and affirm his sentence.

A federal grand jury indicted James on five counts of violating § 1014. Count One accused James of inducing NCNB to increase its line of credit to FSF's factoring business by $3.5 million in December 1989 by not disclosing that FSF's primary customer, Air America, had filed for bankruptcy protection in the autumn of 1989. James was accused in the remaining counts of misrepresenting the "acceptable" accounts receivable he listed in four reports he made to the bank during the spring and summer of 1990.

NCNB had extended credit to FSF and FSF's predecessor company for twenty years. Most of FSF's activity involved factoring government transportation accounts receivable, but in

approximately 1989, FSF began factoring commercial accounts receivable for as much as twenty percent of its business. Because James did not tell the bank about Air America's bankruptcy filing, the bank was not able to maintain a perfected security interest or to file a timely proof of claim in the bankruptcy court in California, though James retained legal counsel and filed a claim on FSF's behalf in the bankruptcy proceeding.

In the autumn of 1990, James disclosed his deceit to his employer and to the FBI. James told FBI agents that he made the false statements to the bank to protect his job and to ensure FSF's continued solvency. James was executive vice-president of FSF, and its predecessor company, for more than four years, and was a minority shareholder in FSF. On December 2, 1991, pursuant to a plea agreement, James pled guilty to Count Five (his false report to the bank on August 20, 1990) in exchange for the dismissal of the other four counts.

The presentence investigation report estimated the loss attributable to James's fraud at $3.72 million. James filed objections to the report and filed a motion for a downward departure. After the sentencing hearing, the district court found that James was responsible for the bank's $3.72 million loss and enhanced James's offense level by thirteen points under U.S.S.G. § 2F1.1(b)(1)(N). Further, the district court adopted the presentence report's recommendation to increase James's offense level by another two points for an abuse of a position of trust, pursuant to U.S.S.G. § 3B1.3, which gave James an offense level of twenty-one. That offense level and a criminal history category of I placed James in the guideline range of 37 to 46 months. The district court sentenced James to thirty-seven months in prison, fined him $7,500, and ordered thirty-six months of supervised release. The district court stayed the sentence and released James pending his appeal.

***2** A district court's determination of the amount of loss involved in a crime of deceit or fraud is calculated under the Sentencing Guidelines by using the greater of either the actual loss or the intended or probable loss that the defendant attempted to inflict. *United States v. Rothberg*, 954 F.2d 217, 218 (4th Cir. 1992). Calculating the amount of loss is not abandoned because it may appear too speculative an exercise. *Id.* at 219. A district court is not required to precisely calculate the loss attributable to fraud. Rather, it need only make a reasonable estimate, given available information.U.S.S.G.§ 2F1.1, comment. (n.8). Its findings on whether the Defendant caused or intended a loss are factual questions which an appellate court will not disturb unless they are clearly erroneous. *Rothberg*, 954 F.2d at 219; *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989).

The amount recovered from the collateral which secures a loan should be considered in calculating the amount of actual loss.

Rothberg, 954 F.2d at 219. Loss should be computed by subtracting what the lending institution recovered, or can expect to recover, out of the collateral from the amount of the unpaid loan. U.S.S.G. § 2F1.1, comment. (n.7(b)). The loss that can be attributed to a defendant who made a false statement subsequent to receiving a legitimate bank loan is the amount of the outstanding loan, less any amount recouped by the bank from loan collateral, less the estimated amount the bank would have lost had the statement not been false. *United States v. Wilson*, F.2d, # 6D 6D6D6D# (4th Cir. Nov. 23, 1992).

This was essentially the approach taken by the district court during the sentencing hearing. James's counsel admitted that the amount of acceptable accounts receivable James listed in his August 1990 report to NCNB ($9,546,252) was false, because that figure included accounts more than ninety days old. Counsel admitted under questioning that NCNB would not have

experienced "this" loss if the bank had not been misled by James's August 1990 report, though he argued the bank would have suffered a greater loss had James revealed Air America's bankruptcy when it occurred earlier. The district court then expressly found as fact that the presentence report's calculation of loss ($3.72 million) was correct because James's August 1990 report "clearly states an amount of receivables that would have prevented, had the statement been accurate, ... the loss in the amount as now calculated."(JA at 128).

All the parties admitted that NCNB's loss was $3.72 million. James contests whether all of that loss can be attributed to him. James also argued below that the losses that did occur would have occurred anyway and that he essentially misrepresented the age, but not the amounts, of the accounts receivable.

James's position is without merit. Enhancement of a defendant's offense level under § 2F1.1(b) can be triggered by the defendant's mere intent to induce the lender "to unknowingly subject itself to a significant and unappetizing risk." *United States v. Baum,* 974 F.2d 496 (4th Cir. 1992) (defendants did not intend for lender to lose full amount of mortgage). Here, the district court heard testimony that the bank's actual loss was $3.72 million-the amount it wrote off after an internal investigation. The probation officer reported that James admitted that the bank advanced approximately $4 million in reliance on the false accounts receivable statements, that the bank could be overextended as much as $3 million, and that losses to FSF resulting from his conduct could total $5 million. A bank official told the probation office that the bank faced a possible loss of $5,757,000 on its relationship with FSF and that it had written off $3,720,000 as a total loss. The presentence report disclosed that James overstated FSF's accounts receivable by $5,757,000, which included $2.424 million in non-collectibles from Air America alone.

***3** We find that the district court had sufficient information before it to determine the amount of loss James caused by filing a false financial statement with NCNB. By adopting the bank's write-off figure of $3.72 million, the district court's calculation does not saddle James with the full amount of the factoring loans, but implicitly subtracts the bank's recovery efforts and the estimated amount the bank would have lost had James's August 1990 statement not been false. On this record, we cannot say that the district court clearly erred in finding that the losses attributable to James's criminal conduct fell between $2.5 million and $5 million and in enhancing James's offense level by thirteen points under § 2F1.1(b)(1)(N).

Therefore, we affirm James's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

C.A.4,1993.
U.S. v. James
993 F.2d 1540, 1993 WL 174140 (C.A.4 (N.C.))

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