IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13765

UNITED STATES OF AMERICA,
Plaintiff-Appellee, -Cross-Appellant,

v.

PHILIP FLORES,
ALAN CARSON,
Defendants-Appellants, -Cross-Appellees.

No. 23-14222

UNITED STATES OF AMERICA,
Plaintiff-Appellant, -Cross-Appellee,

v.

VALERIE HAYES
Defendant-Appellee, -Cross-Appellant.

No. 24-10524

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ENVISTACOM, LLC,
Defendant-Appellee.

On appeal from the United States District Court
for the Northern District of Georgia
No. 1:22-CR-00197-VMC-RGV

REPLY BRIEF OF THE UNITED STATES OF AMERICA

(cover page continued)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to those listed in Defendants' briefs and in the United States's principal and response brief, the following people and entities have an interest in the outcome of this appeal:

Assefi, Omeed A., Deputy Assistant Attorney General for the Antitrust Division

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INTRODUCTION

Defendants' arguments do not undermine the government's challenges to their sentences.

At Hayes's and Carson's sentencing hearings, the district court erroneously failed to apply the Sentencing Guidelines' four-level aggravating-role enhancement. Hayes and Carson claim that this decision rested on factual findings, but the court misinterpreted the Guidelines to require a four-level enhancement only when a defendant personally leads or organizes at least five criminal participants. Hayes does not even defend that interpretation on the merits, and Carson's attempt to do so runs counter to the Guidelines' text and commentary as well as to this Court's precedents.

The district court also erred by (1) applying an offset equal to the total contract prices against the loss caused by Defendants' fraud and (2) ordering no restitution. Defendants claim that the no-loss holding was a factual finding reviewable only for clear error, but the holding rested on misinterpretations of the Guidelines, the Guidelines commentary, and this Court's case law. Contrary to the district court's view, those sources make clear that loss is not automatically offset to $0 whenever Defendants provide acceptable goods and services at a reasonable price. Specifically, when the government awards set-aside contracts designed to provide opportunities to disadvantaged firms, the government does not just have an interest in receiving goods and services at the agreed-upon price; the government also has an interest in ensuring that a qualified, legitimately selected

firm obtains the profits and business-development benefits that come with federal contracts. The district court based its restitution decision on the same reasoning as its no-loss holding, so the former falls with the latter.

ARGUMENT AND CITATIONS OF AUTHORITY

1. The district court erred by declining to apply a four-level aggravating-role enhancement to Hayes and Carson.

The district court declined to apply the four-level aggravating-role enhancement under U.S.S.G. § 3B1.1(a)[1] to Hayes and Carson because they had not personally organized or led at least five participants. (Docs. 284-25-28; 285-22-23); *see* USA Br. 106.[2] As explained in the government's opening brief, this was error given § 3B1.1(a)'s plain text and this Court's precedents. USA Br. 107-08. Hayes and Carson claim that the court did not so interpret § 3B1.1(a) but rather declined to apply the four-level enhancement based on factual findings about Hayes's and Carson's roles in the conspiracy. Hayes Resp. 42-43; Carson Resp. 36-39. Carson separately claims that

[1] References are to the 2023 Guidelines used at Defendants' sentencings.

[2] "USA Br." is the government's principal and response brief. "Envistacom Resp.," "Hayes Resp.," "Flores Resp.," and "Carson Resp." are Defendants' respective response and reply briefs. "Gov't App." is the government's supplemental appendix.

such an interpretation would have been correct. Carson Resp. 41-43. These arguments fail.

A. The district court's interpretation of § 3B1.1(a) is subject to de novo review.

Hayes and Carson are incorrect that the district court's role-enhancement ruling should be reviewed for clear error. *See* Hayes Resp. 42-43; Carson Resp. 36-39. The court declined to apply § 3B1.1(a) because it found that Hayes and Carson had not personally organized or led at least five criminal participants. (Docs. 284-25-28; 285-22-23). Because that decision rests on the court's interpretation of § 3B1.1(a), review is de novo. *See United States v. James*, 135 F.4th 1329, 1332 (11th Cir. 2025).

Hayes. The court was clear at Hayes's sentencing: "[F]our levels is not appropriate here because Ms. Hayes did not have a leadership role over five or more participants." (Doc. 285-23). Hayes never acknowledges this statement. She instead quotes findings that the court made to justify its application of a three-level aggravating-role enhancement. Hayes Resp. 42-43. But the court's reasons for applying a lower enhancement were distinct from the court's reasons for declining to apply the higher one. (Doc. 285-22-24).

Because Hayes does not dispute the government's interpretation of § 3B1.1(a), this Court should vacate her sentence.

Carson. Carson was sentenced the day before Hayes. The district court opened the discussion of the aggravating-role enhancement by stating, "[T]he first thing that would be helpful for me to hear [is] who are the five people that [the government] believe[s] Mr. Carson had a leadership role over." (Doc. 284-12). After hearing argument on this issue, the court remained "stuck on" whether Carson "ha[d] to have a role over" at least five others. (Doc. 284-25). The court stated that Carson "didn't have roles with each of" the criminal participants; claimed that "five or more participants must mean something as to his role, not just there are five people involved"; and reiterated that Carson "didn't have a role with all" the other participants. (Doc. 284-25-26).

Carson argues that the probation officer disabused the district court of its understanding of § 3B1.1(a) (Carson Br. 37-38), but the record belies this claim. Rather than agreeing with the probation officer's explanation that a defendant need not have a role over five people, the court merely replied, "All right." (Doc. 284-27). Immediately after, the court explained it was applying only a three-level enhancement under § 3B1.1(b) because of (1) the purportedly "small number of people" in the conspiracy[3] and (2) the court's

[3] Carson does not argue that this statement independently justified the court's rejection of a four-level enhancement. The enhancement

"concerns about [Carson's] having no involvement with some of those people." (Doc. 284-27-28). Likewise, at Hayes's sentencing the next day, the court declined to apply § 3B1.1(a) because "Ms. Hayes did not have a leadership role over five or more participants." (Doc. 285-23). The court's statements reflect its consistent misunderstanding that a defendant must personally have organized or led at least five participants.

Carson tries to avoid de novo review by noting that the court found he was a manager or supervisor. Carson Br. 38; (*see* Doc. 284-27). But, contrary to Carson's assertion, the court never found that he "was *merely* a manager or supervisor" and "*not* an organizer or leader" (Carson Br. 38 (emphasis added)). Instead, the court made clear that it applied a three- rather than four-level enhancement because of Carson's lack of an organizational or leadership role over five people, not his lack of an organizational or leadership role altogether. (Docs. 284-25 ("I am still stuck on the five issue because that is what determines whether he gets 3- or 4-level."); 284-28 ("I've already stated my concerns about hi[s] having no involvement with some of those people."). Indeed, when applying the three-level

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applies when a criminal activity "involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The court found—and Carson does not contest—that "there [we]re five or more participants" here. (Doc. 284-27).

enhancement, the court noted that Carson "recruited" two others. (Doc. 284-27). And "the recruitment of accomplices" is among the factors that "distinguish[] a leadership and organizational role from one of mere management or supervision." U.S.S.G. § 3B1.1 cmt. n.4; *see United States v. Caraballo*, 595 F.3d 1214, 1231 (11th Cir. 2010).

Carson also argues that the district court could not have understood § 3B1.1(a) to require organization or leadership of at least five participants because that conclusion would have barred the court from applying § 3B1.1(b). Carson Br. 36, 39. It is true that both provisions contain nearly the same relevant language, referring to "criminal activity" that "involved five or more participants." But despite believing that § 3B1.1(b) was applicable, the court plainly interpreted § 3B1.1(a) to require personal organization or leadership of at least five participants. (Docs. 284-12-13, -25-28; 285-22-23). As Carson acknowledges, that conclusion incorrectly treated the five-or-more participants requirement differently in § 3B1.1(a) than in § 3B1.1(b) (Carson Br. 39, 42), which only confirms that the conclusion was mistaken. *See* USA Br. 108.

B. The district court's interpretation of § 3B1.1(a) was erroneous.

Carson argues in the alternative that § 3B1.1(a) applies only to defendants who organized or led at least five participants. Carson Br. 41-43. He is wrong for multiple reasons.

First, Carson's interpretation cannot be squared with the plain text, which refers only to "criminal activity that *involved* five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) (emphasis added). Because the five-or-more-participants requirement appears in a clause attached to the term "criminal activity," this requirement applies to the number of people involved in the "criminal activity," not the number of people overseen by the defendant. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows[.]"). Carson's interpretation also reads out of § 3B1.1(a) the phrase "or was otherwise extensive." *See* Carson Br. 43. That language makes clear that, even if a criminal activity does not "involve[] five or more participants," § 3B1.1(a) can still apply if the criminal activity "was otherwise extensive." U.S.S.G. § 3B1.1(a); *see United States v. Gupta*, 463 F.3d 1182, 1197-99 (11th Cir. 2006).

The Guidelines commentary and this Court's binding authority also foreclose Carson's interpretation, as he admits. *See* Carson

Br. 42. Nonetheless, he urges this Court to disregard the commentary and precedents relying on it. *See id.* He claims that this Court's en banc decision in *United States v. Dupree*, 57 F.4th 1269 (2023), effectively overruled those precedents by holding that the commentary cannot expand the interpretation of unambiguous Guidelines. *Id.* at 1273. But the commentary to § 3B1.1 does not violate that holding. It provides that, "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1 cmt. n.2. That statement is consistent with § 3B1.1(a)'s language, which applies a four-level enhancement when (1) a "defendant was an organizer or leader of a criminal activity" and (2) the criminal activity "involved five or more participants or was otherwise extensive." *See supra* at 8.[4]

Indeed, *Dupree* did not categorically overrule this Court's prior interpretations of specific Guidelines not at issue in *Dupree*. *See United States v. Lightsey*, 120 F.4th 851, 860 (11th Cir. 2024) ("[T]o abrogate [Eleventh Circuit] precedent," an en banc decision "must

[4] *United States v. Adair*, 38 F.4th 341, 354 (3d Cir. 2022), cited by Carson, declined to defer to the commentary on the meaning of "organizer" and "leader" in § 3B1.1(a). *See* Carson Br. 43. No deference is required here either because the commentary only confirms what the text establishes.

demolish and eviscerate all the fundamental props of the prior-panel precedent." (internal quotation marks and citation omitted)). This Court has reaffirmed pre-*Dupree* cases interpreting the commentary where those interpretations were consistent with the Guidelines' language. *See United States v. Pulido*, 133 F.4th 1256, 1279 & n.21 (11th Cir. 2025); *United States v. Horn*, 129 F.4th 1275, 1297-1301 (11th Cir. 2025); *see also United States v. Verdeza*, 69 F.4th 780, 794 (11th Cir. 2023) (on plain-error review, adhering to prior holding on meaning of "loss" under § 2B1.1, "[b]ecause *Dupree* didn't 'specifically and directly resolve[]' that [that] holding is wrong" (citation omitted)).

Carson also asserts that it would not "make[] sense" for the Guidelines to apply significant aggravating-role enhancements for "organizing or managing only *one person* in an organization." Carson Br. 42-43. But he is mistaken. The enhancement level varies based on the defendant's level of responsibility in the criminal activity, not merely the activity's size. *See, e.g.*, *Caraballo*, 595 F.3d at 1231. And the Guideline reflects this understanding by setting forth a hierarchical structure. Under this structure, defendants who play the most influential roles (organizers or leaders) involving the most significant criminal activity (five or more members or otherwise extensive) receive the greatest enhancement; those with slightly less authority receive a slightly lower enhancement; and so forth.

See United States v. Martinez, 584 F.3d 1022, 1026 (11th Cir. 2009) ("The sentence adjustment was plainly designed to address 'concerns about relative responsibility.'" (quoting U.S.S.G. § 3B1.1 cmt. backg'd)).

2. The district court erred by offsetting the total price of the fraudulently obtained contracts against loss.

The district court incorrectly held that "loss" under U.S.S.G. § 2B1.1(b) should be offset to $0 whenever a defendant fraudulently obtains a contract and then performs the contractually required work. *See* USA Br. 111-16. Defendants' primary response is that the court's no-loss holding was based on factual findings that were not clearly erroneous. In fact, however, the court committed legal error by misinterpreting "loss" in § 2B1.1(b), "fair market value" in the Guidelines commentary, and this Court's decision in *United States v. Bazantes*, 978 F.3d 1227 (2020).[5]

[5] This Court should disregard Envistacom's recounting of trial evidence that is not relevant to the government's appeal. *See* Envistacom Resp. 6-14. Envistacom pleaded guilty under *North Carolina v. Alford*, 400 U.S. 25 (1970); did not participate in the trial; and represented to the court below that "the government could produce enough evidence to prove, beyond a reasonable doubt, the three counts in the indictment" (Doc. 171-25).

A. The district court's no-loss holding is subject to de novo review.

Contrary to Defendants' assertions (Envistacom Resp. 31-36; Hayes Resp. 44-47; Flores Resp. 41-44; Carson Resp. 44, 49-50), the district court's no-loss holding rested on a legal conclusion about the Guidelines' meaning and is reviewed de novo. *See James*, 135 F.4th at 1332.

1. Before sentencing, the court held that the government-benefits rule applied to calculating loss. (Doc. 236-6-8). This rule provides, "In 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[.]" U.S.S.G. § 2B1.1 cmt. n.3(F)(ii). Concluding that IntelliPeak and Envistacom were "intended recipient[s]" of the contracts, the court determined that "loss" under the government-benefits rule was not the entire contract price. (Doc. 236-8-11). The court also rejected Defendants' argument that "loss" should be "offset" by "the total amount of the contracts." (Doc. 236-12). The court thus "agree[d] with the Government that the starting point [wa]s the total amount paid under the contracts" but stated that this value would be "offset" by the "fair market value" of services Defendants rendered. (Doc. 236-11, 13).

As previewed, at the hearings, the court determined the offset by applying Application Note 3(E)(i), which provides that "[l]oss shall be reduced by" the "fair market value" of "services rendered." At Flores's sentencing hearing, which was held first, the government presented multiple methods of calculating the "fair market value" of the goods and services provided. (Doc. 256-6-14); *see* USA Br. 39-41. The court responded by stating that it "almost read *Bazantes* as saying did you get the labor, and that's it"—*i.e.*, as automatically requiring a no-loss holding if the government received the contracted-for goods and services. (Doc. 256-17).

After further argument, the court held "there [wa]s no loss," explaining: "I maintain that the contract amounts w[ere] the right place to begin but . . . I don't feel comfortable using the analysis that the government did to provide an offset because ultimately I keep coming back to the point that the work was done, the goods were provided, and I haven't heard anything that the goods or the labor was substandard." (Doc. 256-30). The court quoted *Bazantes* to support this holding. (Doc. 256-32). When the government noted that one of its offset calculations accounted for the court's concerns, the court replied, "I don't know that it includes everything to make it a fair market value[.]" (Doc. 256-34).

At Carson's sentencing, the court reached the same conclusion: "[T]here is no dispute that the defendants provided goods and services to the government, and there is no allegation or evidence that they provided substandard goods or services. Therefore, there is no loss, and I find support for this in the Eleventh Circuit's analysis in *Bazantes*[.]" (Doc. 284-9). The court also rejected the government's argument that the offset should equal Defendants' costs. (Doc. 284-11). The court stated that it "d[id]n't have any reason to think that the prices that were charged in this case were not fair and reasonable." (*Id.*). It thus believed that those prices, not Defendants' costs, reflected "the fair market value for the services and goods." (*Id.*). The court followed this reasoning at Hayes's and Envistacom's sentencing hearings. (Docs. 285-10-12; 337-5-7).

As these statements indicate, the court's no-loss holding rested on its misinterpretations of "loss" and "fair market value" under the Guidelines and its mistaken belief that *Bazantes* requires loss to be offset to $0 whenever defendants provide acceptable goods and services at a reasonable price. (Docs. 256-30, -32, -34; 284-9-11; 285-10-12; 337-5-7). That is a legal conclusion reviewed de novo. *See United States v. Nagle*, 803 F.3d 167, 179 (3d Cir. 2015) ("*Nagle I*") (applying "plenary review" to "an interpretation of 'what constitutes loss' under the Guidelines" (citation omitted)).

2. Defendants' arguments for clear-error review rest on three mistakes: Defendants (1) misunderstand the court's offset analysis; (2) misconceive the relationship between the court's factual findings and legal conclusions; and (3) misinterpret this Court's case law.

a. Defendants suggest the court never reached the question of an offset under Note 3(E)(i) because the court held that the government did not prove any "loss" under § 2B1.1(b). Envistacom Resp. 41 n.8; Hayes Resp. 48; Flores Resp. 44-45; Carson Resp. 45-46, 50. But, in its presentencing order, the court stated that it would calculate loss by starting with the contract prices and applying an offset for the fair market value of the services rendered. (Doc. 236-11-13).

Then, at the first sentencing hearing, the court "maintain[ed] that the contract amounts w[ere] the right place to begin" for determining loss but offset the loss to $0. (Doc. 256-30). The court explained that, "as to the *offset* on the loss," Defendants had met their burden of production. (Doc. 256-57 (emphasis added)). But, after suggesting that the government bore the ultimate burden of proving the offset (Doc. 256-16; *see* Doc. 256-56-57), the court held that the government had not met this burden (Doc. 256-30-31). In doing so, the court relied heavily on *Bazantes*'s discussion of offsets. (Doc. 256-32). At the other sentencing hearings, the court asserted that the government's use of "cost as a measure of the true value of the

contracts" (i.e., as a measure of the offset) was flawed. (Docs. 284-10-11; 337-6-7; *see* Doc. 285-11-12). These statements demonstrate that, taking the contract prices as the initial "loss" amount under § 2B1.1(b), the court offset that amount to $0 under Note 3(E)(i).

It is true, as Defendants point out, that the court also stated that "there [wa]s no loss" and that the government "ha[d] not met its burden of proving loss" (Docs. 284-9, -12; 285-10; 337-5; *see* Doc. 256-30-31). *See* Envistacom Resp. 62-63; Hayes Resp. 45, 47; Flores Resp. 42, 44; Carson Resp. 45. But those statements show only that an offset operates by "reduc[ing]" the "[l]oss" amount. U.S.S.G. § 2B1.1 cmt. n.3(E). To say that "there [wa]s no loss" (or that the government failed to "prov[e] loss") means that, in the court's view, loss was $0 *after* the offset.

b. Defendants also misapprehend the role of judicial factfinding when calculating a fair-market-value offset under Note 3(E)(i). Hayes and Flores claim that this provision requires no "legal interpretation" and that courts are "only left with making factual findings." Hayes Resp. 45; Flores Resp. 41-42. But that is incorrect, as reflected in the district court's own analysis. Purporting to follow this Court's cases, the court held that "fair market value" equals reasonable contract prices, not contractors' costs. (Docs. 284-10-11; 285-11-12; *see* Docs. 256-32, -34; 337-6-7; *see also* Doc. 236-11 (rejecting view that

"costs and profits equate to the fair market value of the goods and services rendered")). That is a legal interpretation of "fair market value" in Note 3(E)(i).

Defendants also point to factual findings that the court made to support its no-loss holding. *See* Envistacom Resp. 31-32, 34-36, 40-44, 60-63; Hayes Resp. 45, 47-48; Flores Resp. 41-42, 44; Carson Resp. 43-45, 47-50. But "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). The findings that Defendants highlight all rested on the district court's erroneous legal interpretation:

- The court stated that "the government ha[d] not met its burden of proving loss with reliable and specific evidence." (Docs. 284-9; 285-10; 337-5; *see* Docs. 236-11; 256-31). But that statement reflected the court's belief that the government could meet its burden only by showing that Defendants failed to provide (or provided unreasonably priced or substandard) goods and services. (Docs. 256-30, -32, -34; 284-9-11; 285-10-12; 337-5-7).
- The court stated that the government "receive[d] the benefit of its bargain." (Doc. 256-30). But that statement derived from the incorrect legal conclusion that the government *necessarily*

receives the full benefit of its bargain when acceptable "goods [a]re provided" at a reasonable price. (Doc. 256-30; *see* Doc. 256-32). In the context of set-aside contracts for disadvantaged firms, the bargain also includes the government's interest in ensuring profits and promoting business development for qualified firms legitimately entitled to the contracts. *See infra* at 22-23.

- The court made comments about the contract prices' purported reasonableness, the defense expert's testimony on certain costs, and the fact that the government set the prices. (Docs. 256-34, -57; 284-9-11; 285-10-12; 337-5-6). But those statements reflected the flawed view that reasonable contract prices, not Defendants' costs, equate to contracts' fair market value. (Docs. 256-32, -34; 284-10-11; 285-11-12; 337-6-7).
- The court stated that Defendants' goods and services were not "substandard." (Docs. 256-30; 284-9; 285-10; 337-5). But that finding arose from the mistaken premise that, for reasonably priced contracts, only substandard performance or non-performance can justify a holding that loss occurred. (Docs. 256-30, -32, -34; 284-9-11; 285-10-12; 337-5-7).
- The court questioned whether one of the government's loss calculations "include[d] everything to make it a fair market

> value." (Doc. 256-34). But the court's concern was again grounded in its view that the fair market value necessarily equaled the contract price because "the work was done." (Doc. 256-30; *see* Doc. 256-32).

Envistacom thus is incorrect to claim that the government challenges "the court's rejection of the government's proffered evidence of 'loss' as not reliable or specific" (Envistacom Resp. 34). Rather, the government challenges the court's erroneous assumption that "the full contract price [i]s the fair market value of Defendants' goods and services." USA Br. 112. The government's principal brief described the evidence that disproved this assumption (*id.* at 113-14 & n.40) simply to show that the court's no-loss holding rested on an erroneous view of the law—not to dispute the court's "evaluation of the evidence" (Envistacom Resp. 34-35).

Envistacom also notes that the district court questioned whether certain costs referenced in the government's sentencing exhibits were "final and accurate" (Docs. 284-10-11; 337-6-7; *see* Doc. 285-11). *See* Envistacom Resp. 39. The court's skepticism, however, was not determinative of its zero-loss holding. At Flores's sentencing hearing, the court did not raise these concerns yet still held that loss was $0. (Doc. 256-30-34). At the other sentencing hearings, the court questioned the exhibits only after it had already explained that "there

[wa]s no loss" under *Bazantes*. (Docs. 284-9-11; 285-10-11; 337-5-7). Moreover, the court expressed its concerns tentatively, noting that the listed costs "[we]re *perhaps* preliminary" (Doc. 284-11 (emphasis added)) and that it was "not sure" the "information [wa]s final and accurate" (Doc. 337-7). Regardless, the court made clear that other considerations figured "more so" in its analysis. (Doc. 285-11).

It is also irrelevant that the court's presentencing order rejected the argument that, "because work was performed," loss was zero. (Doc. 236-13). *See* Envistacom Resp. 32-33, 41-42, 62. The court ultimately backtracked at Defendants' sentencing hearings and accepted that argument. (Docs. 256-30 ("I keep coming back to the point that the work was done[.]"); 337-7 ("[T]here is no loss given that the defendants performed the contracts[.]"); *see* Docs. 284-9; 285-10). Nor does Application Note 3(C) support Envistacom's reading of the order. *See* Envistacom Resp. 33. The note states that "loss determination[s]" should receive "*appropriate* deference." U.S.S.G. § 2B1.1 cmt. n.3(C) (emphasis added). Such deference does not apply to interpretations of the Guidelines themselves. *See Dupree*, 57 F.4th at 1272 ("We review *de novo* the interpretation and application of the Sentencing Guidelines." (citation omitted)).

c. The cases cited by Envistacom and Carson do not call for clear-error review. *See* Envistacom Resp. 33, 35, 42; Carson Resp. 44, 46-

47, 49-50. *Bazantes* addressed the defendants' "conten[tion] that the government did not prove any loss." 978 F.3d at 1249.[6] In *United States v. Near*, 708 F. App'x 590 (11th Cir. 2017) (per curiam), the government challenged the district court's factual findings about "the value of [defendants'] services" and whether defendants were "unintended recipients" under the government-benefits rule. *Id.* at 603. *United States v. Campbell*, 765 F.3d 1291 (11th Cir. 2014), involved a "factual dispute" about whether an institute "was a sham organization." *Id.* at 1302, 1304. And *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010), addressed whether a defendant was properly subject to sentencing enhancements for "a pattern of prohibited sexual misconduct." *Id.* at 623-24. Here, the government does not challenge findings about the proof presented below, the value of Defendants' services, firms' status as unintended recipients, or any other factual dispute. The government challenges the district court's *Bazantes*-based legal conclusion that "loss" in § 2B1.1(b), as

[6] Many other cases cited by Envistacom and Carson also addressed arguments that the district court's loss determination was not supported by sufficient evidence. *E.g.*, *Horn*, 129 F.4th at 1301-05; *United States v. Thomas*, Nos. 22-14301, 22-14339, 23-10006, 2024 WL 3666219, at *3-4 (11th Cir. Aug. 6, 2024) (per curiam); *United States v. Moss*, 34 F.4th 1176, 1190-92 (11th Cir. 2022).

reduced by "fair market value" under Note 3(E)(i), equals $0 whenever defendants perform acceptable work at a reasonable price.

B. The district court erroneously equated the fraudulently obtained contracts' total price with their fair market value.

The district court's reading of § 2B1.1(b), the commentary, and *Bazantes* was incorrect. Assuming that any offset was appropriate, the court should not have automatically concluded that the offset equaled the full contract prices.

1. Set-aside contracts, such as those at issue here, "focus mainly on who is doing the work." *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009). The government does not award set-aside contracts just to procure goods and services. *See id.* It awards them to ensure that qualified firms "develop and grow, creat[e] new jobs," *id.*, and "form connections with suppliers, labor, and others in the industry," *Nagle I*, 803 F.3d at 181.

To determine the "fair market value" of work performed under such contracts, U.S.S.G. § 2B1.1 cmt. n.3(E)(i), courts cannot look merely to the amount paid by the government. *See United States v. Nagle*, 664 F. App'x 212, 215 & n.7 (3d Cir. 2016) ("*Nagle II*"). Instead, courts must recognize that the government "d[oes] not receive the entire benefit of [its] bargain" unless a qualified business that legitimately obtained the contracts "perform[s] the work." *Nagle I*,

803 F.3d at 182; *cf. Kousisis v. United States*, 145 S. Ct. 1382, 1389, 1391 (2025) (upholding fraud conviction where defendants "us[ed] falsehoods to induce [the government] to enter into" a set-aside contract but performed the contractually required work (citation omitted)). When a firm fraudulently procures a set-aside contract, the government loses out by "provid[ing] profit opportunities to [an] entit[y] not entitled to them." *Nagle II*, 664 F. App'x at 216. The qualified firms that otherwise would have obtained those benefits also suffer a loss, missing out on the profits, business development, and job-creation opportunities that set-aside programs foster. *See Maxwell*, 579 F.3d at 1306.

For these reasons, the district court should have held that Defendants' profits—that is, Defendants' net gain after subtracting costs—were "an appropriate measure for loss," *Nagle II*, 664 F. App'x at 216. This Court adopted that approach to restitution in *United States v. Charlemagne*, 774 F. App'x 632, 636 (11th Cir. 2019) (per curiam). Any alternative measure would be "unduly complex to calculate" given the difficulty of determining, after the fact, "what [the government] would have paid for the performance of the contracts under normal competitive bidding procedures." *Nagle II*, 664 F. App'x at 216.

Defendants do not dispute the government's description of the bargain embodied in set-aside contracts. Instead, Defendants repeat the district court's error by asserting, without explanation, that the government receives the benefit of its bargain when it obtains the contracted-for goods and services. *See* Envistacom Resp. 42 n.9; Carson Resp. 43-44, 47-50. But, with set-aside contracts, part of the government's objective is to fund profits and growth for qualified, legitimately selected firms. (Doc. 327-67). The government does not receive the full benefit of its outlay—and qualified, legitimately selected entities do not receive the program's benefits at all—when firms that should never have obtained a set-aside contract reap its rewards.

2. Defendants' counterarguments rest primarily on *Bazantes*. *See* Envistacom Resp. 56-58, 62; Hayes Resp. 45-46, 48; Flores Resp. 42-44; Carson Resp. 46-49. But *Bazantes* held that a contract price set through a legitimate, competitive-bidding process—that is, through fair market competition, not sole-source awards under a set-aside program—equated to fair market value. 978 F.3d at 1249-50. Specifically, *Bazantes* accepted the defendants' argument that "they provided the services that the [government] had contracted for . . . , and because they were presumably the lowest bidder, there was no loss to the [government]." *Id.* at 1249. Where a contract is awarded to "the lowest bidder" after a legitimate competitive-bidding process, it

makes sense to assume—as *Bazantes* did—that the contract price equals "the full, bargained-for benefit" of the work performed. *Id.* at 1249-50.

Here, unlike in *Bazantes*, there was no competitive-bidding process and thus no basis for a similar assumption. *See* USA Br. 6 (describing sole-source set-aside process). And, unlike in *Bazantes*, the government thus would not have "received the same benefit," 978 F.3d at 1250, had it known of Defendants' fraud. *See* Carson Resp. 49. If the government had "ha[d] reasonable knowledge of [the] relevant facts," *id.* at 50 (citation omitted), it would have awarded the profits and associated business-development benefits to a firm legitimately entitled to them.[7]

Defendants also mistakenly rely on *Bazantes*'s statement that "compromis[ing] the integrity of the federal contract bidding process" does not, on its own, cause "pecuniary harm," 978 F.3d at 1250. *See* Envistacom Resp. 58; Carson Resp. 48-49. In *Bazantes*, the defendants compromised the contracting process's integrity by

[7] Hayes and Flores argue that, by distinguishing *Bazantes* on this basis, the government "strengthens" their sufficiency-of-the-evidence and statute-of-limitations arguments. Hayes Resp. 46-47; Flores Resp. 43. Not so. The government did not need to prove that the contracts were competitively bid to establish the fraud charges. *See* USA Br. 60-61. And Hayes's and Flores's tolling agreements were not limited to charges involving competitively bid contracts. *See id.* at 100-02.

submitting falsified payroll records when performing a subcontract on a government project. 978 F.3d at 1234-35. Because this conduct occurred after the contract and relevant subcontracts had been awarded, there was no evidence that the fraud affected the bidding process itself or the final contract prices. *See id.* Indeed, the government in *Bazantes* did not even "argu[e] that [it] suffered a monetary loss." *Id.* at 1250. Here, by contrast, Defendants' fraud not only undermined the contracting process's integrity; it also caused "pecuniary harm," U.S.S.G. § 2B1.1 cmt. n.3(A)(i), by inducing the government to fund profits and business development for firms not legitimately entitled to those benefits. *See supra* at 22-23.

The district court's suggestion that IntelliPeak's contract prices may have been "reasonable" (Docs. 284-11; 285-10; 337-6) does not save Defendants' analogy to *Bazantes*. *See* Carson Resp. 47-50. Before awarding federal contracts, "contracting officer[s] must determine that the proposed price is fair and reasonable." 48 C.F.R. § 13.106-3(a); (*see* Doc. 328-120-123). In the 8(a) setting, a fair and reasonable price may incorporate payments "intended to assist in the business development" of selected firms. (*See* Doc. 327-67). But, outside of 8(a) or other set-aside cases, such payments would not be included in the contract price. *Cf. United States v. Martin*, 796 F.3d 1101, 1111 (9th Cir. 2015) (noting that set-aside programs "are designed to

benefit disadvantaged businesses" and may involve "a premium contract price above what [the government] would pay for other contracts under normal competitive bidding procedures"). Contrary to the district court's view (Docs. 284-11; 285-11-12; 337-6-7; *see* Doc. 256-30, -32), then, "fair and reasonable" prices for set-aside contracts do not automatically equate to the work's fair market value.

The remaining cases Defendants cite also fail to support the district court's analysis. *See* Envistacom Resp. 54-55; Carson Resp. 46-47. *Near* affirmed a factual finding, based on "extensive testimony by a forensic accountant," that the defendants' services were worth at least as much as the government paid. 708 F. App'x at 595, 603. *Campbell* similarly affirmed a district court's loss calculation that rested on substantial evidence. 765 F.3d at 1302-06. Unlike the court here, the district courts in those cases did not assume that loss was zero without evaluating the government's evidence.

3. Turning from the law to the facts, Envistacom, Hayes, and Flores argue that the government did not, in fact, present argument or evidence regarding monetary harm. Envistacom Resp. 37-39; Hayes Resp. 47; Flores Resp. 44. That is inaccurate. At sentencing, the government argued that its pecuniary loss was the entire amount paid under the contracts. (Docs. 256-4-6; 284-6-7; 285-6-7; 337-4). Alternatively, the government argued that its pecuniary loss was equal

to those payments offset by Defendants' costs. (Docs. 256-6-13; 284-7-8; 285-7-8; 337-4). The government supported this offset argument with cost and valuation figures that Envistacom generated in the ordinary course of business. (*Id.*).[8] Envistacom is thus incorrect to claim that the government's proposed offset was based on mere "attorney calculation[s]" (Envistacom Resp. 38-39).

Nor does it matter that the government proved loss using some exhibits that were introduced "post-trial" (Envistacom Resp. 38-39; *see id.* at 22, 25). A loss determination may rest on "evidence presented during the sentencing hearing." *United States v. Gyetvay*, 149 F.4th 1213, 1242 (11th Cir. 2025) (citation omitted). And there is no requirement that the government introduce "lay or expert testimony" (Envistacom Resp. 25) when the documents themselves establish the loss.

Envistacom is similarly mistaken to assert that, by equating the post-offset loss amount to Defendants' profits, the government presented evidence only of "gain," not "loss." *See* Envistacom Resp. 38-40. In the 8(a) setting, the government suffers loss when it

[8] The government also presented another possible measure of the offset. That measure credited the Defendants' costs *and* some of their profits against the total contract prices. (Docs. 256-13-14; 284-8; 285-8-9; 337-4). This calculation incorporated labor rates used by Defendants' own expert. (*Id.*); *see* USA Br. 114 n.40.

contributes to the profits of firms that obtained those profits by fraud. *See Nagle II*, 664 F. App'x at 216 & n.8. In this context, Defendants' profits are a direct measure of pecuniary harm to the government. *See* USA Br. 113 n.39.

Envistacom likewise errs on both the law and the facts by suggesting that the government changed its position between trial and sentencing. *See* Envistacom Resp. 38-39. Any change in position would be legally irrelevant because the amount of "loss" under § 2B1.1(b) was not at issue (and thus not ruled upon) at trial. *See* Doc. 236-3-13 (addressing this issue for the first time at sentencing). Accordingly, the government was not judicially estopped from taking any position on "loss" under § 2B1.1(b) at sentencing. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

In any event, the government took consistent positions at trial and sentencing. In its opening statement, the government explained, "This case is not about whether the defendants did the work. This case is about the fact that they cheated to get it." (Doc. 326-15). And the trial evidence indicated that Defendants provided goods and services under the contracts. (*E.g.*, Doc. 328-105-106). But even when parties perform the contractually required work, loss can still equal the full contract price under the government-benefits rule. *Maxwell*, 579 F.3d at 1300, 1306-07; *see infra* at 31-32 n.9. That is what the

government argued at sentencing. (Docs. 256-4-6; 284-6-7; 285-6-7; 337-4). At the very least, Defendants' performance does not mean that the offset should equal the full contract price. *See supra* at 22-23. That is what the government argued in the alternative at sentencing. (Docs. 256-6-14; 284-7-8; 285-7-9; 337-4).

Defendants similarly go astray in suggesting that the case agent's trial testimony supported the district court's no-loss holding. *See* Envistacom Resp. 17, 38. The court itself never referenced this testimony when explaining the no-loss holding. (Docs. 256-30-34; 284-9-12; 285-9-12; 337-4-7). Nor did the agent suggest that it was impossible to determine "whether the government suffered any pecuniary loss" (Envistacom Resp. 17, 38). (*See* Doc. 330-89-91). She did testify that she could not assess the contract prices' fairness and reasonableness after the fact. (Doc. 330-89-90). But that was simply because Defendants' fraud precluded an independent assessment of the pricing. (*See* Doc. 329-85).

Finally, it is irrelevant that the contracts were firm-fixed-price contracts (Doc. 330-21). *See* Envistacom Resp. 60; Hayes Resp. 48; Flores Resp. 45. Under firm-fixed-price contracts, prices are not subject to adjustment for contractors' cost overruns. 48 C.F.R. § 16.202-1; (*see* Doc. 330-21-22). But Defendants' costs did not

exceed the contract prices; to the contrary, the contract prices far exceeded Defendants' costs. *See* USA Br. 39-41, 113.

4. Carson argues that this Court should not look to Note 3(E)(i)'s discussion of offsets because "'loss' in § 2B1.1(b)(1) is not ambiguous." Carson Resp. 45 n.4. But this argument does not help Defendants. The district court held that the total contract prices were the starting point for loss and then applied an offset. (Doc. 236-11, -13); *see supra* at 15-16. If the court had not applied Note 3(E)(i), the loss amount would have been the contract prices unreduced by any offset.

C. Defendants' remaining contentions do not support the district court's analysis.

Defendants' other arguments are either not at issue on appeal or legally incorrect (or both).

1. Envistacom raises multiple arguments about the government-benefits rule (Envistacom Resp. 44-63), but this Court need not address any of them. The government assumed, for purposes of this appeal, that an offset under Note 3(E)(i) was appropriate whether or not the government-benefits rule applied. USA Br. 111. Even if Envistacom's arguments were right,[9] this Court would still need to

[9] They are not. In *Maxwell*, this Court held that set-aside programs are government benefits and that loss under the government-benefits

address whether the district court erred in determining that the offset should be the total contract price as a matter of law. *See Near*, 708 F. App'x at 596 (declining to "decide whether the government benefits rule applies because it would have no impact on the defendants' sentences"); *Nagle I*, 803 F.3d at 180, 183 (similar).

Envistacom confuses this point by repeatedly discussing a ruling that is not at issue on appeal—*i.e.*, the district court's holding that IntelliPeak and Envistacom were intended recipients under the government-benefits rule. *See* Envistacom Resp. 45, 53-55, 60-61. A firm can both (1) qualify as a contract's intended recipient and (2) perform work with a fair market value less than what the government paid. The government's appeal implicates only the second issue. USA Br. 111.[10]

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rule is "the entire value of the . . . contracts that were diverted to [an] unintended recipient." 579 F.3d at 1306; *see United States v. Blanchet*, 518 F. App'x 932, 956-57 (11th Cir. 2013) (per curiam) (applying *Maxwell* to small-business set-aside program). Envistacom's arguments notwithstanding (*see* Envistacom Resp. 45-53), *Maxwell* was correctly decided and, in any event, remains binding authority. *See United States v. Fard*, 805 F. App'x 618, 620-21 (11th Cir. 2020) (per curiam); *United States v. Aldissi*, 758 F. App'x 694, 712-13 (11th Cir. 2018).

[10] Envistacom, Hayes, and Flores question whether the government is contesting IntelliPeak's and Envistacom's status as intended recipients. *See* Envistacom Resp. 61 n.12; Hayes Resp. 44; Flores Resp. 40-41. The government's principal brief was clear: "The

Nagle is instructive in this respect. *Nagle I* held that a fair-market-value offset under Note 3(E)(i) was proper regardless of whether the government-benefits rule applied. 803 F.3d at 180, 183. *Nagle II* held that the defendants' profits were "an appropriate measure for loss." 664 F. App'x at 216. This conclusion did not depend—and, under *Nagle I*, could not have depended—on the defendants' status as unintended recipients under the government-benefits rule. *Nagle* thus demonstrates that the analyses under Notes 3(E)(i) and 3(F)(ii) are independent.

2. Hayes asserts that "she has suffered severe collateral consequences" that "deserve this Court's consideration." Hayes Resp. 49. But Hayes has not cross-appealed her sentence, so the only pending issue regarding her sentence is whether the district court correctly applied § 2B1.1(b)—not whether the court properly accounted for collateral consequences. In any event, any losses Hayes incurred for perpetrating the fraud would not offset "loss" under § 2B1.1(b). *See, e.g.*, *United States v. Spalding*, 894 F.3d 173, 191-92 (5th Cir. 2018).

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government does not[] . . . challenge the intended-recipients factual finding on appeal." USA Br. 111.

3. The district court erred by ordering no restitution.

The district court ordered no restitution for the same reasons that it held there was no loss under § 2B1.1(b). (Docs. 256-36-37; 284-34; 285-73; 337-8). Defendants acknowledge that the loss and restitution decisions went hand-in-hand. Envistacom Resp. 64; Hayes Resp. 49-50; Flores Resp. 46; Carson Resp. 51. Accordingly, if the Court vacates the no-loss holding, it also must vacate the no-restitution holding.

Envistacom argues that its purported inability to pay is an alternative basis for affirming the district court's restitution holding as to Envistacom. Envistacom Resp. 64-65. And Envistacom claims the government waived any response to this argument. *Id.* at 65. Envistacom is wrong on both counts.

First, Envistacom's financial condition was not relevant to the restitution amount. *See* Envistacom Resp. 64-65. The Mandatory Victims Restitution Act (MVRA) requires courts to order restitution whenever defendants plead guilty to "an offense against property under [Title 18], . . . including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii); *see id.* § 3663A(a)(1). And such restitution must be "in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *Id.* § 3664(f)(1)(A); *see id.* §§ 3556,

3663A(d). Envistacom pleaded guilty to a conspiracy to commit fraud in violation of 18 U.S.C. § 371 and two counts of major fraud in violation of 18 U.S.C. § 1031. (Doc. 171-25; *see* Doc. 1-1-2, -9-12). Restitution was thus mandatory "without consideration of [Envistacom's] economic circumstances," 18 U.S.C. § 3664(f)(1)(A).

Envistacom nevertheless asserts that the MVRA requires courts "to consider . . . 'the financial resources of the defendant[.]'" Envistacom Resp. 64-65 (purporting to quote 18 U.S.C. § 3664(a)). But the quoted language has not appeared in § 3664(a) since 1996, when Congress amended the language to prohibit consideration of defendants' financial conditions. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. II, § 206, 110 Stat. 1214, 1232-36 (1996). Envistacom's reliance on *United States v. Twitty*, 107 F.3d 1482 (11th Cir. 1997), is therefore misplaced because that case was decided under the earlier version of the statute. *Id.* at 1493. Since 1996, this Court has repeatedly recognized that courts may not consider defendants' financial conditions under § 3664. *E.g.*, *United States v. Hernandez*, 803 F.3d 1341, 1343 (11th Cir. 2015) (per curiam).

Second, the government did not waive its response to Envistacom's inability-to-pay argument. In explaining its no-restitution holding, the district court never referenced Envistacom's financial condition.

Instead, the court stated, "Given that I have found that there is no loss, there will not be any restitution." (Doc. 337-8). Nor did the PSR say that "a restitution calculation was unnecessary" because of Envistacom's bankruptcy (Envistacom Resp. 27-28). The PSR stated that there was no need "to determine the [G]uideline *fine* range." Gov't App. Tab A ¶ 86 (emphasis added). And, when it addressed restitution, the PSR relied on the district court's no-loss holding: "The Court ruled Intelli[P]eak Solutions, and Envistacom, LLC, performed the contracts to the [Department of Defense]'s satisfaction, so there is no loss or restitution involved." *Id.* ¶ 67 (italics and boldface omitted); *see id.* ¶ 69. Because Envistacom's inability-to-pay argument is a purported alternative basis for affirmance, not a ground on which the district court itself relied, the government had no obligation to address this argument in the opening brief. *See, e.g.*, *Warmenhoven v. NetApp, Inc.*, 13 F.4th 717, 729 (9th Cir. 2021); *cf. Young v. Grand Canyon Univ., Inc.*, 980 F.3d 814, 821 n.4 (11th Cir. 2020) (declining to address alternative basis to affirm that was not adequately raised by appellee).

CONCLUSION

This Court should vacate Defendants' sentences and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

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 it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Goudy Old Style.

This brief exceeds the 6,500-word type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because, according to the word-processing software, it contains 7,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). On October 16, 2025, the government filed a motion to exceed the word limit, requesting leave to file a brief of up to 8,000 words.

Today, this brief was filed and served using the Court's CM/ECF system, which automatically sends notification to the parties and counsel of record.

October 23, 2025

/s/ Peter M. Bozzo

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