

11-4080(L)

To Be Argued By:

ERIC J. GLOVER/SUSAN L. WINES

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 11-4080(L), 11-4095(CON),
11-4309(CON),
11-4427(CON)**

UNITED STATES OF AMERICA,

Appellee,

-vs-

RAB NAWAZ, aka Asad, MORRIS I. OLMER,
MARSHALL ASMAR, WENDY WERNER,

Defendants-Appellants,

(For continuation of caption, *see* inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. As to Rab Nawaz, judgment entered on September 28, 2011; Nawaz filed a notice of appeal on September 30, 2011. Nawaz SA29.¹ As to Marshall Asmar, judgment entered on September 28, 2011; Asmar filed a notice of appeal on September 29, 2011. AA11. As to Wendy Werner, judgment entered on September 28, 2011; Werner filed a notice of appeal on October 11, 2011. WA21, WA100-01, WA111. As to Morris Olmer, judgment entered on September 28, 2011; Olmer filed a notice of appeal on October 4, 2011. OA20, OA185, OA188.

All notices of appeal were timely under Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) for final judgments in criminal cases.

¹ The abbreviations for the appendices filed in this case are as follows: “OA__” (Olmer Appendix); “WA__” (Werner Appendix); “AA__” (Asmar Appendix); “NA__” (Nawaz Appendix); “Nawaz SA__” (Nawaz Special Appendix); “GA__” (Government Appendix).

**Statement of Issues
Presented for Review**

I. Wendy Werner

- A. Did the district court correctly find that a rational jury could have convicted Werner of conspiracy and mail fraud, and that there were no circumstances warranting a new trial?
- B. Did the district court clearly err in determining the amount of loss for Werner?
- C. Did the district court abuse its discretion in increasing Werner's offense level by two levels for sophisticated means?
- D. Did the district court abuse its discretion in not reducing Werner's offense level for minor role?
- E. Was the district court imposition of a guidelines sentence on Werner of 48 months substantively reasonable?

II. Rab Nawaz

- A. Did the district court clearly err in determining the amount of loss for Nawaz?
- B. Was the district court's imposition of a 90-month sentence on Nawaz substantively reasonable when his sentencing guidelines range was 87 to 108 months?

- C. Did the district court plainly err in ordering Nawaz to pay restitution of \$3,154,291.20?

III. Marshall Asmar

- A. Did the district court correctly find that a rational jury could have convicted Asmar of conspiracy and mail fraud, and that there were no circumstances warranting a new trial?
- B. Did the district court clearly err in determining the amount of loss for Asmar?
- C. Did the district court abuse its discretion in increasing Asmar's offense level by two levels for sophisticated means?
- D. Did the district court abuse its discretion in not reducing Asmar's offense level for minor role?
- E. Was the district court's imposition of a 52-month sentence on Asmar substantively reasonable when his sentencing guidelines range was 57 to 71 months?

IV. Morris Olmer

- A. Did the district court clearly err in determining the loss amount for Olmer by relying on unreliable information?
- B. Did the district court err in sentencing Olmer under the mistaken impression that he was a licensed attorney during the scheme?

- C. Did the district court abuse its discretion in increasing Olmer's offense level for use of a special skill?
- D. Was the district court's imposition of a 60-month sentence on Olmer substantively reasonable when his sentencing guidelines range was 70 to 87 months?

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendants in this appeal were convicted by a jury of conspiracy and substantive fraud charges based on their participation in a mortgage fraud scheme. Three defendants—Wendy Werner, Marshall Asmar and Rab Nawaz—made money from the scheme by agreeing to sell properties at fraudulently inflated prices to straw

buyers. The other defendant, Morris Olmer, a former lawyer, conducted the closings for the transactions.

All four defendants in this appeal proceeded to trial and were convicted by a jury. Only Werner and Asmar challenge the result of the trial. As shown below, however, the evidence against each of them was clearly sufficient for a jury to have found them guilty.

All four defendants challenge various aspects of their sentencings. But the district court conducted thorough and thoughtful sentencing proceedings, and the sentences of each of the defendants were procedurally and substantively reasonable.

Statement of the Case

On July 29, 2010, a federal grand jury sitting in New Haven returned a 15-count Second Superseding Indictment (the “Indictment”) against Syed A. Babar, a/k/a “Ali,” “Asad”; Thomas E. Gallagher; Morris I. Olmer; David Avigdor; Nathan M. Russo; Rab Nawaz; Marshall Asmar; Wendy Werner; Rehan Qamer and Mohammad Saleem.¹ NA8.

The Indictment charged each defendant with conspiring to engage in a mortgage fraud scheme

¹ Rehan Qamer and Mohammad Saleem remain at large.

by: (1) defrauding the United States by impairing, impeding, obstructing and defeating through deceitful and dishonest means, the lawful government functions of the Department of Housing and Urban Development (“HUD”) and the Federal Housing Administration (“FHA”) in connection with mortgage loan insurance issued by the FHA; and (2) committing offenses against the United States, namely, mail fraud, wire fraud, and false statements, in violation of 18 U.S.C. § 371. NA58-66. Counts 2-9 also charged all defendants with wire fraud, in violation of 18 U.S.C. § 1343. NA67-68. Werner was also charged, along with Babar, Gallagher and Qamer with mail fraud, in violation of 18 U.S.C. § 1341. NA69-70. Olmer and Asmar, along with Babar, Gallagher, Avigdor, and Russo, were charged in Counts 11-14 with making false statements in a matter under the jurisdiction of HUD and FHA in violation of 18 U.S.C. § 1001. NA70-72. Finally, Nawaz was charged in Count 15 with obstruction of justice in violation of 18 U.S.C. § 1503. NA72-73.

On March 16, 2011, evidence began in a jury trial involving Olmer, Nawaz, Asmar and Werner, along with Thomas Gallagher and David Avigdor. NA15. On April 12, 2011, the jury found Nawaz guilty on all counts in which he was charged. NA29. On September 22, 2011, the district court sentenced Nawaz principally to 90 months of imprisonment. NA29. On Septem-

ber 30, 2011, Nawaz filed a timely notice of appeal. NA29.

The jury found Asmar guilty on Count 1, 7-9, and 12-14 and not guilty on Counts 2-6 and 11. AA8. On September 22, 2011, the district court sentenced Asmar principally to 52 months' imprisonment. AA11. On September 29, 2011, Asmar filed a timely notice of appeal. AA11.

The jury found Werner guilty on Counts 1 and 10. GA695. On September 21, 2011, the district court sentenced Werner principally to 48 months' imprisonment and a \$100,000 fine. WA94-96. On October 11, 2011, Werner filed a timely notice of appeal. WA111.

The jury found Olmer guilty on Counts 1-9 and 11-14. OA51-53. On September 26, 2011, the district court sentenced Olmer principally to 60 months' imprisonment. OA178. On October 4, 2011, Olmer filed a timely notice of appeal. OA188.

All four defendants are currently serving the sentences imposed.

Statement of Facts and Proceedings Relevant to this Appeal

A. The scheme to defraud

From 2006 to 2010, Babar served as the ring leader of a mortgage fraud scheme that obtained millions of dollars in residential real estate loans through the use of sham sales contracts, false loan applications and fraudulent property appraisals. Nawaz PSR ¶ 9. The scheme involved nearly 30 properties in Connecticut, most of which ended up abandoned, in disrepair, and in foreclosure. Nawaz PSR ¶ 8. The operations of this criminal conspiracy resulted in a loss of over \$3 million to various private lenders and to the FHA, which insured many of the loans that were fraudulently obtained. Nawaz PSR ¶¶ 6, 8; GA700.

Babar and others working with him recruited individuals to serve as “straw” or nominal purchasers of residential real estate, who were paid thousands of dollars to act as the purported buyer of the property. Nawaz PSR ¶ 9. At Babar’s direction, the straw buyer would enter into a written sales contract with the seller of the property for a price above the actual (and unwritten) sales price negotiated between Babar and the seller. Nawaz PSR ¶ 9.

Babar would arrange for the straw buyer to apply for a mortgage based on the written contract price. Nawaz PSR ¶ 10. Through the use of

fraudulent documents, including the written sales contract, the appraisal, and the HUD-1 settlement statement, the lender would be deceived into believing that the written sales price was the actual sales price and extend a loan for that purchase price. Nawaz PSR ¶¶ 10-11; GA57. The difference between the written contract price on which the loan was based and the unwritten actual sales price constituted part of the fraud proceeds that Babar and his co-conspirators would reap from the scheme. GA57.

The contract sales prices, and the amount of the loans fraudulently obtained to purchase the properties, were justified by fraudulent appraisals secured by Babar through co-defendant Thomas Gallagher, a real estate appraiser. Nawaz PSR ¶11. Gallagher would routinely misrepresent the physical state of the properties, and would sometimes include altered photographs in his appraisals. Nawaz PSR ¶11. Babar paid Gallagher thousands of dollars per property, often in cash, for issuing the fraudulent appraisals, which was far more than the basic appraisal fee of about \$375 that was disclosed in the appraisal report. Nawaz PSR ¶ 11.

Babar also orchestrated and directed the way in which the fraud proceeds were extracted from the real estate closing. GA60. On certain transactions, Babar would receive the fraudulent proceeds directly from the seller. GA60. At closing, the seller would be paid the purported sale price

of the property, and then afterwards provide Babar with the difference between the purported sales price in the documents and the unwritten actual price for which the seller agreed to sell the property to Babar. GA60, GA98.

In other instances, Babar would use a fictitious construction company to siphon off the fraudulent proceeds from the closing. Babar had a bank account opened for a fictitious construction company called "Sheda Telle Construction, LLC." GA60, GA69-70. The purpose of the company and the bank account was to divert fraud proceeds to it and, in some cases, to falsely justify the artificially inflated sales price of a house based on renovations purportedly made to the property. GA86, GA89, GA99, GA114, GA144. In the period between April 2007 and October 2009, \$965,355.24 in fraud proceeds were deposited into the account, and \$952,040 were withdrawn. GA702.

After the closing, these fraud proceeds would be sent to the Sheda Telle account by wire from the bank account of the law offices of David Avigdor, which is where co-defendant Morris Olmer, a former lawyer, would conduct the closings. GA58, GA68. While Babar used some other lawyers to close transactions early in the scheme, once he started using Olmer for closings he never used any other lawyer because Olmer did whatever Babar wanted and never asked any questions. GA58-59, GA700.

B. Defendants

1. Wendy Werner

Wendy Werner was a seller of houses in Babar's mortgage fraud conspiracy. Werner conspired with Babar and Gallagher to sell properties at 35, 37, and 41 Lake Street in Norwich, Connecticut. She acquired all three properties for \$45,000, but sold them for the fraudulently inflated purchase price of \$800,000. GA713, GA745, GA795, GA828. The properties went into foreclosure and re-sold out of foreclosure for \$165,000, leaving the lenders with a loss of approximately \$635,000. GA700, GA713.

In June 2006, Gallagher issued fraudulently inflated appraisals for each of the three properties, describing them in glowing terms and as "recently renovated." GA719, GA774, GA811-12. In fact, 41 Lake Street was nothing close to the "recently renovated" home Gallagher described in his appraisal, but rather was an uninhabitable shell. GA410-426. A local property owner described one of the properties as "a shell," "an abandoned building," with no framing, no electrical and no plumbing. GA414. It "looked like something out of a city that's been bombed out." GA426. That testimony was corroborated by photographs. GA760, GA835, GA758-64, GA799-801.

Based on Gallagher's fraudulent appraisals, Werner sold all three properties on August 11

and 28, 2006, to Rehan Qamer, an indicted co-conspirator who remains a fugitive. GA714, GA745, GA765, GA795, GA802, GA828. The sales prices for the properties were \$260,000, \$270,000 and \$270,000, for an aggregate purchase price of \$800,000. GA700, GA713, GA745, GA795, GA828. Using the sales proceeds, Werner paid Babar \$283,704. GA713, GA751-52. Werner made the payment to Babar's shell entity, "Global Accounting and Taxation Services." GA751-52, GA756. Werner wrote that the payments were "consulting fees" on the memo portion of the each of the three checks. GA751-52.

Werner concealed the fact that she was paying Babar \$283,704 from her closing attorney, Ramona DeSalvo. GA377, GA383. She also concealed it from the lender making the loan by keeping it off the Form HUD-1 Settlement Statement for each of the three transactions. GA383, GA745, GA795, GA828.

2. Rab Nawaz

a. Nawaz allowed the conspiracy to use his home address to validate straw buyers' employment.

Rab Nawaz performed a variety of functions for the conspiracy. For example, he allowed his home address and a telephone line to his house to be used as a front for a fictitious company called Global Home Painting, a company used to falsely verify employment for straw purchasers.

Nawaz PSR ¶¶ 12-13. In a recorded conversation on January 20, 2010, Babar and co-conspirator Kenneth Perkins discussed the fact that the prospective lender on a proposed sale of 221 Starr Street may call to verify the straw buyer's employment. Nawaz PSR ¶ 13. Babar instructed Perkins to go to Nawaz's house so that Perkins could speak to the lender in the guise of being an employee of "Global Home Painting," the sham company that had been used as the buyer's employer. Nawaz PSR ¶ 13. Later that day, Perkins traveled to Nawaz's house and spoke to the lender, purporting to be "Chris" from Human Resources at Global Home Painting. GA1554. The verification of employment form associated with that application showed that someone at the lender had spoken to "Chris" at Global Home Painting. Nawaz PSR ¶ 13.

Nawaz also had a land line telephone number for the fake company, Global Home Painting, going directly into his home. Nawaz PSR ¶ 13. During that same January 20, 2010 call, Babar told Perkins that the telephone number for Global Home Painting had been turned off, so he was glad Nawaz was there, "otherwise we'll be in fucking big trouble." GA1567. Babar explained that even if the lender checked on the telephone number for Global Home Painting, it would come up Excellent Painting (Nawaz's legitimate business), which had the same address, so, presumably, it would not raise the lender's suspicion.

GA1567. Babar told Perkins that if the lender asked him (Perkins) why the name came up differently, he should explain “[w]e have two companies, Excellent Painting and Global Home Painting, but we use, same fax number, both companies.” GA1567. Telephone company records showed that telephone service for Global Home Painting was established at Nawaz’s home address and was disconnected on January 20, 2010, the same day as Babar’s conversation with Perkins. GA1982.

Indeed, Perkins testified that he did in fact go to Nawaz’s house that day and that he falsely verified employment for a buyer on a land line telephone number at Nawaz’s house. GA116-18, GA1563-70.

b. Nawaz and his wife sold three houses in the scheme and made the proceeds available to the conspiracy.

Nawaz and his wife, Bushra Nawaz, were involved in purchasing, and then selling three houses for the fraudulent scheme. Nawaz PSR ¶¶ 14-17. They also each repeatedly used their personal bank accounts to take possession of fraudulent proceeds and facilitate the distribution of proceeds to co-conspirators. Nawaz PSR ¶¶ 14-17. Perkins testified that he served as a straw buyer for the purchase of 41 Montauk Avenue in New London from Nawaz and Bushra

Nawaz. Nawaz PSR ¶ 14. For her part, Bushra Nawaz was the seller of record and signed all necessary paperwork. *See* GA969-78, GA999-1000, GA1297-98.

Although Bushra Nawaz's name was on the paperwork, Perkins testified that he dealt exclusively with Rab Nawaz regarding the 41 Montauk purchase. Nawaz PSR ¶ 14. Nawaz himself corroborated his knowledge of and participation in the Montauk deal during a recorded conversation with Perkins in which Perkins asked Nawaz whether there is anything with both of their names on it "other than like Montauk." GA1797. Nawaz responded that "they" (the government) do not know anything about Montauk. GA1797. The Nawazes purchased the house on April 23, 2007 and sold it a little over a month later on May 31, 2007 for \$265,000—a price increase of 89% over what Nawaz paid for it. GA700.

The fact that proceeds from the Montauk transaction went directly to Bushra Nawaz showed that she also participated in the scheme. At trial, Perkins explained that Babar controlled the disposition of the sales proceeds for the conspiracy's real estate transactions. GA60-61; GA78. Often, Babar directed sales proceeds to be diverted to Sheda Telle Construction. GA60, GA69-70. But where Babar trusted the seller, he allowed the sales proceeds to be sent straight into the seller's bank account because the seller could be counted on to withdraw the money and

kick it back to Babar, or to other co-conspirators as appropriate. *Id.* For the Montauk transaction, over \$115,000 in proceeds were deposited directly into Bushra Nawaz's account at DIME Bank. GA438-39. Further, the money from the Montauk closing was taken out of Bushra Nawaz's bank account immediately after it was deposited, in a series of 12 separate cash withdrawals for \$9,500, all conducted between June 6, 2007 and June 25, 2007. GA709.

Nawaz's second sale in the conspiracy was a deal in which he sold 21 W. Coit Street, New London, to Marc Jean. GA700. Nawaz purchased 21 W. Coit Street on August 13, 2007 for \$134,900 and sold it to Marc Jean just five months later for \$255,000, another 89% increase in purchase price. *Id.* On January 17, 2008, the sales proceeds, over \$114,000, were wired into Nawaz's account at Webster Bank, and then immediately drawn out in cash and checks. GA708. On the same day as the wire transfer, Nawaz wrote a check payable directly to Gallagher, the fraudulent appraiser, for \$5,000. GA708, GA430.

The last sale by Nawaz was the sale of 36 Blinman Street, New London, to straw buyer Koa Kent. GA700. This transaction was similar to the others. Nawaz purchased the property in May 2008 for \$153,000 and sold it to Kent just nine months later for \$260,000. GA700. The \$84,000 in sales proceeds were again wired into

Bushra Nawaz's DIME Bank account and were substantially taken out in a series of checks payable to Bushra Nawaz and a check payable to Webster Bank used to pay down the Nawaz's mortgage. GA435, 700, 709.

c. Nawaz obstructed justice in a recorded call with Perkins.

After Babar's arrest in this case, he had a detention hearing on May 14, 2010 during which the government summarized certain evidence, including a January 20, 2010 telephone call between Babar and Perkins. GA479-80; GA 1821, 1824-25. In that call, Babar told Perkins to go to his uncle's house (*i.e.*, Nawaz's house) to verify employment for a straw buyer. GA1565-69, GA1824-25. Nawaz was present in court during this proceeding. GA479-80. On May 17, 2010, Nawaz visited Babar at the jail listing himself as Babar's "uncle." GA1819-20. A week later, on May 20, 2010, Perkins and Nawaz met at Nawaz's house and Perkins recorded their conversation. GA1792-1818.

In this recorded conversation, Nawaz told Perkins to deny knowledge about things that Perkins clearly knew about. For example, Perkins asked Nawaz what to say if law enforcement should ask him about Global Home Painting, "or the phone thing"—a reference to Perkins having used the telephone at Nawaz's residence to fraudulently verify Jeremy Turner's employ-

ment. GA1808. Nawaz told Perkins: “You don’t know nothing about it.” *Id.* Nawaz also told Perkins that he could say he knows that Nawaz runs Excellent Painting because “you know you can’t hide that,” but told him, “you don’t know anything, Global Painting.” GA1809. Because Nawaz was apparently concerned about law enforcement connecting him to Babar, Nawaz also told Perkins that “for future reference,” if someone asks Perkins about Babar’s “uncle,” that Perkins should “tell ‘em I don’t know.” GA1796. Then, Nawaz told Perkins that if he had to visit, “don’t come in the daylight” and “use maybe a different phone.” GA1815.

3. Marshall Asmar

Marshall Asmar was a property owner who negotiated directly with Babar to sell three properties in the scheme. For each of these deals, there was one price (an inflated one) that would appear on papers submitted to the lender, and another secret price negotiated between Babar and Asmar. Asmar got the price he negotiated and Babar got the inflation factor to distribute to the other members of the conspiracy as he saw fit.

In June 2008, Asmar’s representative emailed Babar with a list of properties Asmar had for sale. GA97-98; GA1253. Asmar and Babar met shortly after this meeting and Babar explained to Asmar the nature of the conspiracy and how

the fraud worked. Asmar PSR ¶11. Asmar then had multiple other dealings with Babar to arrange several real estate transactions, as set forth below.

a. 243 Starr Street

On October 10, 2008, Asmar sold 243 Starr Street to straw buyer Wilson Nicolas for \$175,000 in a transaction insured by the FHA. GA700. But Asmar knew that this was not a real sale and that Nicolas was not a real buyer. Nicolas testified that he never saw the property before closing, did not pick it out, did not negotiate the price with Asmar, and never got the keys. Asmar PSR ¶14; GA100, GA221-23. Although the closing documents represented to the lender that Nicolas intended to occupy 243 Starr Street as his primary residence, Nicolas testified that he never set foot in the place. GA227.

Further, a tenant who lived at the 243 Starr Street property and paid rent to Asmar testified that her family had lived at the property before the purported sale to Nicolas, and remained after the sale, all the while paying rent to Asmar. GA212.

The HUD-1 settlement statement for the transaction represented to the lender that Asmar was to receive \$161,420.96. GA1250. In fact however, Asmar made a side deal with Babar in which Asmar received \$82,400 from the sale and Asmar paid \$73,240.82 to Sheda Telle—a pay-

ment that was not disclosed to the lender. GA1250, GA1267-68.

b. 88 Hazel Street

Just five weeks after 243 Starr Street closed, on November 19, 2008, Asmar sold another property to Nicolas, 88 Hazel Street, for \$180,000, in another FHA-insured transaction. GA700. Again, Nicolas did not choose the house, did not negotiate the price with Asmar, and never got the keys. GA221-23, GA226. The closing for 88 Hazel took place at Olmer's office and Nicolas testified that he was told to (and did) wait in a room while Babar, Perkins and Asmar discussed things privately without him. GA224. Once it came time to sign the closing documents, Nicolas sat down and signed documents with Asmar. GA224.

Nicolas testified that he went to see 88 Hazel Street after the closing, but the house he had supposedly just purchased for \$180,000 was so "scary" and "trashed," that he did not even get out of his car. GA227-28, GA1294-96.

The HUD-1 for the deal represented to the lender that Asmar would be taking \$90,034 in cash and \$76,207 as payoff of a mortgage to Washington Mutual. GA1281. But in fact, Asmar had agreed to pay \$76,591 to Sheda Telle and reduce cash proceeds to \$11,543 cash and the Washington Mutual payoff. GA1283, GA1284-86. The lender for 88 Hazel was kept in the dark

about this secret payment, just like the lender for Starr Street. GA1250, GA1281.

c. 211 Lloyd Street

On October 1, 2009, Asmar sold 211 Lloyd Street to straw buyer Alicia Martineau. GA700. Asmar had purchased 211 Lloyd Street in December 2008 for \$16,000, and sold it 10 months later to Martineau for \$160,000 in another FHA-insured transaction. GA700, GA712.

Martineau did not negotiate the sales price with Asmar and never received keys. GA111, GA300.

This was Asmar's third sale and third FHA-transaction, and no one involved told the lender that Sheda Telle was again involved. The HUD-1 represented to the lender that Asmar was taking \$144,000 out of the deal, but in fact, Asmar and Babar had agreed that Sheda Telle would get \$49,375, while Asmar took \$93,000. GA712, GA1332-33, GA1397-98, GA1399.

d. 221 Starr Street and 70 Center Street

In late 2009 and early 2010, Asmar and Babar tried to sell two other Asmar properties, 221 Starr Street in New Haven, and 70 Center Street in Bridgeport, to straw buyers. By now however, Perkins was cooperating with the government, and he was able to capture some of the conspiracy's discussions on tape.

In a January 26, 2010 recorded conversation between Babar and Perkins, Babar told Perkins that Gallagher would appraise 70 Center Street for \$375,000, but that Asmar wanted to take \$250,000 of that for himself. GA130-32, GA1655-57. Alicia Martineau was selected as the straw buyer for the deal. GA1433-37, GA1438-41. However, the loan for 70 Center Street was never approved and the sale did not go through as planned.

In late 2009 and early 2010, Asmar, Babar, Gallagher, and others tried to conduct another fraudulent sale, this time of the house located at 221 Starr Street in New Haven. Asmar had purchased the property in or about May 2009 for \$20,000. GA700, GA712. The proposed deal later that year was for a straw buyer to purchase the property for \$125,000. GA1470. The price on paper for the deal was \$125,000, GA1470, but Asmar struck a deal with Babar to take \$70,000 for the property. GA67-68, GA1505-08.

The conspirators took various steps to justify the more than six fold increase in price and Gallagher's appraisal of the house for \$125,000. From January 22, 2010 through January 25, 2010, Babar and Perkins had a series of conversations about getting a fake invoice from a construction company owned by Jerry Paolillo, a friend of appraiser Gallagher, to be used as evidence that work had been done to the property (that had not, in fact, been done). GA119-23;

GA1585-88; GA1592-92. In a conversation on January 22, 2010, Babar instructed Perkins to write a letter to Action Mortgage, the real estate broker for the deal, from “Marshall,” saying that Paolillo did work at 221 Starr Street. GA1585-86.

Asmar gave Perkins access to 221 Starr Street to take a number of photos to use in Gallagher’s inflated appraisal. GA144, GA1717. Perkins then doctored a number of the photos, making the property look to be in better condition than it actually was, and the conspirators submitted the doctored appraisal to the lender. GA145-47, GA1447-65. In this instance, however, Franklin American asked too many questions for the conspirators’ comfort, and they eventually withdrew the loan application. GA147, GA1773.

4. Morris Olmer

Morris Olmer was a former lawyer with an office in New Haven. He lost his law license in February 2007, prior to his involvement in the conspiracy, through his role in a separate fraudulent transaction. Olmer PSR ¶ 9; GA2135. Babar began using Olmer to conduct closings for transactions beginning in early 2008 with 173 Beaver Street in New Britain, Connecticut. GA700; Olmer PSR ¶ 10. Olmer conducted 14 closings on fraudulent real estate transactions for Babar. Olmer PSR ¶ 11. Olmer shared offices

with Attorney David Avigdor, and while Olmer orchestrated and conducted the closings on the transactions, Olmer had Avigdor certify the transaction as the settlement agent and receive and disburse the funds involved through Avigdor's IOLTA account. Olmer PSR ¶¶ 9, 11; GA1083, GA1089, GA1408. About \$3,520,000 in fraudulent loan proceeds flowed through Avigdor's IOLTA as a result of the fraudulent transactions Olmer closed for Babar and the others. PSR ¶ 11. Olmer funneled well over a half-million dollars of this money to Sheda Telle Construction. GA706.

Babar had been using different lawyers to close on the fraudulent transactions until he found Olmer, after which he used only Olmer because, as a cooperating witness testified, Olmer "would do whatever we needed done and he didn't have any problems with what we were doing." GA59; Olmer PSR ¶ 11.

Indeed, in the course of a little over a month, Olmer conducted five closings at Babar's direction for straw buyer Mohammed Saleem, all on houses that were represented to five different lenders to be for use as Saleem's primary residence. GA700, GA1124. In connection with the closings, Olmer signed several of the occupancy affidavits in which Saleem represented that he would occupy the house as his primary residence. GA1101, GA1106, GA1155. Saleem did not occupy those houses, much less as his prima-

ry residence, and defaulted on the loans; all five properties went into foreclosure. GA700. When creditors raised questions, Olmer and Babar discussed the possibility of obtaining a death certificate for Saleem, who had returned to Pakistan. GA96-97.

Olmer conducted multiple closings on houses that were supposed to be occupied as a primary residence for transactions with other straw buyers Babar brought to him: Marc Jean (GA1083, 1089), Lisa Depa (GA1168, GA1175), and Wilson Nicolas (GA1246, GA1281).

As discussed in more detail below, Olmer even went so far as to rent out a house just days after he conducted a fraudulent closing on it between seller Asmar and straw buyer Martineau. GA1332, GA1405, GA280-87. That is the reason Olmer did not provide the keys to straw buyer Martineau at the closing, not even for show. GA304. The lease required the tenant to pay \$600 per month at Olmer's office. GA1405.

Summary of Argument

I. Wendy Werner

A. The district court correctly denied Werner's Rule 29 motion, concluding that a rational jury could have found that the government proved beyond a reasonable doubt that Werner conspired with Babar, Gallagher and others to commit mail fraud, and in fact did commit mail fraud. Werner sold three properties to a straw buyer arranged by Babar for \$800,000 after having purchased the properties for \$15,000 each. The properties were in extraordinarily poor condition, with one not even habitable. Werner kicked back about \$283,000 to Babar through his shell company out of the fraud proceeds generated by the sales. Werner concealed this payment from her closing attorney and from the lenders making the loans. The jury was well within its prerogative in convicting Werner.

B. Werner claims that the district court erred in calculating the loss amount that resulted from her offense. But the district court correctly calculated her loss as more than \$400,000 and not more than \$1,000,000. The fact that the restitution amount was lower than the loss figure calculated by the district court does not demonstrate error in the loss calculation, but rather reflects a difference between the different requirements for each calculation.

C. Werner also argues that the district court erred in imposing a two-level increase in her offense level for sophisticated means. The district court correctly applied the enhancement because, among other reasons, Werner concealed the kickback to Babar by payment to Babar's fictitious shell company. Her scheme also involved the use of fraudulent appraisals to inflate the prices at which she sold the properties.

D. Werner did not play a minor role in the offense. As the district court found, Werner's role was not minor compared to the average participant in a mortgage fraud conspiracy. She was personally involved in selling three houses in order to obtain the \$800,000 from lenders. She kept important information away from the closing attorney and the lender in order for the loan to close. Werner also personally distributed the proceeds of the fraudulent activity to Babar, and she realized a substantial financial gain from the fraudulent transaction.

E. The district court's imposition of a 48-month sentence on Werner was entirely reasonable. The district court carefully considered Werner's arguments for a non-guidelines sentence, rejected them and explained its reasons in a thoughtful and rational way. Her sentence was clearly within the district court's considerable sentencing discretion.

II. Rab Nawaz

A. The district court did not clearly err in its loss calculations. As required by the guidelines and this Court's decision in *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010), the sentencing court started with the reasonably foreseeable pecuniary harm and then subtracted as a credit against loss the actual resale prices victim lenders received for foreclosure properties. The lenders here did not simply "dump" these properties for "nominal" prices. Faced with significant costs of carrying houses that were not worth anything near what they had been told and that had been largely abandoned, multiple lenders made the reasonable business decision to sell these properties as efficiently as possible. For the district court, which had presided over a weeks-long trial and had heard hours of live testimony, to use those resale prices as a reasonable estimate of loss was not clearly erroneous.

B. The district court did not plainly err in declining to sentence Nawaz to a lower non-guidelines sentence. The court expressly recognized Nawaz's arguments and thoroughly understood its authority and obligations under 18 U.S.C. § 3553(a). The sentencing court's decision not to impose a lower non-guidelines sentence was entirely reasonable where Nawaz was involved with the conspiracy for nearly three years, sold three houses into the scheme, used his bank account to funnel money to other mem-

bers of the conspiracy, supported other deals in the scheme by allowing his home address and telephone number to be used to verify straw buyers' employment, and obstructed justice by trying to silence an important witness. The court was well within its discretion to impose a guidelines sentence under those circumstances.

C. The district court did not plainly err in its restitution calculations in which it subtracted the actual resale prices lender received out of foreclosure from the loan amounts. Those resale prices arose from genuine arm's length market transactions in which lenders had every incentive to recoup their losses. As such, the district court's finding that resale prices best represented the value lenders received from the return of property did not affect Nawaz's substantial rights, or the fairness of the proceeding.

III. Marshall Asmar

A. There was sufficient evidence to convict Asmar. The evidence at trial showed that Asmar participated in the conspiracy for over a year and a half in which time he sold three houses in the scheme and made preparations to sell two others. He was well aware that these "sales" were bogus and that the buyers would make no real claim to the properties as Asmar continued to collect rent at one of the properties well after he supposedly sold it. He negotiated his cut on those deals directly with the scheme's leader,

Babar. Recorded calls with co-conspirators showed that Asmar was knowledgeable about the fraud. That evidence was more than sufficient to support his convictions.

B. The district court also correctly denied Asmar's motion for new trial as there were no extraordinary circumstances to justify granting a new trial and no reason to believe that the verdict was unjust. The jury heard 14 days of evidence and deliberated for four days. Their split verdict, acquitting Asmar on several counts, shows that they thoughtfully parsed through the evidence.

C. The district court properly applied a sophisticated means enhancement to Asmar's guidelines calculation. Asmar participated in an elaborate scheme to defraud mortgage lenders involving multiple co-conspirators, the creation and use of false documentation, and transactions with fictitious entities designed to conceal who was benefitting from the fraudulent scheme. Those facts well justified the enhancement.

D. The district court did not err in declining to grant Asmar a minor role adjustment. His conduct spanned a significant period of time and involved multiple transactions. He engaged in negotiations with the top members of the conspiracy and knew that the scheme involved the generation of false documentation and the use of a fictitious corporate entity. In doing so, he was

no less culpable than the average participant and did not merit a minor role adjustment.

E. The district court did not plainly err in declining to sentence Asmar to a lower non-guidelines sentence. The court in fact did impose a non-guidelines sentence here, sentencing Asmar to a term of 52 months, well below his advisory guidelines range of 57-71 months. The court expressly stated that it had considered all of Asmar's arguments and the remarks offered by him and on his behalf at sentencing. It was not error for the court to have declined to lower Asmar's sentence any further.

IV. Morris Olmer

A. Olmer claims that the district court based its loss findings on unreliable information about property values. But the district court correctly relied on the actual re-sale of the properties out of foreclosure and, where not available, appraisals. Contrary to Olmer's claim, it was the defendants, not the government, who advocated the use of Zillow.com estimates at the hearing on loss in the district court. In any event, Olmer cannot show that any error affected his substantial rights.

B. Olmer claims that he should have received a reduction for acceptance of responsibility for his admissions at sentencing. Olmer is wrong. He proceeded to trial, where he contested his factual guilt and was found guilty on all counts.

In fact, although the district court gave Olmer credit for his statement at sentencing and gave him a below-guidelines sentence, Olmer never even asked the district court to reduce his offense level by two levels for acceptance of responsibility.

C. Olmer argues that the district court acted under a misimpression that he acted as an attorney, but a full reading of the district court's statement at sentencing, shows that it did no such thing. The district court presided over a lengthy trial in which the evidence showed as clear as it possibly could that Olmer conducted the fraudulent closings as an unlicensed attorney.

D. Olmer also argues that the district court abused its discretion in enhancing his offense level for use of a special skill. But the district court was correct in doing so, as Olmer's special skills as a former attorney significantly facilitated the ongoing mortgage fraud by allowing him to orchestrate and conduct the closings on fraudulent real estate transaction.

E. Olmer claims that his sentence of 60 months for his involvement in a multi-million dollar mortgage fraud scheme was substantively unreasonable. But the district court carefully considered all of the factors under § 3553(a) in arriving at a sentence below the guidelines range of 70 to 87 months.

Argument

I. The claims of Wendy Werner are without merit.

A. The evidence was sufficient for the jury to convict Werner of conspiracy and mail fraud, and no new trial is warranted.

1. Relevant facts

The district court denied Werner's motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure in a written ruling:

[T]here was substantial evidence of Werner's guilt. As set forth in detail by the government in opposition, there were significant parallels between Werner's transactions involving the Lake Street properties and the other transactions described at trial, and the "hallmarks" of fraud introduced into evidence with respect to the transactions to which Werner was a party were more than sufficient to support the jury's verdicts; the lapse in time between the Lake Street transactions and the other transactions described at trial was not sufficient, particularly in view of the evidence with respect to other events that occurred in the interim, to undermine the reasonableness of the conclusions reached by the jury; the evidence introduced at trial (in-

cluding Werner’s own evidence) supported the conclusion that \$800,000 was not a legitimate price for the Lake Street properties; the evidence that came in through Ramona DeSalvo was more than sufficient to support a conclusion by the jury that the payments to Babar were not legitimate; and the evidence at trial was more than sufficient to support the jury’s conclusion that Werner had the requisite knowledge.

WA75-76.

The district court also denied Werner’s motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure in the same ruling, finding no extraordinary circumstances that warranted a new trial or any other reason to order a new trial. WA76.

2. Governing law and standard of review

This Court has described the burden that a defendant faces when challenging the sufficiency of the evidence as a “heavy” one. *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006). In reviewing a conviction for sufficiency of the evidence, the court “view[s] the evidence in the light most favorable to the government, drawing all inferences in the government’s favor.” *United States v. Sabhani*, 599 F.3d 215, 241 (2d Cir. 2010). A reviewing court applies this sufficiency test “to

the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal. See *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000). "The ultimate question is not whether we believe the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could so find." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

This Court reviews *de novo* the district court's assessment of the sufficiency of the evidence. *Sabhani*, 599 F.3d at 241.

Rule 33 provides that the district court may grant a new trial upon the defendant's motion "if the interest of justice so requires." The ultimate question for the district court in ruling on a Rule 33 motion is "whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 133, 134 (2d Cir. 2001).

Although courts have "broader discretion to grant a new trial under Rule 33 than to grant a

motion for acquittal under Rule 29,” they “none-theless must exercise the Rule 33 authority ‘sparingly’ and in ‘the most extraordinary circumstances.’” *Id.* (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)).

Thus, although a district court has more leeway to evaluate the evidence on a Rule 33 motion than in the Rule 29 context, it still “must defer to the jury’s resolution of the weight of the evidence and the credibility of the witnesses.” *Sanchez*, 969 F.2d at 1414 (quoting *United States v. LeRoy*, 687 F.2d 610, 616 (2d Cir. 1982)). “It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.” *Id.* The judge may not “freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury.” *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998). Even a “judge’s rejection of all or part of the testimony of a witness or witnesses does not automatically entitle a defendant to a new trial.” *Sanchez*, 969 F.3d at 1414. The test remains whether the court “is convinced that the jury has reached a seriously erroneous result.” *Landau*, 155 F.3d at 104.

This Court reviews a district court’s ruling on a new trial motion for abuse of discretion. *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009).

3. Discussion

a. The evidence was sufficient for the jury to convict Werner of conspiracy and mail fraud.

The evidence was clearly sufficient to support the jury's verdict to convict Werner of conspiracy and mail fraud. Viewing the evidence in the light most favorable to the jury's verdict, and drawing all reasonable inferences from it, the evidence at trial showed that Werner engaged in a mortgage fraud conspiracy by engaging in the sham sale of three properties on Lake Street in Norwich.

The trial evidence showed that Werner conspired with Babar and Gallagher to sell three properties at 35, 37, and 41 Lake Street in Norwich that she acquired for \$45,000 for the fraudulently inflated aggregate sales price of \$800,000. GA713, GA745, GA795, GA828. All three properties went into foreclosure and resold out of foreclosure collectively for \$165,000, leaving the lenders with a loss of approximately \$635,000. GA700, GA713.

Werner, through her company, Marbo Restorations, obtained the Lake Street properties in April 2001 for \$15,000 each. GA700. On June 17, 2006, Gallagher issued fraudulently inflated appraisals for each of the Lake Street properties. GA719, GA774, GA811. For example, Gallagher prepared an appraisal for 41 Lake Street dated June 17, 2006 which stated:

The subject is in average to good condition overall having recently been renovated inside and out. All mechanicals, walls, floors, windows & doors are new. No significant deficiencies were observed and no repairs are required at this time.

GA812. The appraisal also described the property as including “decks; all new sheetrock; all new kitchen & baths; all new vinyl replacement windows.” GA812.

These representations were false. At trial, the testimony of David Neary, a property owner on Lake Street and a licensed home improvement contractor, established that 41 Lake Street was nothing close to the “recently renovated” home Gallagher described in his appraisal, and in fact was an uninhabitable shell. GA410-426. Neary testified that he looked at 41 Lake Street in 2001 (at the time defendant Werner purchased it) but decided against buying it because it required repairs beyond what he believed he could handle. GA411. After Werner sold the property to Qamer based on her fraudulent agreement with Babar, the property went into foreclosure. GA700, GA304, GA411. Neary looked at the property again sometime during 2008 when it was back on the market after the foreclosure. GA411-12. He testified that the property was in the same condition it had been when he first saw it in 2001 and still in disrepair. GA413-14. In fact, he described it as “a shell,” “an abandoned build-

ing,” with no framing, no electrical and no plumbing. GA414. It was in the same condition as he saw it in 2001, as were the other two properties. GA412-14. Neary testified that it “looked like something out of a city that’s been bombed out.” GA426.

Neary’s testimony was corroborated by photographs of the 41 Lake Street house and the other properties. GA760, GA835, GA758-64, GA799-801. Moreover, Werner called her own expert appraiser, and he too testified that the property was not finished, and that he believed the property to be uninhabitable. GA566-67. In short, Gallagher’s description of this property as having been “recently renovated” was utterly false.

The appraisals for the other two Lake Street properties (35 and 37 Lake Street) made nearly identical false and fraudulent representations about the condition of those properties. GA719, GA774.

Based on Gallagher’s fraudulent appraisals, Werner sold all three Lake Street properties on August 11 and 28, 2006, to Qamer, an indicted co-conspirator. GA714, GA745, GA765, GA795, GA802, GA828. The sales prices for the properties were \$260,000, \$270,000 and \$270,000, for an aggregate total purchase price of \$800,000. GA700, GA713, GA745, GA795, GA828. The lenders provided nearly \$800,000 in residential real estate loans to fund the transactions. After

the “sales” closed, the proceeds—\$690,265—were deposited into Werner’s Marbo Restorations account at Citizens Bank. GA713, GA749. Using the sales proceeds, Werner paid Babar \$283,704. GA713, GA751-52.

Werner paid the kickback to Babar through Babar’s shell entity, “Global Accounting and Taxation Services.” GA751-52, GA756. Werner wrote that the payments were “consulting fees” on the memo portion of the each of the three checks. GA751-52. The payments were, of course, a fraudulent payoff for providing a straw buyer—Qamar—to purchase the properties from Werner at grossly inflated prices. Even after paying Babar, Werner walked away with a fraudulent gain of over \$400,000. GA713. Babar in turn wrote 10 checks in the aggregate amount of \$179,208 to Qamar, the so-called “buyer” of the properties. GA713, GA753-54.

Werner concealed the fact that she was paying Babar \$283,704 from her closing attorney, Ramona DeSalvo. GA377, GA383. Werner also concealed it from the lender making the loan by keeping it off the Form HUD-1 Settlement Statement for each of the three transactions. GA383, GA745, GA795, GA828. DeSalvo testified that she knew nothing about the \$283,704 payment to Babar’s shell entity, and that if she had known about it, she would have disclosed it on the form HUD-1 settlement statement. GA382-83.

Adam Loskove, a representative from Credit Suisse, one of the lenders on the Lake Street properties, testified about the loan transactions. GA360-61. Loskove testified that it would have been important for Credit Suisse to have known about any payments such as the payment to Babar, and that he would have expected to see the payment disclosed on the HUD-1. GA369. Loskove testified that the payment would affect Credit Suisse's decision to make the loan if it had known about it. GA369. As he explained, "the lender wants to know the whereabouts of all funds being disbursed in connection with the origination of the loan." GA368.

Clearly, taking these facts in the light most favorable to the government, the jury was well within its prerogative to find Werner guilty of conspiracy and mail fraud by causing Credit Suisse and another lender to part with almost \$800,000 in loan proceeds in connection with a sham sale involving properties that were fraudulently appraised.

Werner does not appear to dispute the essential facts established at trial, but just the inferences the jury drew from them. *See* Werner Br. at 11-14, 18-19. Werner claims that the jury's finding of her joining the conspiracy with Babar and Gallagher "rests on surmise and straining inferences." Werner Br. at 15. She argues that there was no "direct testimony" as to her participation from any cooperating witness.

Werner is correct that neither of her co-conspirators, Babar and Gallagher, testified at trial. Werner Br. at 19, 21. But she is incorrect that this has any import as to the sufficiency of the evidence against her. As set forth above, there were numerous witnesses who provided testimony that, together with the extremely incriminating records of the transactions, fully justified the jury's finding that Werner knowingly conspired with Babar and Gallagher, and engaged in a scheme to commit mail fraud with them.

Werner's sales of the Lake Street properties were the first fraudulent sales on which Babar and Gallagher collaborated, and Werner claims that the jury based its verdict on subsequent transactions in which Werner was not directly involved. Werner Br. at 23. This is not true, and Werner offers nothing to show as much except her say so. The government did not argue anything of the sort about Werner in summation or rebuttal, nor does Werner claim otherwise. GA628-30, GA659-61. Indeed, the government dismissed the substantive wire fraud counts against Werner that were based on subsequent transactions—and properly charged under *Pinkerton v. United States*, 328 U.S. 640 (1946)—after the government decided that there was no need to pursue a *Pinkerton* theory of liability. The jury had all the evidence it needed from Werner's own actions to conclude that she was

guilty of conspiring with Babar and Gallagher (count one) and of participating in a mail fraud scheme (count ten).

Werner claims that the government failed to prove she knew that “the Lake Street transactions were devised to fraudulently extract funds from lenders.” Werner Br. at 21. But the evidence showed that Werner knew the fraudulent nature of the transaction, as well as the role of Babar and Gallagher in making them happen.

For instance, the jury was justified in finding that Werner knew as the owner and seller of the property, just as local property owner David Neary testified he knew, that 41 Lake Street was a shell of a house in a blighted neighborhood with no sheet rock, electric or plumbing. GA410-14, GA426. The evidence showed that Werner knew that the property was not worth \$270,000—it was the same shell she had purchased for \$15,000—and that the three properties combined were not worth \$800,000, or anything but a fraction of it.

In addition to the physical condition of the property and the vastly inflated sales price, the jury had sufficient evidence of Werner’s knowledge of the fraudulent nature of the deal by the \$283,704 kickback payment she made to Babar. By comparison, a real estate commission of a full 6% would only have been about \$48,000. Moreover, Werner made the payment not to Babar directly, but to Babar’s shell company,

“Global Accounting and Taxation Services,” an entity that had nothing to do with the transaction. There was no direct evidence at trial as to what the reference to “consulting fees” was on the three checks that she provided to “Global Accounting and Taxation Services”—just the logical and obvious inference that it was a cover for money owed to Babar for arranging for the fraudulent sale. GA751. These facts, viewed not in isolation but in conjunction with all the evidence, clearly support the jury’s verdict of guilt as to conspiracy and wire fraud. *See United States v. Cuti*, -- F.3d --, 2013 WL 3197796, at *7 (2d Cir. June 26, 2013).

Werner also argues that her transaction was separate from the overall conspiracy in which Babar, Gallagher and others participated because it did not share the “hallmarks” of the other transactions in the conspiracy. Werner Br. at 20. In particular, Werner claims that most of Babar’s “trusted” sellers were family members or friends, that none of the other checks presented at trial could be linked to a bank account with Babar’s name on the signature card, that all the other seller lawyers were in collusion with Babar but Werner’s attorney, Ramona DeSalvo, was not, and that all the other straw buyers in the case received significantly less in payments than Qamer ostensibly did. Werner Br. at 20.

Werner is wrong. She highlights the minor differences between the fraudulent conduct in

which she engaged with the Lake Street properties and the fraudulent conduct involving the other properties, all the while glossing over the fundamental ways in which her transactions mirrored the other fraudulent transactions in the conspiracy.

The simple truth is that there were broad similarities between all the transactions involved in the scheme. In the scheme, Babar would arrange a fraudulent transaction between a straw buyer and a seller. GA57. Babar and Gallagher would have the home appraised at an inflated value, and with the exception of the one transaction in which Gallagher served as seller of his own home, Gallagher would provide the fraudulent appraisal. GA57-58. A portion of the loan proceeds would often, though not always, be sent to a shell company, from which Babar and others would take a cut. GA60. Babar would then ensure that the straw buyer was also paid for acting as the purchaser. GA57, GA60.

Suffice it to say that on these key points, Werner's transactions squarely fit the fraud template used throughout the conspiracy. Her properties were grossly overvalued in Gallagher's appraisal. Once the mortgage loan was approved, a portion of the loan proceeds were sent to a shell company—in Werner's instance, Global Accounting and Taxation Services. When Werner sent payments to Global Accounting and Taxation Services, Babar sent a portion of those

proceeds to Qamer, the straw purchaser. GA753-54. These are the very “hallmarks” of fraud that existed in all the Babar and Gallagher transactions—hallmarks that a rational jury could see throughout the conspiracy as a whole, including the portion in which Werner participated.

The particular details of any two transactions were never exactly alike, nor would one expect them to be. Sometimes the funds were diverted through Sheda Telle Construction, sometimes they were paid directly from the seller. GA60. Sometimes sellers attended the closing, sometimes they did not. Sometimes there were witting lawyers involved, sometimes there were not. GA86, GA93. No two transactions were exactly the same, but the essential fraudulent features of the transactions were.

Werner also argues that the time lapse between the Lake Street deals involving Werner and the other transactions was so great it could not have been part of the same conspiracy. Werner Br. at 23. But the time lapse between the Lake Street deals and the other deals was a matter of mere months in a conspiracy that lasted several years. Werner’s sale of 41 Lake Street closed on August 28, 2006. GA700, GA807. That December, just a little more than three months later, Babar initiated Jo’mell Thomas and Ken Perkins into Babar and Gallagher’s ongoing conspiracy and engaged shortly thereafter in many more transactions. GA70. Certain participants

in the conspiracy came and went, but Babar and Gallagher remained the constant from beginning to end (GA700), as did the object of defrauding lenders through sham real estate sales. When taken in that context, the jury's conclusion that Werner's activity was part of the Babar-Gallagher conspiracy is clearly a rational one supported by the evidence.

Werner also claims that the government failed to prove the allegations in the mail fraud count of the Indictment. Werner Br. at 23-24. In fact, Werner challenges nothing other than Werner's knowledge that Babar paid Qamer out of the \$283,704 in fraudulent proceeds that she paid Babar. Werner rests her argument on paragraph 30 of Count 10 of the Indictment, which states:

It was part of the scheme or artifice that in or about August 2006, Werner, through Marbo Restorations, LLC, provided Babar with approximately \$283,704.43 of the proceeds generated through the sale of the three houses to Qamer. Babar deposited that money into the account of his business, Global Taxation and Accounting Services, and he wrote ten checks to Qamer for a total of approximately \$179,208.00.

WA44-45. In fact, the government proved every one of the allegations in that paragraph. Werner did pay Babar's shell company \$283,704 through Marbo Restorations. GA751-52. Babar

did write the ten checks to Qamer for \$179,208. GA753-54, GA713. The government did not allege or prove, nor did it have to, that Werner had knowledge of the payments from Babar to Qamer. Werner is simply trying to create a burden that the government did not have to meet, namely, showing that she knew every facet of the scheme. *See, e.g., United States v. Panza*, 750 F.2d 1141, 1150 (2d Cir. 1984) (defendant playing a part in a fraudulent scheme need not know every detail of it). Werner's guilt and complicity in the scheme are evidenced by the fraudulently high prices of the Lake Street properties based on the fraudulent appraisals, the kickback to Babar for arranging the "sale," and her failure to disclose the extraordinary payment to Babar on the HUD-1 settlement statements.

Werner also refers to an amount that "she ascribed to the properties" at trial as \$500,000. Werner Br. at 24. There was *no* evidence at trial that Werner herself believed the properties were worth this much when she sold them. Rather, at trial, she called an appraiser to provide expert testimony that the market value of the properties at the time of her August 2006 sale was \$501,000. GA560-72. Her expert's testimony was notable, but for reasons that did not help her at trial and do not help her here.

First, not even Werner's expert could opine that the properties were worth \$800,000 at the

time Werner fraudulently sold them for that price and kicked back \$283,000 to Babar. Rather, he testified that they could have been worth as much as \$501,000. GA567. Second, her expert admitted the properties were not complete and that he did not inspect the interiors of the buildings, but rather got his information about the interiors from Werner's husband. GA566. He assumed that the properties were inhabitable. GA566-67. Third, one of the prior sales on Lake Street that he found "highly comparable" to Werner's Lake Street properties had been appraised by none other than Thomas Gallagher, using language similar to his fraudulent Werner appraisals. GA570-71. Finally, the expert acknowledged that the price at which Werner's three Lake Street properties sold out of foreclosure, a total of \$165,000, was consistent with the way in which he testified properties had appreciated on Lake Street between 2001, the year in which Werner bought the properties for \$45,000 (total), and 2006, the year in which she sold them per the fraudulent arrangement with Babar for \$800,000. GA571.

On another point, Werner cites evidence that someone crossed out the "entire agreement" clause in one of the contracts, which she argues shows that "the jury could have reasonably concluded" was "Werner's overt representation to the lenders that the payments to Babar" were disclosed. Werner Br. at 24. But, of course, the

jury did not so conclude, nor would it have been reasonable for it to do so. Werner's concealment of the \$283,704 kickback to Babar from her closing attorney, and her concealment of it on the HUD-1, as well as the fact that she made the payment to an unrelated Babar shell entity, was powerful evidence that Werner knew the payment could not be known to anyone besides her and Babar for the loan to close. No one, including Werner, testified about who crossed out the language or why. But the overwhelming evidence showed, and the jury was justified in concluding, that Werner's payment to pay Babar was fraudulently withheld from her closing attorney and the lender in order for the loan to issue.

Werner also claims that the evidence showed there was more than one conspiracy. Werner Br. at 26. There was one conspiracy, and it was operated by Babar throughout, with appraisal services of Gallagher used throughout, as even Werner concedes. *Id.* As set forth above, all of the transactions throughout the conspiracy bore the same essential features of defrauding lenders by arranging sham sales to straw purchasers at inflated purchase prices justified by fraudulent appraisals. Werner requested, and received, a multiple conspiracy instruction from the court. GA597. The jury clearly found that one conspiracy existed, and that Werner knowingly joined it and agreed to accomplish one of its objectives.

This was not, as Werner claims, “guilt by association,” Werner Br. at 26, but rather guilt beyond a reasonable doubt.

b. No new trial is warranted.

In asking this Court to vacate the verdict and order a new trial, Werner relies on her argument to the jury that her payment to Babar’s shell company of \$283,704 was a “finder’s fee” rather than a kickback of fraudulently obtained loan proceeds. Werner Br. at 28. Based on the evidence before it, the jury was well within its prerogative in rejecting that argument, and finding her guilty of conspiracy and mail fraud.

Werner’s other argument for a new trial is one of so-called “spillover prejudice” from the wire fraud counts against other defendants. Werner Br. at 29. But there was no such “spillover prejudice.” The government dismissed counts two through nine against Werner after it rested its case because it wanted the jury to consider only the conspiracy and mail fraud counts against Werner, which concerned her own conduct and direct involvement, and not the wire fraud counts, which were based on a liability theory under *Pinkerton v. United States*, 328 U.S. 640 (1946). Werner was convicted of counts one and ten, conspiracy and mail fraud, based on the evidence properly admitted against her. There was no “spillover” evidence, much less prejudicial spillover evidence, admitted against

her. Moreover, the government's argument in summation was carefully tailored to Werner's own acts with Babar and Gallagher in connection with the sales of the Lake Street properties. GA628-30, GA659-61. Werner was properly tried with other co-conspirators, and in any event she never even moved for a severance from those co-conspirators.

In short, Werner presents no reason to think that the "interests of justice" would require a new trial, nor that letting the verdict stand would be a "manifest injustice." There is no reason to believe that the verdict was unjust, and in fact, on the contrary, the verdict rendered was a just result given the evidence against Werner.

B. The district court's sentence was procedurally and substantively reasonable.

1. The district court's loss finding was correct.

a. Relevant facts

The PSR calculated Werner's sentencing guidelines range as follows: Starting with a base offense level of 7, Werner PSR ¶ 21, 14 levels were added because the loss was more than \$400,000, but not more than \$1,000,000. Werner PSR ¶ 22. The PSR found a specific loss amount of \$617,034.81. Werner PSR ¶ 12 (finding inflated total purchase of approximately \$782,034.81,

and properties resold out of foreclosure for \$165,000, leaving lender with loss of approximately \$617,034.81); *see also* Werner PSR ¶ 16. (As the PSR notes, “[t]he sales prices for the properties were \$260,000, \$270,000 and \$270,000, for an aggregate total purchase price of \$800,000,” but the total amount of loan proceeds obtained by fraud was \$782,034.81. PSR ¶ 14).

The PSR (¶ 23) also included a two-level enhancement for sophisticated means pursuant to U.S.S.G. § 2B1.1(b)(9)(C).

Werner’s total offense level was 23, which yielded a sentencing guidelines range of 46 to 57 months. Werner PSR ¶¶ 29, 50, 56.

Werner objected to the loss amount and the sophisticated means enhancement. GA2292-94. She also objected to the lack of reduction for minor role in the offense. GA2294. The district court rejected all three arguments.

As to the loss amount, the district court explained that it had calculated loss consistent with this Court’s decision in *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010) and *United States v. Mallory*, 709 F. Supp. 2d 455 (E.D. Va. 2010). GA2292. The district court continued:

The various arguments raised by this defendant and her codefendants during the hearing on objections to the Presentence Report are at odds with *Turk* and *Mallory*

and the Court finds none of those arguments persuasive.

.... [T]he defendant argued that the Court should place weight on appraisals that were approved by the Connecticut Superior Court in connection with strict foreclosure actions, and that these appraisals showed that the lenders who had sold properties for a fraction of the fair market value accepted by the superior court were dumping the properties. However, based on the fact that we have here not one idiosyncratic lender but several lenders who sold properties out of foreclosure for low prices relative to the appraisals at issue, the fact that it stands to reason that a foreclosure sale is a sale made under less than optimal conditions because the lender has to consider carrying costs and other matters like that, and the fact that defendants in this case themselves bought properties on foreclosure at very low prices, the Court concludes that the figures in the Presentence Report are reliable.

The Court also found unpersuasive the defendant's arguments that relied on *United States v. James*, 592 F.3d 1109, a Tenth Circuit case from 2010, and *United States v. Rutkoske*, 506 F.3d 170 (2d Cir.

2007). The Court noted that *Rutkoske* was addressed directly in *Turk*.

Finally, the Court also found unpersuasive the argument that the occurrence of a unique market event, like a downturn in the real estate market, has an effect on loss calculation in this case. *Turk* and *Mal-lory* make it clear that it does not.

GA2292-93.

b. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

On appeal, a district court’s sentencing decision is reviewed for reasonableness, a review akin to abuse of discretion. *See Booker*, 543 U.S. at 260-62; *Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). “It is by now famil-

iar doctrine that this form of appellate scrutiny encompasses two components: procedural review and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.” *Id.* (quoting *Gall*, 552 U.S. at 51).

Sentencing for mail fraud is governed under U.S.S.G. § 2B1.1. Under Application Note 3(A)(i), the “actual loss” for which a defendant is liable is “the reasonably foreseeable pecuniary harm that resulted from the offense.” *See, e.g., United States v. Feldman*, 647 F.3d 450, 457 (2d Cir. 2011). Under Application Note 3(A)(iv), “‘reasonably foreseeable pecuniary harm’ means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.” The district court “need only make a reasonable estimate of loss.” App. Note 3(C). “The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that ev-

idence,” and its “loss determination is entitled to appropriate deference.” *Id.*

c. Discussion

Werner’s argument on loss is essentially the same challenge to the district court’s loss calculation as that made by defendant Nawaz, and in fact Werner incorporates those arguments in her brief. *See* Werner Br. at 33-34. The government will not repeat those arguments here, but rather refers the Court to part II.A, below.

Werner argues specifically with respect to her own loss figure that the restitution amount was below the loss amount found in the PSR. She points to the fact that the final restitution figure for her, which she does not challenge here, was \$448,448.90, whereas the loss amount found by the district court was \$617,034.81. Werner Br. at 33-34.

The disparity between Werner’s restitution figure and her loss figure is not a mystery, and in fact is the result of the government’s efforts to locate the last holder of one of the notes for the three properties at issue in her case and find out how much that party paid for the note. As it turns out, that company, Shelving Rock Partners LLC, purchased the note on 35 Lake Street for \$70,109. WA109. The note, of course, turned out to be worth very little.

The government noted this very issue at a hearing on loss and other common guidelines issues on August 1, 2011. GA2254. The government argued that the loss amount can be determined by taking the loan amount that was fraudulently obtained less any residual fair market value of the collateral, here, the property. GA2254. One does not need to apportion that loss among potential purchasers of the note in any downstream transactions that may have occurred (that is, the original lender selling the note to a successive holder of the note). Restitution, on the other hand, does require that the government determine what loss each victim has suffered. In other words,

no matter how many times the mortgage is resold, the total loss caused by the fraud can always be calculated as the original mortgage amount minus the final foreclosure price: The profit earned by secondary lenders who resell a mortgage will always be canceled out by a corresponding loss to the last mortgage purchaser. Thus, the number of lenders involved and the amount of profit made by the original lender or any intermediate lenders is *mathematically irrelevant* to the calculation of the total loss caused by the fraud.

United States v. James, 592 F.3d 1109 (10th Cir. 2010) (Lucero, J., concurring) (emphasis in original). Applying these principles in this case, the

district court correctly calculated Werner's loss at \$617,034.81 based on the three original loan amounts less the amount recovered in foreclosure. The restitution amount of \$448,448 is lower because while the last holder of the note, Shelving Rock Partners LLC, submitted information for restitution purposes, prior holders of the note did not. Accordingly, the district court correctly calculated Werner's loss as more than \$400,000 but not more than \$1,000,000.

2. The district court's enhancement for sophisticated means was correct.

a. Relevant facts

The PSR included a two-level enhancement for sophisticated means pursuant to U.S.S.G. § 2B1.1(b)(9)(C). Werner PSR ¶ 23. Werner objected to the enhancement, but the district court overruled the objection, referring to the examples identified in the Application Notes to the guideline, and noting further that a defendant is responsible for the reasonably foreseeable acts of others in jointly undertaken activity. In other words, as the district court noted, a defendant could receive an enhancement for sophisticated means based on the activities of her co-conspirators if those activities were reasonably foreseeable to her. GA2293.

Applying these principles, the court applied the enhancement:

The offense here involves sophisticated means, such as hiding the transaction in which the defendant paid a kickback to Syed Babar and the use of fraudulent appraisals. The defendant wrote checks on the account of Marbo Restorations to Babar in the aggregate amount of \$283,704 out of the proceeds of the mortgage loans for the three properties on Lake Street. None of these payments was disclosed on the HUD-1 for the loan in question. Each of the payments was made to Babar by means of Werner making a check payable to Global Accounting and Taxation Services. There is a notation on each check that it is for consulting fees when no consulting work and no other legitimate services had been performed. The defendant concealed the fact that she was making the payment to Babar from her lawyer and from the lender making the loan. Global Accounting and Taxation Services was a shell entity used by Babar to receive the payments from the defendant and make payments to the straw buyer.

In addition, the defendant . . . acquired the three properties in April 2001 for \$15,000 each—that is for a total of \$45,000—and she sold them for a total of \$800,000 in August 2006. As a person experienced with real estate transactions,

the defendant knew that an appraisal justifying the amount of the loan was required to be submitted to the lender making the loan. The evidence established that she was aware that the properties had not increased in value from \$45,000 to \$800,000 during the time she held them.

Thus, the evidence established that the use of both of these sophisticated means was reasonably foreseeable to the defendant and, in fact, with respect to the concealment of the payment to Babar, actually known to the defendant because of her personal involvement.

GA2293-94.

b. Governing law and standard of review

This Court “reviews issues of law *de novo*, issues of fact under the clearly erroneous standard, and mixed questions of law and fact either *de novo* or under the clearly erroneous standard, depending on whether the question is predominantly legal or factual, and exercises of discretion for abuse thereof.” *United States v. Thorn*, 446 F.3d 378, 387 (2d Cir. 2006); *United States v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006).

In this case, the district court’s application of the sophisticated means enhancement presents a “primarily factual” question which should be

reviewed for clear error. *See Gotti*, 459 F.3d at 349.

A finding of fact made at sentencing is clearly erroneous only where “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Cuevas*, 496 F.3d 256, 267 (2d Cir. 2007) (internal quotations omitted). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *United States v. Chalarca*, 95 F.3d 239, 244 (2d Cir. 1996) (citation omitted).

Sophisticated means is an offense characteristic, not a characteristic of an individual defendant. U.S.S.G. § 2B1.1(b)(10)(C). Further, a defendant is responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1)(B). Accordingly, the enhancement may apply to a defendant who did not personally use sophisticated means so long as defendant’s co-conspirators’ use of sophisticated means was reasonably foreseeable. *Id.* *See also United States v. Miles*, 360 F.3d 472, 482 (5th Cir. 2004) (rejecting defendant’s argument that sophisticated means enhancement did not apply where she allegedly did not personally use sophisticated means, because her co-conspirator’s use of sophisticated means was reasonably foreseeable to her).

The use of shell corporations will ordinarily be found to constitute “sophisticated means.” U.S.S.G. § 2B1.1(b)(10)(C), App. Note 8(B) (“[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.”). Similarly, the creation and use of false documentation is frequently found to involve sophisticated means. *See, e.g., United States v. Amico*, 416 F.3d 163, 169 (2d Cir. 2005) (finding sophisticated means based on creation of false bank documents, appraisals, and blueprints).

Where a defendant’s scheme involves various steps, the enhancement may apply “even if each step in the scheme was not elaborate.” *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003). In other words, “[r]epetitive or coordinated conduct, though no one step is particularly complicated, can be a sophisticated scheme.” *United States v. Finck*, 407 F.3d 908, 915 (8th Cir. 2005); *Jackson*, 346 F.3d at 25 (upholding sophisticated means enhancement where “the total scheme was sophisticated in the way all the steps were linked together . . .”).

c. Discussion

The district court did not err, much less clearly so, in finding that the scheme in which Werner, Babar and Gallagher engaged involved sophisticated means.

First, the district court correctly found that Werner personally took steps to conceal the transaction with Babar, and that she did so by making use of Babar's shell entity, Global Accounting and Taxation Services. See U.S.S.G. § 2B1.1, App. Note 8. Werner claims that she and Babar did nothing to conceal the transfer to him, Werner Br. at 38, but this is simply not true.

In order to conceal the connection between the kickback payment to Babar and the sale of the Lake Street properties, Werner, through her company Marbo Restorations, wrote three checks to Global Accounting and Taxation Services totaling \$283,704. GA751-52. In the memo section of the check, Werner wrote "consulting services." GA751-52. No one who saw the check and the entity to which it was written could or would connect it to the sale of the Lake Street properties. Werner did this by design, and it was consistent with her concealing the payment from her attorney and her failure to disclose it on the HUD-1. The substantial payment was an enormous red flag, and Werner knew that it had to be concealed for the loan to close, and making the payment to Babar's shell company was a good way to conceal it.

Moreover, a second level of concealment existed concerning the connection between Babar and his shell entity, Global Accounting and Taxation Services. Werner claims that connection

was “transparent,” but only an investigating agency with subpoena power could discover that the signatory on the bank account of Global Accounting and Taxation Services was Syed Babar. GA756.

By paying \$283,704 to a Babar-controlled entity, Werner tried to ensure that no one except those involved in the scheme would know of the connection between the kickback and the real estate transaction. After all, neither Babar nor his entity was a party to the Lake Street transactions. The property transactions were between Marbo Restorations and Rehan Qamar, the straw buyer. By making the payments to an entity with no apparent tie on its face to the transactions or even real estate generally, Werner and Babar concealed the illicit payment to Babar, as well as the link to the subsequent payments of about \$179,000 to Qamar, the purported buyer.

The district court also correctly found that it was reasonably foreseeable to Werner that the only way to justify a \$800,000 sales price would be through a fraudulent appraisal, and this too evidenced the sophisticated means used in connection with the scheme. Werner’s response to this seems limited to insisting that all fraud schemes involve deceit and dishonest methods. Werner Br. at 41. Although this is true, it does not account for the sophistication of the deceit, and fraudulent appraisals are, as the district

court correctly found, not simply garden variety mortgage fraud, but rather a sophisticated variation on that theme.

3. Werner did not play a minor role in the offense.

a. Relevant facts

Werner argued below for a two-level reduction for minor role. The district court did not agree:

The defendant has not established that her role was minor when compared to the average participant in a mortgage fraud conspiracy. She was personally involved—in fact, the only person involved on behalf of the seller—in selling three houses in order to obtain the \$800,000 in proceeds from the lenders. She personally dealt with the lawyer involved in the closing for the seller and kept from that lawyer important information that she knew could not be disclosed to the lender on the HUD-1 if the loan was to close.

She also personally distributed the proceeds of the fraudulent activity to Babar, disguising them as payments unrelated to the real estate transaction by making them payable to Global [Accounting and] Taxation Services and labeling them as consulting fees.

She also realized a substantial financial gain from the fraudulent transaction.

Finally, the Court notes that the defendant's guidelines computation was done on the basis of the transactions in which she was personally involved as the seller and amounts for losses arising out of other transactions that were part of the conspiracy were not included.

GA2294.

b. Governing law and standard of review

Section 3B1.2(b) provides for a two-level reduction where a defendant "was a minor participant in any criminal activity." A minor role adjustment applies to a defendant "who is less culpable than most other defendants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, Application Note 3; *see United States v. Jeffers*, 329 F.3d 94, 103 (2d Cir. 2003). Lack of knowledge or understanding of the scope and structure of the scheme and of the activities of others is "a relevant factor" to determining minor role. *United States v. LaValley*, 999 F.2d 663, 665 (2d Cir. 1993). The defendant bears the burden of proving a minimal or minor role reduction by a preponderance of the evidence. *See United States v. Shonubi*, 998 F.2d 84, 90 (2d Cir. 1993).

It is not enough for a defendant to show simply that he is less culpable than his co-defendants. *See United States v. Lopez*, 937 F.2d 716, 728 (2d Cir. 1991) (upholding trial court refusal to reduce defendant's offense level for being a "minor" participant; "even if defendant were less culpable than other coconspirators, intent of Guidelines is not to 'reward' guilty defendant with adjustment merely because his coconspirators were even more culpable"). Rather, as this Court has explained, the sentencing court must measure the defendant's culpability against his co-defendants and against the typical or average defendant of the offense of conviction. *See United States v. Pena*, 33 F.3d 2, 3 (2d Cir. 1994) ("[O]ne who, say, points a gun at a bank teller and seizes the money is not entitled to a downward adjustment simply because someone else in the gang supervised his activities.") (citation omitted); *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1988). An adjustment based solely on a comparison to a co-defendant, rather than to an average participant in a similar crime, is subject to reversal. *See United States v. Carpenter*, 252 F.3d 230, 236 (2d Cir. 2001); *United States v. Ajmal*, 67 F.3d 12, 18 (2d Cir. 1995).

c. Discussion

The district court did not err, much less clearly so, in finding that Werner was not a minor participant. When compared to the average participant in a mortgage fraud conspiracy, Wer-

ner's role cannot reasonably be characterized as minor. She was personally involved in selling three properties in order to obtain almost \$800,000 in loan proceeds for herself and others in the conspiracy, including Babar. This involvement included keeping from her lawyer important information that she knew could not be disclosed on the HUD-1. Werner also personally distributed the fraud proceeds to Babar, disguising them as payments unrelated to the real estate transaction. In doing so, Werner realized more than a \$400,000 gain from the fraudulent transaction, even *after* the \$283,704 kickback to Babar. GA713.

These facts show that Werner's conduct was not minor as compared to the average participant in a mortgage fraud crime. Werner spends a great deal of time in her brief trying to show that she was less culpable than other defendants in this scheme. But as this Court has made clear, to get a minor role reduction, Werner's conduct must be minor as compared to the average participant in this kind of crime.

In any event, even her comparisons to her co-defendants do not help her. Werner cites two other sellers in the scheme for support, Nawaz and Asmar. Werner Br. at 44-45. But Nawaz and Asmar sold three properties fraudulently, just like Werner did. Moreover, the fact that Werner did not remain active in the scheme as new sellers entered the scheme simply shows that

while certain participants like Babar and Gallagher were constants throughout the conspiracy, others, such as Werner, Asmar and others, changed over time. It does not mean that Werner's role was minor while she was an active participant, and in fact it was not.

Werner argues that her awareness of the nature and scope of the criminal conduct at issue was slight. Werner Br. at 44. This is not the case. The facts proved at trial show that Werner clearly understood the scope and structure of the scheme, knew about and understood the role of the participants in the scheme, and played an important role herself. *See LaValley*, 999 F.2d at 665.

Werner also argues that the district court erred "to the extent" that it viewed the reduction as precluded because Werner's loss was based only on the fraudulent sales in which she was involved. Werner Br. at 46. But the district court never indicated that the reduction was precluded because Werner's loss was based only on her fraudulent sales. It simply noted that her guidelines were not based on the losses caused by the overall conspiracy, which mounted in the millions, but rather just the transactions in which she was personally involved as the seller of the Lake Street properties. GA2294.

And Werner is incorrect that the court should have given her a minor role reduction because her sophisticated means enhancement was

based solely on the conduct of Babar. Werner Br. at 47. The district court based the sophisticated means enhancement on the fact that she took steps to conceal the transaction with Babar through the use of payments *she made* to Babar's shell entity and the corresponding non-disclosure of those payments to her closing attorney and to the lender by omitting them from the HUD-1.

4. The district court correctly applied the § 3553(a) factors to impose a reasonable sentence.

a. Relevant facts

Werner sought a non-guidelines sentence due to a host of factors, including aberrant behavior, contributions to her community, her age (48), and her potential deportation to Australia, among other things. The district court took her arguments into account and sentenced her to a guidelines sentence of 48 months of imprisonment.

The district court recited all of the factors that it took into account in sentencing Werner. GA2302. Those included the factors applicable under 18 U.S.C. § 3553(a), which the court recited in full. GA2302. The court noted the specific information it received with respect to Werner's case, including the PSR, various sentencing memoranda and the remarks of counsel at the sentencing hearing. GA2302. The court also not-

ed that it did “preside over the trial in this case and I have presided over proceedings in which we dealt with cases of other people who have been referred to during trial.” GA2302. The district court recited in detail the factors relating to “the need for the sentence in this case to serve the various purposes of a criminal sentence.” GA2302. With respect to Werner specifically, the court stated:

In your case I am most aware of the need to impose a sentence that provides just punishment and that deters others from committing the offense committed by you.

I have considered the conduct of other individuals who’ve been convicted or pled guilty And I’ve looked at other people I’ll be sentencing today and tomorrow, as well as other folks that will be coming in.

I have thought about the arguments that were raised in terms of the downward departure under the Sentencing Guidelines or, in the alternative, a non-Guidelines sentence.

GA2302.

With this background, the court first rejected Werner’s argument that her conduct constituted aberrant behavior. GA2302-03. Given evidence of Werner’s involvement in other fraudulent conduct relating to property sales besides the

Lake Street properties, the court did not find Werner's aberrant behavior argument "credible." GA2303.

The court addressed Werner's argument concerning deportation as follows:

As to deportation, I don't believe it's appropriate to adjust the sentence on that basis either. Insofar as this is a white collar case, I think that defendants in drug cases and other kinds of cases have the same feelings and unhappiness about being deported as people do in white collar cases. So I don't see that as a legitimate basis for distinguishing this defendant.

GA2303. The court also addressed Werner's argument relating to community contributions she had made:

Insofar as there's an argument requesting a downward adjustment based on community contributions, I really do see some indications of community contributions, but my overwhelming reaction to you, Ms. Werner, is it's very hard to get a read on you. *There's very conflicting information* and it is difficult to get a picture. I have no confidence that I really know you that well, certainly not enough to find persuasive the arguments that are being made with respect to community contributions, and I'm sorry about that.

Looking at all the statutory factors, the purpose of sentencing, I have concluded that a Guidelines sentence is appropriate in this case and that's what I will impose.

GA2303 (emphasis added). Werner's sentencing guidelines range was 46-57 months; the court imposed a sentence of 48 months. GA2303.

b. Governing law and standard of review

Reasonableness review encompasses both procedural and substantive dimensions. *Watkins*, 667 F.3d at 260. Reviewing a sentence's substantive reasonableness, *i.e.*, reviewing whether the sentence is sufficient to meet the purposes of 18 U.S.C. § 3553(a), is a highly deferential exercise. In particular, this Court has said:

[W]e will not substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case We will instead set aside a district court's *substantive* determination *only in exceptional cases where the trial court's decision "cannot be located within the range of permissible decisions."*

Cavera, 550 F.3d at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)) (second emphasis added). Moreover, substantive

review “take[s] into account the totality of the circumstances, giving due deference to the sentencing judge’s exercise of discretion, and bearing in mind the institutional advantages of district courts.” *Id.* at 190.

Although permitted by the Supreme Court in *Rita v. United States*, 551 U.S. 338, 347-51 (2007), this Court has not adopted a presumption of reasonableness for sentences falling within the advisory guidelines range. *Cavera*, 550 F.3d at 190. However, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27. *See also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006).

Consequently, the trial court’s sentencing discretion will be limited only in the most exceptional cases. *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). As this Court explained:

In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupported as a matter of law.

Id.

c. Discussion

Werner's main argument about the sentence imposed by the district court is that the court found that it "certainly did not have enough" confidence that he knew her well enough "to find persuasive the arguments that are being made with respect to community contributions." *See* Werner Br. at 48-50. Werner claims that the court's view that "it is difficult to get a picture" of her is "unsupportable." *See* Werner Br. at 50. In support, Werner cites to excerpts of letters written in her support.

What Werner does not discuss, but what the court was clearly referring to by "conflicting information" and its difficulty in getting a "read" on Werner, was the darker side of Werner's work in "rehabilitating properties" in urban Norwich and New London—namely, mortgage fraud. Werner engaged in fraudulent transactions beyond just the Lake Street properties. Although the government did not present evidence of those transactions at trial, or even as relevant conduct at sentencing, it presented evidence of Werner's involvement in them in response to her arguments at sentencing. GA2302-03.

Werner sold 35, 37 and 41 Lake Street in August 2006. GA700, GA713. She was involved in similar transactions with three properties in New London in October and November 2006. GA2185-87.

The three properties at issue were located at 18 Hope Street, 54 Hempstead Street, and 18 Mountain Avenue, all in New London. GA2185, GA2195-2202. In these transactions, Werner, through a company called Dumpmasters, LLC, sold the three New London properties to the same straw buyer, just like she sold the Lake Street properties to one straw buyer. GA2185, GA2195-2202. The straw buyer involved in the New London properties worked for an individual named Jose Guzman. GA2207-11. Guzman pled guilty to federal criminal charges in connection with a mortgage fraud scheme. *See United States v. Jose Guzman*, 3:08CR189 (D. Conn. 2008).

Werner sold each of the three New London properties for \$305,000 (\$915,000 in total). GA2195-2202. Thereafter, just as with the Lake Street properties, each of the New London properties went into default, and ultimately foreclosure. GA2207-11, GA2219-24. Each was sold out of foreclosure for less than a third of what they were sold for: \$80,000 (18 Hope Street); \$87,550 (18 Mountain Avenue); \$80,000 (54 Hempstead Street). GA2219-24.

The similarities between Werner's sale of the New London properties and her sale of the Lake Street properties in Norwich are striking. The district court was well within its discretion in taking these additional transactions into account in refusing to give Werner any break in her sen-

tence for “community contributions,” and in sentencing her to a guidelines sentence of 48 months.

In addition to Werner’s conduct in connection with these properties, the district court also had before it Werner’s interactions with a real estate agent named Wendy Perez. Werner gave Perez the listing for a Dumpmasters, LLC property at 55 Blackhall Street in New London. Perez thought the property should be listed for \$195,000, but Werner wanted it listed for \$395,000, which Perez did. GA2213. After reducing the price to \$365,000 when no interest arose from potential buyers, Werner told Perez that she had found a buyer for the original price of \$395,000. GA2214. But Werner would not let Perez meet the buyer and told Perez that she did not want the buyer represented by a real estate agent. GA2214. Werner only wanted Perez to execute the sales contract for the agreed upon sales price of \$395,000. When Perez told Werner that she would not work that way and insisted on meeting the buyer, Werner took the listing away from her. GA2214. Notably, when Perez asked Werner whether she was working with Jose Guzman, the individual noted above in connection with the New London properties who has pled guilty to other mortgage fraud charges, Werner did not directly answer Perez and laughed the question off. GA2214.

In short, the district court had every reason to believe that it lacked the full picture of Werner, particularly the picture that she tried to paint of herself as an outstanding citizen in her community, and thus fully justified in its unwillingness to see a basis for a non-guidelines sentence.

The district court was also well within its prerogative not to depart or impose a non-guidelines sentence because she faced deportation after her incarceration. The district court clearly understood that it had the ability to fashion a sentence taking her potential deportation into account, but decided against it.

In imposing a sentence within the guidelines range, the district court considered the factors cited by Werner. The district court nonetheless declined to impose a non-guidelines sentence, choosing instead to sentence Werner with a guidelines sentence to provide just punishment and to deter others from committing mortgage fraud. GA2320. The district court acted well within its “considerable sentencing discretion” in imposing sentence, and the judgment should be affirmed.

II. The claims of Rab Nawaz are without merit.

A. The district court did not err in its loss calculations.²

1. Relevant facts

The PSR calculated Nawaz’s loss amount as \$2,862,965. Nawaz PSR ¶ 20. At sentencing, the government noted certain corrections to the loss calculations, the most significant having to do with recalculating the loss for 57 Bassett Street to account for the property having been resold, and adding intended loss numbers for the two attempted sales (70-72 Center Street in Bridgeport, and 221 Starr Street in New Haven). Nawaz PSR ¶ 20; GA2350.

The district court carefully considered the loss calculations in this case. On August 1, 2011, the district court held a hearing on loss. GA2225. Nawaz argued that in calculating actual loss, the sales prices for properties sold out of foreclosure by the victim banks should not be used as a credit against loss because those prices were “so divorced from market reality and from fair market value that simply looking to the voluntarily chosen ‘disposal’ price makes no sense” NA133.

² Asmar and Werner raise substantially similar arguments to challenge the district court’s loss calculations; accordingly, this argument responds to all of those arguments.

Nawaz offered an appraisal for 21 W. Coit Street ordered by the State of Connecticut Superior Court in the foreclosure action that appraised the property at \$203,000 as of March 2, 2009. GA2238. He compared that appraisal price to the actual resale price of \$37,000 to argue that the lender simply “dumped” the property. GA2239.

Similarly, for 41 Montauk Avenue, Nawaz compared an appraisal filed in the foreclosure action valuing the property at \$168,000 as of March 19, 2008 to the actual resale price of \$33,000 to argue that the large gap in values showed that the lender was not acting in a commercially reasonable manner seeking to maximize its profits. GA2240.

Nawaz also offered an appraisal as of June 8, 2010 for 36 Blinman in the amount of \$74,000. GA2238.

The government concurred with the PSR’s loss calculations and argued that if the lenders could have sold these properties for the higher values Nawaz cited they certainly would have done so. GA2236, GA2248. As the government explained, the mere fact that lenders did not receive resale prices that were as high as some of the appraisals did not mean lenders sold the homes for a nominal amount. GA2248. Indeed, the lenders here did not sell any property for a dollar, but instead sold them for various amounts. GA2249. The government also pointed

out that a variety of lenders sold houses in this manner, showing that there was no idiosyncratic lender simply underselling the properties. GA2248. Finally, the government noted that it would be impractical to require the government to present evidence as to what each lender did to try to maximize their value in foreclosure sales, turning a sentencing hearing into another trial on an issue that a district court need only find to be a “reasonable estimate” by a preponderance of evidence. GA2248.

At the September 22, 2011 sentencing, the district court adopted the PSR’s loss calculations, and rejected Nawaz’s argument that the court should ignore the resale prices in calculating actual loss. GA2321. The court set forth defendant’s argument, namely:

... that the Court should place weight on appraisals that were approved by the Connecticut Superior Court in connection with strict foreclosure actions and that these appraisals showed that the lenders who sold properties for a fraction of the fair market value accepted by the Superior Court were “dumping” the properties.

GA2319.

The court rejected this argument, concluding:

However, based on the fact that we do not have just one lender but several lenders who sold properties out of foreclosure at

relatively low prices, the fact that it stands to reason that a foreclosure sale is less than optimal conditions because the lender has to consider things such as carrying costs and the fact that defendants in this case themselves bought properties out of foreclosure at relatively low prices, the Court concludes that the figures in the Presentence Report are reliable.

GA2319.

2. Governing law and standard of review

This Court reviews the district court's loss determination for clear error. *See United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009). The calculation of loss amounts is governed by U.S.S.G. § 2B1.1. The sentencing court is only required to make a "reasonable estimate of the loss." U.S.S.G. § 2B1.1 app. note 3(C); *see also United States v. Coppola*, 671 F.3d 220, 249-50 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013). Furthermore, because the sentencing court "is in a unique position to assess the evidence and estimate the loss based upon that evidence," the sentencing court's "loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1 app. note 3(C). That deference is particularly applicable where a sentencing court "presided over a weeks-long trial and heard a great deal of live testimony." *Lacey*, 699 F.3d at 720.

The Guidelines also state that as a “General Rule” the court should determine loss as “the greater of actual loss or intended loss,” and then defines “actual loss” as “the reasonable pecuniary harm that resulted from the offense.” U.S.S.G. § 2B1.1 cmt. n.3(A)(I). The Guidelines provide additional guidance with regard to the calculation of loss by stating the loss amount should be reduced by certain “credits against loss.” Specifically, the guidelines state that loss amounts should be reduced by:

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from the disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

U.S.S.G. § 2B1.1 cmt. 3(E)(ii).

This Court has made clear that actual loss calculations under § 2B1.1 necessarily involve a credit for any amount a financial institution actually recovered in the sale of underlying collateral. In *United States v. Turk*, 626 F.3d 743, 751 (2d Cir. 2010), the defendant fraudulently procured \$27 million in loans from 70 lender victims using a collection of buildings as collateral. *Id.* at 745. Because the housing market collapsed, the value of the buildings dropped significantly. *Id.* Thus, the defendant argued that it was the hous-

ing market crash and other “extrinsic factors” that caused the victims’ losses, not Woolf Turk, and therefore that her loss should be reduced because she could not have foreseen such a downturn. *Id.* at 747.

This Court rejected Woolf Turk’s argument because it relied on a “faulty premise, namely, that the victims’ ‘loss’ is the decline in value of what was promised as collateral (*i.e.*, the buildings).” Instead, this Court held that the “loss is the principal value of the loans [victims] made to Woolf Turk which were never repaid and which the buildings were supposed to have collateralized but never did.” *Id.* Thus, the decline in value of collateral need not have been foreseeable to the defendant in order for the defendant to be held accountable for that entire loss. *Id.* at 749. This Court found such an approach necessary:

. . . to ensure that defendants who fraudulently induce financial institutions to assume the risk of lending to an unqualified borrower are responsible for the natural consequences of their fraudulent conduct. . . . Put another way, a defendant may not reasonably count on the expected sale value of collateral to save himself from the foreseeable consequences of his fraudulent conduct.

Id. at 750. This Court reasoned that do to otherwise would “encourage would-be fraudsters to roll the dice on the chips of others, assuming all

of the upside benefit and little of the downside risk.” *Id.*

This Court relied on *United States v. Mallory*, 709 F. Supp. 2d 455, 458 (E.D. Va. 2010) in setting forth a two-step process for determining actual loss under U.S.S.G. § 2B1.1. *Turk*, 626 F.3d at 751. The first step is to calculate the reasonably foreseeable pecuniary harm resulting from the fraud. *Id.* In mortgage fraud cases, such as the *Mallory* case itself, “[t]his amount will almost invariably include the full amount of unpaid principal on the fraudulently obtained loan, as an unqualified borrower’s default is clearly a reasonably foreseeable ‘potential result of the offense’ within the meaning of Application Note 3(A)(iv).” *Id.*

The second step requires application of the “credits against loss” provision whereby “courts must deduct from the calculated loss the amount actually recovered or actually recoverable by the creditor from the sale of the collateral.” *Id.* This calculation is made as of the time of sentencing and without regard for whether this amount was reasonably foreseeable by the defendant. This Court made clear that where the victim has sold the collateral, the sentencing court should credit the amount actually recovered in the sale. *Id.*

3. Discussion

a. The district court did not err in using actual resale prices in calculating credits against loss.

Nawaz argues that the district court erred in its loss calculation by using actual resale prices as a “credit against loss” rather than a higher appraised value for properties that had resold out of foreclosure. Nawaz Br. at 30-39. But the district court did precisely what it should have done in calculating loss pursuant to U.S.S.G. § 2B1.1 cmt. 3(E)(ii) and this Court’s decision in *Turk*. The court started with the reasonably foreseeable pecuniary harm resulting from the fraud, namely, the principal amount of the loan. Nawaz PSR ¶¶ 20-21; Asmar PSR ¶ 29; GX1. The court then applied the “credits against loss” provision, deducting the amount actually recovered by the lenders for those properties that had already sold out of foreclosure. *Id.* This methodology was not, as Nawaz claims, “contrary to Guidelines policy.” Rather, it was precisely what the Guidelines describe and consistent with this Court’s decision in *Turk*. § 2B1.1(E)(ii).

Nawaz argues that *Turk* should not apply because the loans at issue there were unsecured whereas the loans in this case were secured by real property. Nawaz cites *United States v. Lacey*, 699 F.3d 710, 719 (2d Cir. 2012) to argue that “a factfinder is entitled to consider the circumstances underlying the sale of the collateral

in determining whether its [sic] represents the fair market value of the property for purposes of determining loss.” Nawaz Br. at 34. Nawaz’s argument is without merit.

In *Lacey*, the defendants engaged in a mortgage fraud scheme in which they purchased short sale properties and then resold them at a higher price to straw buyers who had no intention of living there or making the loan payments. 699 F.3d at 712. The district court in *Lacey* calculated the defendants’ intended loss as the difference between what the defendants paid for each property and the value of the mortgage loans ultimately made. *Id.* at 713. The defendants argued that the district court erred by failing to calculate both the intended and actual loss. *Id.* at 717. This Court found any procedural error harmless since the district court was required to apply the greater of the actual or intended loss which meant that “[e]ither the actual loss would have been *less* than the intended loss, and therefore irrelevant, or the actual loss would have been greater than the intended loss, in which case the court’s failure redounded to defendants’ benefit.” *Id.* at 718.

The *Lacey* defendants also argued that the district court erred in valuing the collateral. *Id.* at 719. Instead of relying on the short sale price, the defendants argued that the court should have valued each property according to appraisals submitted to the lender when the straw buy-

ers purchased the properties. *Id.* The defendants reasoned that the short sale price was not “the fair market value of the collateral at the time of sentencing,” since it represented a “fire-sale” price. *Id.*

This Court rejected the defendants’ arguments in *Lacey*, finding that the district court was entitled to rely on the short-sale prices rather than appraisals because the short-sale prices were negotiated, not fraudulent, and because evidence showed that the appraisals may not have been reliable. *Id.* at 720.

Nawaz uses *Lacey* to argue that instead of “blind adherence” to the credit against loss formulation in *Turk*, the district court should have consider[ed] the circumstances underlying the sale of the collateral in determining whether it represents the fair market value of the property for purposes of determining loss.” Nawaz Br. at 34. *Lacey* is entirely inapposite.

Lacey dealt with the calculation of *intended* loss, not actual loss which is at issue here. It was in distinguishing the calculation of actual versus intended loss that this court stated that Application Note 3E(ii) may not be followed in every instance. Specifically, this court held that:

. . . although Application Note 3(E)(ii) “accurately describes the calculation of *actual* loss,” the note “cannot be mechanically followed where *intended* loss is higher,”

since the larger intended amount is a better “measure for the defendant’s culpability” than is the actual loss. . . . Thus, a sentencing court need not apply the fair market value as an offset in calculations of *intended* loss; it need only offset the loss amount by however much it finds the defendant did not intend loss.

Id. at 720 (emphasis in original) (citations omitted).

Lacey did not hold that a district court could simply disregard the credits against loss calculation set forth in Application Note 3E(ii) in calculating actual loss. Indeed, actual loss was not even at issue in the *Lacey* decision. Instead, this Court found the district court’s use of short-sale prices as a credit against loss to be a “reasonable estimate of the intended loss.” In so finding, this Court stated:

It is hardly clear error for a sentencing judge to conclude that a price negotiated by a willing buyer and a willing seller is better evidence of the property’s value than an appraisal by a purported expert.

Id. Thus, this Court found that the short-sale prices in *Lacey*, transactions in which lenders were receiving far less than what was typically owed on the underlying loans, were reasonable arm’s length deals. *Id.*

Here, Nawaz’s argument that the district court should have used an estimated market value rather than actual resale prices to calculate “credits against loss” runs directly contrary to the plain language of the Guidelines. Section 2B1.1 cmt. 3(E)(ii) states that loss should be reduced, “[i]n a case involving collateral pledged or otherwise provided by the defendant, [by] the amount the victim has recovered at the time of sentencing from the disposition of the collateral.” The “amount the victim has recovered” is the resale price, so that is the amount of the offset. Estimates of fair market value are not required (or useful) where the victim has disposed of the underlying collateral.

The victim lenders in this case received resale prices for homes that sold out of foreclosure which were substantially lower than the fraudulently inflated sales prices engineered by the conspiracy, and in some cases, lower than the appraisal prices used in the lenders’ own foreclosure actions. Nawaz claims that these lower prices show that the victim-lenders simply “dumped” the properties and “made no attempt to obtain the fair market value” for the properties. Nawaz Br. at 39. But left with abandoned properties and costs of carry, lenders had every incentive to maximize the amount of their recovery (and minimize their losses) and to do so as efficiently as possible. *See* GA2250 (Nawaz’s counsel noting that in the foreclosure process fol-

lowed by lenders in this case, “[t]he foreclosing lender never writes a check, never spends anything additional to obtain title back”), GA2252 (district court stating that lenders are not “in the business of owning property, managing it the way an individual would if they wanted to hold out for a higher price” and positing to defense counsel that this shows lenders’ conduct was commercially reasonable); NA127 (Nawaz’s sentencing memorandum). *See also United States v. Siciliano*, 601 F. Supp. 2d 623, 627, 631 (E.D. Pa. 2009) (using foreclosure resale prices to most closely estimate property’s fair market value in determining loss rather than appraisals because foreclosure sales resulted from arm’s length transactions; noting that “it defies logic to suggest that [the bank] would do anything less than its utmost to recoup its losses, especially when it had no other means of doing so” and stating that there is a “presumption that the actual realized resale price of a foreclosure property is the value to be used, that the bank has every incentive to maximize the price of the property at this sale . . .”).

Nawaz argues that the loss calculation should have been reduced because the victim lenders did not do a good enough job mitigating their losses. But Nawaz offers no authority to support such a result. Instead, courts have found that a victim’s failure to mitigate its losses does not provide a basis for reducing a defendant’s loss.

See United States v. Miller, 962 F.2d 739, 744 (7th Cir. 1992) (noting that “a victim’s failure to mitigate . . . does not prevent attributing to the defendants the full amount of loss.”) (citations omitted). *See also United States v. Lutz*, 154 F.3d 581, 590 (6th Cir. 1998) (“As to [defendant’s] claim that HUD deliberately did not recover as much on the resale of the properties as it could have, this allegation is unsupported and would not, in any event, prevent the district court from attributing the entire amount of loss to [defendant.”). Nawaz’s crimes are the same whether or not the victims mitigated their losses, and he should therefore be held accountable for the entire amount of loss to the lenders. *See also United States v. Berkowitz*, 927 F.2d 1376, 1390 (7th Cir. 1991) (“Berkowitz’s crime is the same whether or not the government mitigated its loss, and the government’s lack of mitigation is irrelevant to Berkowitz’s culpability.”).

b. The district court did not err in its factual findings.

Nawaz also argues that the district court erred in its factual findings that the “resale amount procured by the lender” was a “reliable barometer of the fair market value of the property.” Nawaz Br. at 39. But the district court made no such finding. The district court did not conclude that the resale amount, that is, the amount victim lenders received after reselling properties out of foreclosure, represented “fair

market value.” Instead, in applying the “credits against loss” formula under U.S.S.G. § 2B1.1, App. Note 3E(ii) for properties that resold, the district court looked to the resale amount simply to determine the amount of proper credit. Such prices also may have been “fair market value” in the sense that they were the best price the lenders could obtain given other competing concerns, but that determination was not necessary to the district court’s loss calculation and was not made.

c. The district court understood Nawaz’s loss argument, it just rejected it.

Nawaz claims that the district court “misapprehended” his loss calculation argument, and “ruled under the mistaken belief that Nawaz was advancing the same ‘foreseeability’ argument as that advanced by defendant Turk and rejected by the Second Circuit.” Nawaz Br. at 40. But the district court clearly understood Nawaz’s argument that it “made no sense” to apply the Guidelines credit formula where lenders chose to sell for less than market value, stating:

Among other things, the defendant argues that the Court should place weight on appraisals that were approved by the Connecticut Superior Court in connection with strict foreclosure actions and that these appraisals showed that the lenders who

sold properties for a fraction of the fair market value accepted by the Superior Court were “dumping” the properties. However, based on the fact that we do not have just one lender but several lenders who sold properties out of foreclosure at relatively low prices, the fact that it stands to reason that a foreclosure sale is less than optimal conditions because the lenders has to consider things such as carrying costs and the fact that defendants in this case themselves bought properties out of foreclosure at relatively low prices, the court concludes that the figures in the Presentence Report are reliable.

GA2319. The district court specifically referred to Nawaz’s argument that the appraisals tended to show that the lenders were “dumping” the properties. This shows that the court understood Nawaz’s argument, it just rejected it. Given the district court’s proper calculation of loss, there was no error in having done so.

B. The district court acted reasonably in declining to sentence Nawaz to a lower, non-guidelines sentence.

1. Relevant facts

The PSR calculated Nawaz’s advisory guidelines range as 87 to 108 months’ imprisonment. Nawaz PSR ¶ 61.

The district court heard from eight individuals who spoke on Nawaz's behalf during his sentencing, from Nawaz himself and from Nawaz's attorney. The defense presentation emphasized the effect Nawaz's incarceration would have on his family, their positive personal experiences with Nawaz, and their belief that Nawaz's crime was an aberration. GA2322-28. The government argued for a guidelines sentence, and opposed Nawaz's request for a lesser sentence based on family circumstances and on aberrant behavior. GA2328-31.

The sentencing court detailed the § 3553(a) factors it was required to consider, and expressly told Nawaz that it had "taken into account each of these factors." GA2331-32. The court specifically told Nawaz that it had reviewed the PSR, the sentencing memoranda by the parties, and that it had considered the "many letters that spoke very highly of you that were attached to the submissions by your counsel." GA2332. The court stated that it had also considered the remarks of "all the people who have spoke about your good qualities today," remarks by Nawaz's counsel and the government, and by Nawaz himself. GA2332.

The court specified which § 3553(a) factors it believed warranted particular consideration including the "need to provide just punishment," and "the need to deter others from committing the offense." The court also noted that "even

more than those purposes, I have to say that I am most aware of the need to promote respect for the law.” GA2332.

The court next turned to Nawaz’s arguments for mitigation, stating first that Nawaz’s family circumstances did not merit a lesser sentence because “[t]he sad fact is that the circumstances your family will face are really quite typical of the harm that defendants inflict on their families by committing offenses that lead to their incarceration.” GA2332. Further, the court noted that the fact that Nawaz’s wife was also involved in the underlying offense conduct, “makes it inappropriate to put much weight on family circumstances.” GA2332.

The court analyzed Nawaz’s aberrant conduct argument, stating that it was going to combine its analysis of aberrant behavior with “some points I want to make about obstruction of justice” GA2332. The court explained:

Last night and into this morning as I was preparing my findings on various objections, I did go back and read the transcript, [GA1792-1818], because I was looking for certain things, and I took a look at it again during this break. And in addition, I thought about the sequence of events that unfolded, unbeknownst to me, the sequence that led you from the courthouse to Wyatt to the conversation with Mr. Perkins ultimately, and I thought

about the substance of that conversation. And it creates a very serious concern, not just for people who bring charges but for the court system and I think our society. Obstruction of justice raises very serious concerns. It's not just that someone who is guilty might escape appropriate consequences, but it can actually lead to innocent people being harmed. Obstruction, which includes perjury, is about one of the most serious attacks on the administration of justice that I can think of.

I have no doubt about the fact that you have many, many fine qualities, but I have to say that they are substantially outweighed in the context of this sentencing by the fact that you obstructed justice. And it wasn't just a passing thing. Having taken the time to read through this transcript again, it's a very, very serious matter and it really has controlling weight in my analysis, I have to say. So I am going to propose a guidelines sentence.

GA2332.

2. Governing law

The law governing substantive reasonableness review is set forth in Part I.B.4.b., above.

In discharging its duty to consider the § 3553(a) factors at sentencing, a district court is not required to “precisely identify either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all of the § 3553(a) factors along with the applicable Guidelines range.” *Fernandez*, 443 F.3d at 29. *See also Crosby*, 397 F.3d at 113. Nor is a sentencing judge required to state any specific verbal formulations in order to show that it has considered matters relevant to sentencing. *Fernandez*, 443 F.3d at 29. Instead, this Court presumes that “in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors.” *Id.* (citation omitted).

The requirement that a district court consider the § 3553(a) factors “is not synonymous” with any requirement that a particular factor “be given determinative or dispositive weight.” *Id.* at 32. Rather, the weight to be afforded any § 3553(a) factor is a matter “firmly committed to the discretion of the sentencing judge” and is beyond review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented. *Id.*

3. Discussion

Nawaz argues that the district court “did not recognize its authority . . . to impose a non-

Guidelines sentence,” and failed to give proper weight and consideration to his arguments of overstated loss, community contributions, exemplary law abiding life and family circumstances. Nawaz Br. at 41. This argument fails.

The district court here recognized and thoroughly considered the factors on which a sentence should be based, including the arguments Nawaz raised at sentencing. The court expressly stated that it had considered the § 3553(a) factors and referred to those factors repeatedly during the sentencing hearing. Further, the court identified those factors it believed were particularly relevant to Nawaz’s sentence, namely, the need to provide just punishment, deter others, and to promote respect for the law, and thoroughly explained its reasoning. GA2332. The district court carefully considered Nawaz’s family circumstances and concluded that “[i]t’s going to be very tough for your family, and I know that and I’m sorry about that, but it’s not extraordinary.” GA2332. The court also noted that the fact that Bushra Nawaz was involved in the underlying criminal conduct makes it “inappropriate to put much weight on family circumstances.” GA2332. Further, the sentencing court thoughtfully evaluated whether Nawaz’s conduct was aberrational, particularly in light of his obstructionist conduct, concluding that the ongoing nature of Nawaz’s conduct, combined with his having engaged in obstruction, did not merit a

sentence reduction for aberrant conduct. GA2333.

Although not framed as a formal departure argument by counsel, the district court considered the issue of whether the amount of loss overstated the harm, expressly referring to this argument and hearing from counsel on the subject. GA2244, GA2250. As described above, the court carefully considered the loss calculation issues over two separate hearings. The court also carefully considered each property attributed as loss to each defendant. *See* GA2271-76, GA2334-37.

That the district court did not mention the case name “*Booker*” or expressly utter the words “I have authority to impose a non-guidelines sentence,” does not mean that the court failed to recognize its authority to do so. A district court is not required to engage in “robotic incantations” to prove that it considered the § 3553(a) factors, and this Court “will not assume a failure of consideration simply because a district court fails to enumerate or discuss each § 3553(a) factor individually.” *Fernandez*, 443 F.3d at 30 (internal quotation marks omitted). Here, the record clearly shows that the court was well aware of its authority to impose a non-guidelines sentence and its duty to consider the § 3553(a) factors. The district court fully acknowledged Nawaz’s arguments and recognized its authority to

impose a below-guidelines sentence, it simply chose not to do so.

Nawaz cites a number of other factors that he claims the district court failed to consider. For example, Nawaz argues that the district court failed to consider his “expression of remorse,” citing the district court’s reference to his statements to Probation that he knew by the third closing that he was involved in “something bad and possibly criminal.” GA2320; Nawaz PSR ¶ 25. The court certainly considered this statement as evidenced by referencing it during the hearing, it simply took a different view of its significance, namely, that Nawaz was a knowing participant rather than the minor player he tried to depict himself as during sentencing. GA2320.

Similarly, Nawaz claims that the district court failed to consider his naiveté or his “positive contributions to the community” and instead attached “culpable conduct” to “otherwise innocent actions.” Nawaz Br. at 46. The district court thoroughly considered these arguments and the evidence Nawaz offered in support, but again, it just took a different view of it. Rather than finding Nawaz showed an “extreme lack of sophistication” or innocently attended the closings for Bushra Nawaz properties, the district court concluded that Nawaz was “personally involved in selling houses for the conspiracy;” that he “personally dealt” with straw buyer Perkins; that he

allowed his home address and landline telephone number to be used to legitimize a fake company and bank accounts; and that he was “actively involved in distributing the proceeds from his deals.” GA2320. That the district court ultimately took a different view of the evidence than Nawaz would have liked, does not mean that it failed to consider it.

C. The district court did not plainly err in ordering Nawaz to pay restitution of \$3,154,291.20.

1. Relevant facts

In the August 10, 2011 restitution hearing, the district court considered defense counsel’s arguments about obtaining information for certain lender costs. GA2274. The court reviewed a draft restitution order circulated by the government and expressly noted that restitution amounts would be the amount paid to obtain the loan, plus other expenses and costs, minus the resale price. GA2272, GA2274. When asked whether any defense counsel had any other issues to raise, Nawaz’s counsel did not raise any objection regarding the restitution calculation, or the use of resale prices to calculate restitution. GA2274-75.

Given the complexity of the restitution issues, all information required for purposes of calculating restitution was not available at the time of sentencing. Accordingly, at Nawaz’s Septem-

ber 22, 2011 sentencing, the district court had already determined that restitution would be calculated at a later date at a separate hearing. GA2333.

The court then held the separate restitution hearing on October 17, 2011 which Nawaz attended with his counsel. GA2334-35. In preparation for that hearing, the district court distributed a draft restitution order and a schedule specific to each defendant to all counsel. GA2335. The court calculated the restitution amounts just as it had described during the August 10 hearing, by taking the amount paid by the last lender to obtain the loan, adding in certain expenses and costs, and, if a property had resold, subtracting the actual resale price. GA2350. If a property had not resold at the time of sentencing, the court subtracted an appraisal value obtained in the foreclosure proceedings. GA2350. Using this method, Nawaz's restitution obligation was calculated to be \$3,154,291.20. GA2351.

The district court asked counsel if there were "any questions or comments on the restitution order itself as opposed to the Schedule A for each defendant?" Government counsel and Olmer's counsel specifically stated that they had no objection, and no other counsel raised their hand. GA2336. Given no objections to the restitution order, the court then asked about the schedule as to each individual defendant. GA2336. Olmer's counsel and Asmar's counsel both stated

that they had no objections. GA2336. Nawaz’s counsel spoke next, stating: “Similar situation, Your Honor. The mathematics appear to be correct. I guess I would leave it at that.” Nawaz’s counsel raised no objection to how the restitution amounts were calculated, to the court’s use of actual resale prices or appraisal values, or to the district court’s restitution calculation as to Nawaz. GA2336.

2. Governing law and standard of review

a. Standard of review

This Court reviews a restitution order deferentially, and “will reverse only for abuse of discretion.” *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006). However, where a defendant fails to object to the restitution order at the time of sentencing, this Court reviews for plain error. *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012).

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputa-

tion of judicial proceedings.” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quotations omitted).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

b. The Mandatory Victims Restitution Act

The Mandatory Victims Restitution Act of 1996 (“MVRA”) states that “[n]otwithstanding any other provision of law,” a sentencing court “shall order” defendants convicted of certain crimes to “make restitution” to their victims. 18 U.S.C. § 3663A(a)(1). In the case of a crime “resulting in damage to or loss or destruction of property of a victim,” the MVRA requires that the restitution order require the defendant to:

- (A) return the property to the owner of the property or someone designated by the owner; or
- (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—
 - (i) the greater of –
 - (I) the value of the property on the date of the damage, loss, or destruction; or
 - (II) the value of the property on the date of sentencing, less
 - (ii) the value (as of the date the property is returned) of any part of the property that is returned.

The threshold issue in determining restitution is to identify “the property” taken from the victim. § 3663A(b)(1)(B). *See also Boccagna*, 450 F.3d at 114. The next step is to determine as of when to value the lost property, which the MVRA states is either on the date of loss or on the date of sentencing. *Boccagna*, 450 F.3d at 114.

The final step is to determine how to value the property on those dates. *Id.* However, the MVRA is silent as to what measure a court should use in this last step. This Court has concluded that determining “value” of the property is a “flexible concept to be calculated by a district

court by the measure that best serves Congress’s statutory purpose.” *Id.* at 115. That purpose “is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.” *Id.* (internal quotation marks omitted). Focusing on the specific property lost and its value at the date of sentencing allows the victims to replace the property and thus “restores[s] [the] victim, to the extent money can do so, to the position he occupied before sustaining injury.” *Id.* at 115.

c. Determining offset value under the MVRA

In mortgage fraud cases where “the property” taken by a defendant was cash secured by real property, there is a split of authority regarding how to calculate offset value, that is, “the value (as of the date the property is returned) of any part of the property that is returned” set forth in U.S.C. § 3663A(b)(1)(B). The Third, Seventh, Eighth, and Tenth Circuits hold that the offset value should be based, as the district court’s restitution order was here, on the amount recouped by the victim following a foreclosure sale of the collateral real estate. The Fifth and Ninth Circuits, by contrast, hold that offset value should be based on the estimated fair market value of the real estate collateral at the time the victims obtain title to the houses. This Court has not squarely addressed this issue in the mortgage

fraud context, although as discussed below, precedent suggests that the Court would adopt the approach of the Third, Seventh, Eighth and Tenth Circuits.

i. Cases finding offset value to be based on cash recouped upon actual resale out of foreclosure

The leading case holding that offset value should be based on cash recouped after resale of the collateral real estate is *United States v. Robers*, 698 F.3d 937, 938 (7th Cir. 2012), *petn for cert. filed*, No. 12-9012 (Feb. 26, 2013), a mortgage fraud case similar to this one. The scheme in *Robers* involved more than 15 houses in Wisconsin for which the conspirators submitted fraudulent loan applications materially misrepresenting straw buyers' income, qualifications and intent to live in the houses and to repay the loans. *Id.* at 940. The lenders funded the loans based on these misrepresentations. *Id.* The loans went into default and the banks later foreclosed on and then sold the houses which served as collateral for the loans. *Id.*

Robers objected to the PSR which calculated his restitution based upon the unpaid principal of the loan, accrued interest, attorney's fees, property taxes, and other related expenses offset by the amounts the lenders obtained by selling the foreclosed properties. *Id.* Robers argued that the MVRA requires the offset value to be based

on the fair market value of the real estate collateral on the date the victim lender obtained title to the houses following foreclosure “because that is the ‘date the property is returned.’” *Id.* at 939. The government argued that money was the property stolen and that the foreclosure sale was not a return of that property. *Id.* Rather, only when the collateral real estate is resold and the victims receive money do they obtain the type of property stolen. *Id.*

The district court ordered restitution as set forth in the PSR. *Id.* In relevant part, the Seventh Circuit affirmed the district court’s restitution calculation method. *Id.* at 956. In particular, the Court concluded that “the property” under the MVRA was cash, not the underlying collateral, reasoning:

The victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale. Under the plain language of the statute, what matters is when at least part of the cash was returned to the victims—not when the victims received title to the houses securing the loans. And the cash was returned to the victims only when the collateral houses securing the loans were eventually resold.

Id.

In rejecting Robers's argument that the collapse of the real estate market caused his victims' losses and that therefore, he should not be held responsible under the MVRA for the depressed resale prices of the underlying real estate collateral, the Seventh Circuit stated:

Contrary to Robers's argument, his fraud actually caused the losses at issue here. Absent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place. Likewise the mortgage notes would not have been extended, not paid, and then defaulted upon. And the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value.

* * * * *

The decline in the real estate market does not mitigate his fraud. . . . Absent Robers's fraud, the decline in the real estate market would have been irrelevant. The declining market only became an issue because of Robers's fraud.

* * * * *

Essentially, Roberts wants a bailout, leaving the victims of his fraud to suffer the consequences of his deceit. Robers, not his victims, should bear the risk of market forces beyond his control.

Id. at 943-44 (citations omitted).

The Seventh Circuit emphasized the unfairness in calculating offset by the estimated fair market value at the time lenders obtained title to the properties in foreclosure:

If the real estate values increased, thereby allowing the creditor to resell the houses at a higher amount than owed, the bank would not be entitled to a restitution award. Similarly, if the increased sales price merely reduced the bank's loss, it would obviously be error for the district court to order restitution based on the earlier lower market value because "[t]he VWPA and MVRA ensure that victims recover the full amount of their losses, but nothing more."

* * * * *

Thus, what Robers truly seeks is a one-way ratchet. But "the 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the victims, not the victimizers.'"

Id. at 944. (citations omitted).

The Third, Eighth and Tenth Circuits are in accord. For example, in *United States v. Himler*, 355 F.3d 735, 737 (3d Cir. 2004), the defendant fraudulently purchased a condominium by tendering false checks to a settlement company that in turn paid the seller \$193,833. The district

court ordered the defendant to pay restitution in the amount of the cash paid by the settlement company, to be reduced by the ultimate net proceeds from the sale of the condominium. *Id.* The Third Circuit affirmed the award finding that “even though the property was deeded back to [the settlement company], that return did not adequately compensate for its loss.” *Id.* at 744.

Similarly, in *United States v. James*, 564 F.3d 1237, 1243-47 (10th Cir. 2009), the Tenth Circuit upheld a restitution award in another mortgage fraud case, calculating total loss by subtracting the eventual resale price of the real estate collateral from the initial loan proceeds. The Tenth Circuit found:

. . . the best measure of calculating [victim’s] actual loss was by using the amount of money it procured from the foreclosure sale and then subtracting that amount from the amount of the mortgage on which [defendant] had defaulted. If the district court had used the assessed value instead, which is an approximate value of the property, that measure would not have as closely represented “*calculation of actual loss*” incurred by [the victim]. In other words, the assessed value of \$468,000 might represent the approximate value of the property, but not best represent the actual loss [the victim] experienced when

it sold the property at foreclosure for the lower price of \$428,500.

Id. at 1246. *See also United States v. Statman*, 604 F.3d 529, 538 (8th Cir. 2010) (upholding district court's use of eventual proceeds from foreclosure sale as the offset value because that best satisfied the overarching goal of the MVRA of making victim whole); *United States v. Innarelli*, 524 F.3d 286 294-95 (1st Cir. 2008) (remanding with directive to district court in a mortgage case to recalculate restitution by offsetting amount lost by any amount recouped by the victim, including through resale of the property).

ii. Cases finding offset value based on the estimated fair market value of real estate collateral at the time title is transferred to victims

Cases in the Ninth and Fifth Circuit take a contrary view, namely, that the offset for restitution purposes is to be calculated by the estimated value of the real estate collateral at the time the lender takes back title. The leading Ninth Circuit case is based on *United States v. Tyler*, 767 F.2d 1350, 1351 (9th Cir. 1985), a case having nothing to do with mortgage fraud. There, the defendant pled guilty to theft of timber and was ordered to pay restitution. The same property that was stolen (*i.e.*, the timber), was returned to the government on the same day the crime occurred. *Id.* at 1352. In between the time of sentencing and the time the timber was stolen and returned, the value of the timber had declined. *Id.* at 1351. The district court calculated restitution as the difference between the value of the timber at the time of theft (and return) and the lesser value of the timber at sentencing. *Id.* The Ninth Circuit reversed, finding that the defendant's conduct did not "cause" the loss sustained by the government because "[a]ny reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not from [the defendant's] criminal acts." *Id.* at 1352.

The Ninth Circuit relied on the *Tyler* decision in the timber case in deciding *United States v. Smith*, 944 F.2d 618 (9th Cir. 1991). In *Smith*, the victim was a savings and loan which lent cash secured by real property based on the defendant's fraud, and then ultimately foreclosed on the collateral. *Id.* at 620-21. The Ninth Circuit found that the defendant should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred to the victim. *Id.* at 625. The Court reasoned that when title transferred to the victim, it had "the power to dispose of the property and receive compensation." *Id.* Further, "[a]ny reduction in value after [the defendant] lost title to the property stems from a decision by the new owners to hold on to the property; to make [the defendant] pay restitution for that business loss is improper." *Id.* The Court therefore concluded that the victims "received compensation" when they received title to the property and the corresponding ability to sell it for cash. *Id.* Later cases are in accord. See *United States v. Yeung*, 672 F.3d 594, 601 (9th Cir. 2012); *United States v. Hutchinson*, 22 F.3d 846 (9th Cir. 1993); *United States v. Catherine*, 55 F.3d 1462 (9th Cir. 1995). Like *Smith* however, these later Ninth Circuit cases did not address that the property returned to the lender for calculating the offset was different from what was stolen.

The Fifth Circuit has also found offset based on an appraised value of collateral. In *United States v. Reese*, 998 F.2d 1275, 1282 (5th Cir. 1993), the trial court calculated offset using an appraised value of the real estate collateral offered by the government done two months after the deed in lieu of foreclosure, rather than the appraisal offered by the defendants at the restitution hearing. The Fifth Circuit found that “the property” subject of the calculation “could only be loan proceeds funded in cash at the original closing of [the loan].” *Id.* at 1283. In determining the offset to be the value of the collateral at the time it is returned, the Court reasoned that:

Conceptually, it would seem to us that when a lender accepts conveyance of the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the ‘cash loan proceeds.’”

Id. at 1284. The government in *Reese* did not argue that the offset should be the resale price out of foreclosure and the Fifth Circuit did not offer any further explanation for why real property is “conceptually” the same as cash.

In *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994), the Fifth Circuit acknowledged the distinction advanced by the government between “the property” that was lost, namely, the cash, and the return of collateral in the form of real estate. The Court then held that the offset to restitution should include the value of the real

estate returned to the victim. *Id.* The Court did not explain how real property collateral is equated with cash, other than to cite *Reese* which, as described above, simply concluded that there was no “conceptual” difference between the two and *Smith*, which did not address that distinction at all.

iii. This Court’s cases suggest that it would find offset value to be based on cash returned to the victims upon actual resale out of foreclosure.

In *United States v. Paul*, 634 F.3d 6768, 678 (2d Cir. 2011), this Court held that where restitution is based upon the defendant having fraudulently obtained bank loans, a decline in the value of collateral securing those loans is “irrelevant” to the restitution calculation. In that case, Paul committed securities fraud by artificially raising a stock price through trades among his multiple accounts. *Id.* at 670. To finance the scheme, he obtained margin loans from several banks secured by the artificially inflated stock. *Id.* When the scheme was uncovered, the stock price fell dramatically, and Paul was unable to repay the loans. *Id.* Paul pleaded guilty to securities fraud and argued, relying on *United States v. Rutkoske*, 506 F.3d 170 (2d Cir. 2007), that the victims’ losses were caused by the decline in value of the collateral stock and that the district court was therefore required to exclude

those losses from restitution because they were not caused by his fraud. *Id.* at 677. This Court rejected that argument, reasoning that the loss to the victims “was not caused by the decline in value of [the] stock but, rather, by the making of the loans in the first instance.” *Id.* As a result, this Court found *Paul* more analogous to *Turk*.

In *Turk*, the defendant fraudulently obtained \$27 million in loans from multiple banks using real estate as collateral. *Id.* at 745. Because of the housing market collapse, the value of the buildings used as collateral dropped significantly. *Id.* *Turk* argued that it was the housing crash and other “extrinsic factors” that caused victims’ losses, not her, and that therefore, loss should be treated as zero because “the properties in which her victims thought they were investing arguably had some market value at the time her fraud was discovered.” *Id.* at 747-48.

The *Turk* Court concluded that “the item of value lost by her victims was the unpaid principal of the loans, not the buildings themselves,” and that “[a]t any given time, the buildings in this case were nothing more than insulation against loss.” *Id.* at 751.

Based on that logic, the *Paul* Court concluded that the fact that independent market forces may have contributed to the decline in stock value “is irrelevant to the restitution calculation, because the stock was merely securing the fraudulently obtained loans.” 634 F.3d at 678.

Thus, this Court drew a sharp distinction between the loans which constituted the loss and the collateral securing those loans, placing the burden of the decline in value of the collateral on the defendant. The Court stated that “[t]he loss to the [victims] resulted from Paul’s inducement of the loans, and it is for this loss that Paul must provide restitution.” *Id.*

To be sure, as Nawaz has identified, there is dicta in *Boccagna* suggesting that this Court might adopt a different approach. In that case, this Court held that the victim (HUD) was not entitled to offset its out-of-pocket losses with the nominal prices HUD accepted on reselling the collateral real properties. *Boccagna* fraudulently obtained millions of dollars through private real estate mortgage loans insured by HUD under a program it uses to stimulate private rehabilitation and development of residential properties. *Id.*

Boccagna purchased a number of distressed residential properties in New York City and sold them to complicit not-for-profit organizations at inflated prices. *Id.* at 110. Eighty-eight of the properties went into foreclosure, and, as guarantor of the mortgage loans, HUD obtained title to 53 of the properties by paying down loan balances, outstanding taxes, maintenance fees, and other expenses, for a total out-of-pocket loss of \$20,609,746. *Id.*

In order to dispose of the properties in a manner consistent with its mission, HUD entered into a Memorandum of Understanding with the New York City Department of Housing Preservation and Development (“HPD”) whereby HPD agreed to purchase the properties for “nominal prices” ranging from \$1 to \$120,000. *Id.* Further, HUD and HPD agreed to jointly undertake repairs of 2,200 dwelling units in the properties. *Id.* at 111.

In calculating restitution, the district court offset HUD’s out-of-pocket loss by the recouped collateral, namely, the foreclosure properties. *Id.* at 112. The court valued those properties at HUD’s nominal resale prices to HPD, some as low as \$1, without regard to fair market value. *Id.* Boccagna argued that the district court should have calculated the offset value of the foreclosure properties by reference to their fair market value. *Id.*

This Court held that “value” under the MVRA is a “flexible concept to be calculated by a district court by the measure that best serves Congress’s statutory purpose.” *Id.* (citations omitted). The purpose of restitution is “essentially compensatory: to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.” *Id.* at 115. Although fair market value will often serve that statutory purpose, this Court noted that the MVRA allows the exercise of discretion by sentencing courts in determining

the measure of value appropriate to the restitution calculation in any given case. *Id.*

This Court concluded that the district court erred in using the nominal resale prices to offset HUD's losses because it resulted in a restitution amount that exceeded the amount necessary to make the victim whole. *Id.* at 117. Instead of selling the foreclosure properties on the open market, HUD opted to transfer the properties to HPD under the terms of the parties' MOU. *Id.* HUD therefore received not only the nominal sales price for the properties, but also HPD's guarantee that the properties would be developed as low-to-middle income residences pursuant to the MOU—a guarantee that was valuable to HUD as it is consistent with HUD's mission to promote affordable low income property. *Id.* This Court concluded that to allow HUD to receive both the development guarantee and restitution offset by only a nominal price would place HUD in a better position than it was before it agreed to guarantee the loans. *Id.* at 119.

In the course of this holding, in dicta, this Court recognized the distinction between a return of cash and a return of collateral in determining what "property" has been returned under the MVRA. The government in *Boccagna* did not argue that the offset provision applied only to the actual cash HUD gave out in making the fraudulently obtained loans and not to property that HUD obtained after default. *Id.* at 113 n.2.

This Court posited that “[s]uch an argument would not be convincing” because, citing *Holley* and *Smith*, two other circuits had concluded that “when a lender victim acquires title to property securing a loan, ‘the value of such property should constitute a partial return of the cash loan proceeds.’” *Id.*

3. Discussion

Relying on *Boccagna*, Nawaz argues that the district court erred in determining the amount of restitution because, for properties that resold out of foreclosure, it subtracted the actual resale price lenders obtained out of foreclosure from the loan amounts owed at the time of sentencing. Nawaz Br. at 53-54. Nawaz argues that the court should have instead determined the “fair market value of the subject properties at the time the lenders obtained title to the property” and subtracted that amount from the loan balances. *Id.* But Nawaz’s reliance on *Boccagna* is misplaced.

a. *Boccagna* is distinguishable.

Unlike what HUD did in *Boccagna*, the victim lenders in this case did not sell homes out of foreclosure for a “nominal price,” namely, a price that is “trifling, esp[ecially] as compared to what would be expected.” 450 F.3d at 117 n.4. *See* GA2350. Indeed, in *Boccagna*, HUD sold some of the foreclosed properties for as little as \$1, be-

cause it sought to simply transfer the properties to the HPD pursuant to the parties' MOU. 450 F.3d at 118. HUD did so because it received another important benefit from the transfer—HPD's promise to develop the properties for low-income housing. *Id.* In other words, these were not arm's length market transactions by multiple market players in which the prices reflected the entire consideration for the deal.

By contrast, multiple lenders here engaged in arm's length market transactions in less than optimal conditions. GA2319. They sold properties that had not been occupied or cared for by a legitimate homeowner and, in many cases, were simply left abandoned. Nawaz PSR ¶ 8. The evidence presented to the district court showed that the costs of carry for these properties were so significant, they in some cases approached (or exceeded) the resale prices lenders ultimately obtained. For example, for 41 Montauk Avenue, the lender's costs were \$31,716.79, while the property resold for \$33,000. GA2350. Similarly, for 80 Hillside Avenue, lender costs were \$31,111.29, while the property later resold for \$32,000. GA2350. Lender costs for 281 Crown Street were \$61,553.93, while that property resold for \$38,000. GA2350. Indeed, Nawaz conceded in his sentencing briefing that the foreclosure process Nawaz complains the lenders followed here is one in which "the foreclosing lender is often spared the costs and time consump-

tion of the much more cumbersome foreclosure by public, open-market sale.” NA127. That lenders made a business decision to dispose of these properties in that manner and avoid incurring additional unwanted expenses was entirely reasonable.

The victim lenders here did not transfer properties under an MOU and secure a separate benefit for themselves as HUD did in *Boccagna*. Rather, the sales price they received out of foreclosure was the only benefit they received. As these sales were the lenders’ only chance to recoup their losses, they had every incentive to minimize their losses. *See Siciliano*, 601 F. Supp. 2d at 631-32. Because the resale prices here were not “nominal” prices that accompanied other benefits accruing to the victim lenders, *Boccagna*’s reasoning simply does not apply.

b. Using the cash proceeds from resale as an offset to restitution is consistent with the language of the MVRA, the purposes of restitution and this Court’s cases.

The issue of whether it is appropriate for a district court to use actual resale prices out of foreclosure as an offset to a victim lender’s restitution amount was not squarely before this Court in *Boccagna*. Accordingly, this Court’s dic-

ta in that case, does not preclude such a holding here.

Moreover, using actual resale prices as an offset for restitution under the MVRA comports with the plain language of the statute. It is not disputed that “the property” taken under the MVRA was cash, namely, the principal amount of the mortgage loans. The lenders here were defrauded out of cash and are not in the business of owning real estate. GA2252. The lenders wanted cash back, not houses, and as the *Robers* Court found, these victims “do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale.” 698 F.3d at 942. The plain language of the MVRA shows that what matters is when “part of *the property*” (*i.e.*, cash) is returned, not when the victims receive something they can turn into cash. 18 U.S.C. § 3663A(b)(1). That property was returned to the victims only when the collateral houses securing the loans were eventually resold.

Cases that equate obtaining title to houses out of foreclosure with obtaining cash either rely on poorly reasoned precedent, are flawed in their reasoning, or both. For example, the entire line of Ninth Circuit cases (and cases in other circuits too) rely on *Smith*, which in turn relies on *Tyler*. But *Tyler* is not instructive because in that case, the stolen property, namely timber, was returned to the victim on the very same day

it was originally stolen. 767 F.2d at 1352. The victim did not receive something else of unknown value that it had to convert into the property stolen, it received the very property at issue. Thus, *Smith* cannot stand for the proposition that “the property” under the MVRA means “any property returned, as opposed to the property stolen.” *Robers*, 698 F.3d at 947 (quoting *Smith*, 944 F.2d at 632 (O’Scannlain, J., dissenting) (“Nor does our decision in [*Tyler*], upon which both the majority and *Smith* rely, support the court’s holding. A defrauded lender’s assumption of title over collateral property that is itself part of the fraud is in no way analogous to a timber owner’s recovery of stolen timber.”)).

The *Smith* case is flawed for other reasons, too. *Smith* reasoned that at the moment the victims obtained title to the real estate collateral they had the power to dispose of it and therefore, that any decline in the collateral’s value after that date was due to the lenders’ decision to hold onto it. 944 F.2d at 625. But this reasoning simply ignores the reality facing victim lenders in a mortgage fraud scheme. The lenders here were left with, in many cases, properties that were abandoned and in disrepair. Nawaz PSR ¶ 8. Indeed, the district court here found that lenders were not “in the business of owning property, managing it the way an individual would if they wanted to hold out for a higher price.” GA2252. Instead, the only chance the

lenders here had to recoup their losses was to sell these properties for as much as they could as quickly as they could. To conclude that they did not do so earlier because they had made a decision to hold onto the properties is not supported by the record and ignores the basic reality of foreclosure sales, namely, that “real property is not liquid and, absent a huge price discount, cannot be sold immediately.” *Roberts*, 698 F.3d at 947. It misconstrues applicable market forces to assume that the only reason collateral is not immediately turned into cash is because of a deliberate decision by the victim to hold onto it. *Id.* at 951.

By contrast, using actual resale prices as an offset under the MVRA is entirely consistent with this Court’s approach for determining loss amount in *Turk* and *Paul*. In *Turk*, this Court found the victims’ loss to be the principal value of the loans made to the defendant, not the decline in value of what was promised as collateral (*i.e.*, the real property securing the loans). 626 F.3d at 749. This Court also found the defendant’s arguments about extrinsic forces causing the value of the collateral to decline, “simply irrelevant—they may or may not have been true, and [the defendant] might have earned a credit against loss if they had not occurred, but she may not invoke them to insulate her from responsibility for the loss she caused, namely, the loss of the unpaid loan principal.” *Id.* at 751 (ci-

tation omitted). Similarly, in *Paul*, this Court drew a sharp distinction between the fraudulently obtained loans and the stock serving as collateral securing the loans, finding that a decline in the collateral's value was "irrelevant to the restitution calculation" because "the stock was merely securing the fraudulently obtained loans." 634 F.3d at 678.

In short, this Court has made clear that there is a significant distinction between the item of value lost (the loans), and property that merely serves as collateral to the loans. *See Turk*, 626 F.3d at 751; *Paul*, 634 F.3d at 678.

So here. Nawaz seeks to insulate himself from responsibility for the loss he caused, namely, the loss of the mortgage loans, by shifting the burden of a declining real estate market onto the victim lenders. Nawaz seeks a bigger credit against his restitution liability than the victim lenders actually received by selling homes out of foreclosure. But that simply penalizes the victims for being forced to take back collateral that they did not want, that was not liquid, and that was being sold in a declining market. As the Court in *Robers* noted, "[t]he declining market only became an issue because of [defendant's] fraud." 698 F.3d at 944. Nawaz, not the lenders, should bear the risk of external market forces since he should suffer the consequences of his crimes.

c. Nawaz cannot show that the district court plainly erred in its restitution calculation.

If this Court were to decide that the sentencing court must use estimated values of the collateral underlying “the property” stolen at the time of sentencing as an offset under the MVRA, then the district court’s calculation here could be construed as erroneous to the extent it used actual resale prices instead. However, such an error was far from clear or obvious. Indeed, this Court’s cases in *Turk* and *Paul* appeared to approve the exact approach used by the district court here. And at a minimum, the split of opinions between the Fifth and Ninth Circuit on the one hand, and the Third, Seventh, Eighth and Tenth Circuits on the other, makes clear that the argument is subject to reasonable dispute, and therefore not plainly erroneous. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir.2004) (holding that, in absence of binding precedent, “genuine dispute among the other circuits” precludes conclusion that any error is “plain”).

Further, even if the district court’s calculation was error, Nawaz has not shown that any error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Marcus*, 130 S. Ct. at 2164. In this case, all of the restitution issues were carefully vetted by the district court by way of two separate hearings during which the district court took care to

work through any issues counsel had with restitution. During the October 17, 2011 hearing, when the district court circulated a draft of the final restitution order and the restitution calculations specific to Nawaz, not only did his counsel fail to object to it, he affirmatively told the court that Nawaz did not challenge the restitution numbers. GA2336. Nawaz's counsel did not even mention the word "restitution" in any of the briefing submitted to the district court.

Nawaz failed to object to the restitution calculation at any time leading up to sentencing, during the hearings on restitution, or during the sentencing itself. He failed to object to the use of resale prices in calculating restitution and did not suggest any other method of calculation.

Further, although Nawaz claims that the relatively lower prices lenders obtained for the foreclosed properties shows that lenders were simply "dumping" the properties in a commercially unreasonable manner, and that therefore, these prices were "nominal," there was no such finding by the trial court. Instead, the trial court found that the prices were reliable. GA2319. That the sales prices lenders ultimately received out of foreclosure were lower than certain appraisals, not does render the resale prices "nominal." It simply reflects the economic reality facing lenders who chose to cut their losses after having been defrauded.

After a careful analysis of the restitution issue conducted over two separate hearings, the trial court, which presided over a weeks-long trial, determined that the resale prices on the foreclosed properties were a reliable indication of value returned to the lenders. The MVRA allows the “exercise of discretion” by sentencing courts in determining the measure of value appropriate to the restitution calculation in any given case, and the court’s determination here awarded the victims the amounts of their actual losses, thus fully serving the statutory purpose of restitution. *Boccagna*, 450 F.3d at 117. In sum, Nawaz has not shown that the court’s detailed approach to calculating restitution—an approach to which Nawaz did not object—affected the fairness or integrity of judicial proceedings. The restitution order should be affirmed.

III. Marshall Asmar’s claims are without merit.

A. There was sufficient evidence to convict Asmar.

1. Relevant facts

In addition to the facts set forth in the Statement of Facts above, the following facts are relevant to Asmar’s claims.

Asmar’s participation in the criminal conspiracy was referenced during several recorded calls. For example, in a January 14, 2010 telephone call, Babar told Perkins that from the

stated sales price for 221 Starr Street of \$125,000, Asmar was slated to receive \$70,000. GA68, GA1505-06. This was entirely consistent with Asmar's three earlier deals in which he negotiated an amount he wanted out of the fraudulently inflated closing proceeds.

Babar was plainly accustomed to speaking with Asmar as he tried to conference Asmar in during a January 22, 2010 call with Perkins in which they were working on the 221 Starr Street transaction. GA1595-96. Babar routinely referenced needing to speak with Asmar or having already talked to him. For example, Babar needed Perkins to visit 221 Starr Street to take pictures for the property's sale and had to arrange that with Asmar since there was a tenant at the property. So as not to raise suspicion, Babar reported to Perkins on February 2, 2010 that Asmar had told the tenant that an "insurance guy" was coming to take pictures, and thus, Babar instructed Perkins "so you are going to be insurance guy." GA1714-17.

In another call with Perkins on January 26, 2010, Babar referenced having struck a deal with Asmar for 70-72 Center Street in Bridgeport (a transaction that did not ultimately close), in which Asmar and Babar agreed Asmar would get \$250,000 out of the sale. GA1657.

Asmar was also mentioned by name by other members of the conspiracy who knew who Asmar was and precisely how he was involved in

the criminal conspiracy. In a recorded call with Perkins, Olmer complained that Asmar wanted to sell his properties and continue to collect rent, stating:

See, Marshall is a prick. Marshall wants to make a lot of money, but he doesn't want anybody else to make money. So, he wants to sell 'em and still keep the money. He's still collecting \$800 a month on one of 'em.

GA1767. Olmer's reference to Asmar "sell[ing] 'em" and "still collecting \$800 a month" is consistent with Maribel Valencia's testimony (*see below*) about Asmar continuing to collect rent at 243 Starr Street after the "sale" to Nicolas.

Similarly, Gallagher, the conspiracy's fraudulent appraiser, also knew that Asmar was in on the fraud. In putting the 221 Starr Street deal together, a deal in which the conspiracy was going to have Asmar sell the property to a straw buyer, the conspirators needed to justify the \$125,000 sales price. Asmar had purchased the property approximately 8 months earlier for \$20,000. GA700. On January 12, 2012, Gallagher emailed Babar stating: "I need Marshall to give me a breakdown of his expenses in rehabbing 2212 [sic] Star for Action Mtg They need to justify increase in value over what he paid for it." GA113, GA1483. As the appraiser on the deal, Gallagher knew that no such "rehabbing" had been done at the property. Asmar did not ultimately prepare that breakdown because Gal-

lagher himself later emailed a fake invoice to Babar purporting to justify a \$50,249 rehabilitation at 221 Starr Street that never occurred. GA121, GA1581-84. But in asking Babar to get a “breakdown” from Asmar, Gallagher understood that it was safe to include Asmar in the process.

During the trial, several witnesses testified specifically about Asmar. Perkins identified Asmar as a seller in the conspiracy who negotiated directly with Babar concerning the amounts Asmar would take away from the conspiracy’s property closings. GA97-99, GA112. Perkins described Asmar’s initial meeting with Babar during which the conspirators reviewed a list of Asmar’s properties and discussed prices Asmar would receive if he agreed to sell them to the conspiracy. GA98-99. Babar explained the nature of the conspiracy and fraudulent scheme to Asmar. GA98-99; PSR ¶11. Asmar knew going in that after he got paid the price he negotiated with Babar, a price that would be less than the stated sales price, the leftover money from the loan proceeds would be used to pay other members of the conspiracy. GA98.

Perkins testified about attending closings for two of Asmar’s properties, one involving straw buyer Wilson Nicolas, who purchased 88 Hazel Street and 243 Starr Street, and one involving Alicia Martineau who purchased 211 Lloyd Street. GA99-100; GA111. Perkins recalled that during one of the Asmar sales to Nicolas, there

was a dispute because Asmar was asking for more money than Babar had originally agreed upon. GA99-100. Perkins also described Asmar attending the 211 Lloyd Street closing and signing closing documentation. GA103, GA111.

Maribel Valencia, who lived at 243 Starr Street from approximately February 2009 until the time of trial, positively identified Asmar in court and testified that Asmar was her landlord who came to 243 Starr Street to do repairs at the property and to collect rent. GA212. This was notable (and highly inculpatory) because Asmar had purportedly “sold” 243 Starr Street to Nicolas on October 10, 2008, which, if a legitimate sale, would have meant that Asmar was no longer the landlord and would no longer be collecting rent. GA700. Asmar, however, knowing that the sale was a fraud, knew that Nicolas would have nothing to do with the property after the sale and that he could continue to collect rent from Valencia’s family as if nothing at all had happened.

Straw buyer Nicolas also testified about Asmar, identifying him as the seller of two properties Nicolas purchased, 243 Starr Street and 88 Hazel Street. GA222-24. Nicolas testified that Asmar was present and seated at a table with Nicolas at the 88 Hazel closing as they both signed the closing documents in Olmer’s presence. GA224. Nicolas also testified that before signing the closing documents, Asmar engaged

in a private negotiation (out of Nicolas's earshot) with Babar, Olmer and Perkins. GA224. Nicolas confirmed that he never received keys to 243 Starr Street or 88 Hazel, did not choose those properties, and did not ever live in them. GA223-24, GA226-27. Nicolas testified that he did visit 88 Hazel Street after closing, but did not even go inside because it looked "scary and trashed." GA227, GA1294-96.

Straw buyer Alicia Martineau also identified Asmar as the person who "sold" her 211 Lloyd Street. GA300-01. Martineau testified that she attended the closing at Olmer's office, but was told to wait while Babar, Olmer, Asmar and Perkins had a private conversation out of her presence. *Id.* Asmar appeared agitated when he emerged from that meeting, but the closing went through. GA301. Martineau did not receive the keys at closing and had nothing to do with the property after that. GA297, GA304.

Almost \$200,000 was diverted from the closing funds of Asmar's three deals to Sheda Telle, a fact that none of the co-conspirators told the lenders. At trial the government introduced "seller authorizations" showing that Asmar had authorized these payments. For example, Government Ex. 2416 is a document dated October 10, 2008 which states "I hereby authorize disbursement of Seller proceeds as follows" and then includes a line for "Sheda Telle Construction" in the amount of \$73,240.82. GA1267. A

check for that precise amount was then written to Sheda Telle. GA1261, GA1268. Similarly, Government Ex. 2715 is a handwritten document dated October 1, 2009 which states: “To Settlement Agent: I direct you to pay Sheda Telle Construction LLC the sum of \$49,375.00 from my proceeds of the sale of 211 Lloyd St. New Haven.” GA1388. A wire in that precise amount was then sent to Sheda Telle. GA1397. These two seller authorizations bear signatures for Asmar. GA1267, GA1388.

2. Governing law and standard of review

For the governing law and standard of review for a district court’s denial of a motion for judgment of acquittal, see part I.A.2, above.

3. Discussion

Asmar argues that the trial court erred in failing to grant a judgment of acquittal because the trial evidence did not show “Asmar had knowledge or, or participated in, the charged conspiracy.” Asmar Br. at 8. Asmar then cites several supposed failures in the government’s proof, namely, that there was: (1) “no wiretap telephone calls involving Asmar . . . nor any testimony involving Asmar other than the Government’s cooperating witness”; (2) no evidence that “he and his co-conspirators carried out the scheme by submitting fraudulent documentation

to lenders”; (3) no evidence “that Asmar was aware of the shell corporation (Sheda Telle)”; and (4) “no evidence of any contact—directly or indirectly—between Asmar and Babar.” Asmar Br. at 12-14.

But Asmar simply ignores the substantial evidence presented against him at trial. Asmar is correct that there were no wiretap telephone calls involving him, but there was no wiretap in the case at all. Certainly however, Asmar’s knowing participation in the criminal conspiracy was specifically discussed on tape by Babar who referred to Asmar having agreed to a price of \$70,000 for 221 Starr Street, a price well below the proposed sales price of \$125,000. GA1505-06. This call alone shows Asmar’s knowledge that his deals involved inflated sales prices. *See also* GA1656-57 (Babar saying that “Marshall [was] asking 250” for 70-72 Center Street and appraisal value is 375 so “we can make a big chunk out of it”).

Further, Babar’s repeated mention of working with Asmar, for example, telling Perkins that Asmar told the tenant at 221 Starr Street to expect an “insurance guy,” or needing to call Asmar, shows a working relationship with Babar centered around the fraud. GA1595-96, GA1714-17.

Olmer’s reference to Asmar still collecting rent after having sold a property and Gallagher’s email to Babar asking for a breakdown of costs

from Asmar for a rehabilitation that had not been done similarly shows that Asmar knew the sales he was profiting from were bogus. GA1767.

Asmar argues that Perkins was the only witness to testify about him at trial. Even if that were true (which it is not), Perkins's testimony would be sufficient, especially when combined with corroborating documentary evidence to withstand a Rule 29 motion. *See United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990) (conviction may be supported only by uncorroborated testimony of single accomplice). Perkins identified Asmar as a seller with knowledge of the inflated prices on which the mortgage loans were based. GA97-99. His testimony was corroborated by closing documentation for Asmar's properties and other documents showing that the amounts Asmar actually received from those closings were substantially less than what the lenders were told. GA1250, 1267-68, GA1281, GA1283-86, GA712, 1332-33, GA1397-98, GA1399.

But Perkins was certainly not alone in testifying about Asmar as three other witnesses also put him at the center of the conspiracy. Valencia testified that Asmar continued to collect rent from her family at 243 Starr Street after it had purportedly been "sold" to Nicolas. GA212. Only someone who knew the sale was bogus would know that he could keep his tenants in place even after he no longer owned the property.

Nicolas, the straw buyer for two of Asmar's properties identified Asmar as the seller who attended the closing for 88 Hazel Street and engaged in private negotiations with Babar, Olmer and Perkins. GA1224. Similarly, Martineau, the straw buyer for Asmar's third sale, 211 Lloyd Street, confirmed that Asmar attended the closing and appeared agitated after having a private conversation with Babar, Olmer and Perkins. GA301.

These witnesses place Asmar in direct negotiations with Babar at the closings of his properties with knowledge of the fraudulently inflated sales prices and knowledge that the "sales" were not really sales.

Asmar also argues that "there was no evidence whatsoever that he and his co-conspirators carried out the scheme by submitting fraudulent documentation to lenders" and that he was not aware of the shell corporation, Sheda Telle. Asmar Br. at 12-13. But the goals of the conspiracy could not have been achieved without submitting fraudulent documentation to the mortgage lenders, a fact that Asmar well knew.

For example, the HUD-1 Settlement Statement for 243 Starr Street, a document signed by Asmar as seller, Nicolas as buyer, and David Avigdor, the settlement lawyer, was supposed to reflect all the monies involved in the transaction. The HUD-1 represented to the lender that As-

mar was to receive \$161,420.96 in closing funds. GA1250-51. In fact, however, Asmar received only \$82,400 because \$73,240.82 of the closing funds were diverted to Sheda Telle Construction, consistent with the side deal that Asmar had negotiated with Babar. GA1268. If Asmar had not agreed to the money being siphoned out of the closing funds, he certainly would have objected to receiving only half of the money he had coming to him based on the HUD-1. But Asmar knew that he was not getting all of that money, and he knew the entire deal was a fraud because he never gave keys to the buyer Nicolas and continued to collect rent from Valencia's family even after the sale was done. GA212, GA223, GA226-27.

Asmar further knew that 243 Starr Street was not worth the \$175,000 sales price on which the mortgage loan was based. Asmar was a real estate professional and had, through his representative, sent Babar his own evaluation, an evaluation in which he had every incentive to value the property high, that 243 Starr Street was worth \$75,000. GA1254.

Asmar and his co-conspirators repeated this same fraud for 88 Hazel and 211 Lloyd Street, deals that also relied on false HUD-1s signed by Asmar. GA1281-82, GA1332-33.

Asmar argues that he did not know about Sheda Telle and could not have foreseen its use. But the trial evidence showed that Asmar specif-

ically authorized a portion of his seller proceeds from the 88 Hazel and 211 Lloyd Street sales to be disbursed to Sheda Telle. GA1267, GA1388. As discussed below, in arguing against a sophisticated means enhancement Asmar argued that the seller authorizations should not be imputed to him. The district court analyzed and rejected this argument. GA2308.

In sum, the evidence showed that Asmar directly participated in the conspiracy by selling properties to straw buyers and agreeing to take substantially less than the purchase price used to obtain a mortgage. The evidence was more than sufficient to support his convictions.

B. The district court correctly ruled that Asmar was not entitled to a new trial.

1. Relevant facts

The facts relevant to this argument are set forth in the Statement of Facts section and in the Relevant facts section set forth immediately above in opposition to Asmar's motion for judgment of acquittal.

2. Governing law and standard of review

For the governing law and standard of review for a district court's denial of a motion for a new trial under Rule 33, *see* part I.A.2, above.

3. Discussion

There were no extraordinary circumstances to justify granting Asmar's motion for new trial and no reason to believe that the verdict was unjust. Asmar was part of a multi-defendant trial that spanned 14 days of testimony and arguments, as well as an additional day of instructions. The jury deliberated for four days and rendered a reasoned verdict—acquitting Asmar of certain Counts 2-6, and 11, but convicting him of Counts 1, 7-9, and 12-14. In light of the substantial evidence showing Asmar's knowing involvement in the conspiracy and the jury's thoughtful deliberation, the trial court did not err in denying Asmar's motion for new trial.

C. The district court properly applied a sophisticated means enhancement to Asmar's guidelines calculation.

1. Relevant facts

Asmar's PSR recommended a two-level enhancement for sophisticated means. Asmar PSR ¶ 36. Asmar objected to this enhancement, arguing that his conduct was limited to giving a list of properties and attending a closing. GA2232. Asmar also argued that he could not have foreseen Sheda Telle receiving money because it was not on the HUD-1s he signed. GA2232-33. Further, Asmar argued that he should not be imputed with knowledge of Sheda Telle from the seller authorizations because Perkins testified that he

sometimes forged documents in the scheme and because the signatures on the seller authorizations looked different from each other. *Id.* Asmar therefore implied (but did not expressly argue), that his signature was forged.

During the September 22, 2011 sentencing hearing, the district court applied the sophisticated means enhancement. GA2308. The court noted that the offense involved “hiding the transactions in which the proceeds of the fraud were distributed to the co-conspirators by using a shell entity, Sheda Telle, and by using fraudulent appraisals.” GA2307. The court stated that in each of Asmar’s three completed transactions, “the HUD-1 showed proceeds going to the defendant in an amount substantially in excess of the actual proceeds received by the defendant.” *Id.* That was because, as the court pointed out, “significant amounts of money, *i.e.*, \$73,240, \$76,591, and \$49,375 went to Sheda Telle.” *Id.*

The court rejected Asmar’s argument regarding the difference in signatures on the seller authorizations, reasoning:

. . . even assuming *arguendo* that a signature on one of those documents is not the defendant’s signature, the other signature is his, and that is sufficient to establish his knowledge with respect to the way Sheda Telle was being used when taken in conjunction with the other evidence in this case. However, the Court is not particular-

ly persuaded that one of the signatures is not the defendant's signature because in viewing the financial statements submitted by the defendant and attached to the Presentence Report, the Court noted the same type of variation in the signatures in those documents as is reflected in Government Exhibits 2416 and 2715.

GA2308. The court concluded that as a person experienced in real estate, and having negotiated a price for his properties and then agreed to a higher purported sales price to be submitted to lenders, Asmar knew that fraudulent appraisals were being used to conceal funds going to Sheda Telle. *Id.*

2. Governing law and standard of review

For the governing law and standard of review concerning a sentencing enhancement for use of sophisticated means, see part I.B.2.b, above.

3. Discussion

Asmar argues that the district court erred in applying a two-point sophisticated means enhancement because he did not "employ sophisticated means." Asmar Br. at 29. Specifically, he argues that he "did not try to conceal anything from taking place" and that "all he did was hand over a list of properties and then show up at a closing." Asmar Br. at 29-30.

However, as set forth above, Asmar need not have personally engaged in sophisticated means in order for the enhancement to apply. U.S.S.G. § 2B1.1(b)(10)(C); U.S.S.G. § 1B1.3(a)(1)(B); *Miles*, 360 F.3d at 482 (applying sophisticated means because co-conspirator's use of sophisticated means was reasonably foreseeable to defendant). It is enough that his co-conspirators engaged in a sophisticated scheme using doctored photographs in property appraisals, multiple bank transactions and accounts to conceal the source of funds, and a shell corporation to funnel money out of the real estate transactions and to the co-conspirators.

The use of these methods was reasonably foreseeable to Asmar who personally negotiated the secret price he was to receive from each deal with Babar, the leader of the conspiracy. In addition, Asmar, who was experienced with real estate closings, could reasonably foresee the use of false appraisals and fraudulent documentation given that the sales prices for his deals were inflated so far above what he was receiving. *See Amico*, 416 F.3d at 169.

In addition however, Asmar personally engaged in sophisticated aspects of the scheme to defraud mortgage lenders. He misrepresented the amount of money he received from bogus real estate closings in order to conceal the fact that Babar, someone with no ostensible connection to the transactions, was receiving large portions of

the proceeds. This is precisely the type of conduct that the case Asmar cites in his brief says constitutes sophisticated means. *United States v. Lewis*, 907 F. Supp. 683, 686 (S.D.N.Y. 1995) (“means’ that are ‘sophisticated’ at protecting against the discovery of the scheme or the identification of the person responsible for or benefiting from the fraudulent scheme.”).

Further, the trial evidence showed that Asmar had actual knowledge of the use of Sheda Telle, the fictitious construction company, used to disguise the recipient of fraudulent proceeds. Asmar expressly authorized the closing attorney to divert significant amounts from his closing proceeds directly to Sheda Telle as shown in the seller authorizations for 243 Starr Street and 211 Lloyd Street.

Asmar participated in an elaborate scheme to defraud mortgage lenders involving multiple conspirators, the creation and use of false documentation, and transactions with fictitious entities designed to conceal who was benefitting from the fraudulent scheme. The district court did not err in applying a sophisticated means enhancement to Asmar based on those facts.

D. The district court properly declined to grant Asmar a minor role adjustment.

1. Relevant facts

Before the district court, Asmar argued for a minor role adjustment, claiming that he did not know many members of the conspiracy and that his role was limited. GA2264-65. The government opposed a minor role adjustment. GA2265.

The district court denied Asmar's request for a minor role adjustment finding that he failed to establish his role was minor compared to the average participant in a mortgage fraud conspiracy. GA2308. The court reasoned that Asmar was personally involved in five transactions (two attempted sales) and was himself a "repeat player" whose conduct spanned from the summer of 2008 until January 2010. *Id.*

2. Governing law and standard of review

For the law governing the minor role adjustment, see Part I.B.3.B., above.

3. Discussion

The district court's denial of a minor role adjustment was entirely appropriate. First, Asmar's argument that he "wasn't aware of" any other individual in the conspiracy other than Babar is clearly wrong, since he attended clos-

ings in which Perkins, Olmer and straw buyers Nicolas and Martineau attended. Indeed, both Nicolas and Martineau testified that Asmar met with Babar, Perkins and Olmer to discuss matters in private. Further, both Olmer and Gallagher referred to Asmar by name in the context of the criminal conspiracy. Asmar was certainly well known by several members of the conspiracy.

More to the point however, is the fact that Asmar was not less culpable than other defendants. Asmar completed three sales over a year and a half and attempted two other deals with Babar. He negotiated directly with Babar out of the straw buyers' earshot, indicating that he and the other more knowledgeable members of the conspiracy (Babar, Perkins, Olmer) had things they did not want the straw buyers to know. That indicates a higher level of culpability than those straw buyers. Given those facts, the district court did not err in denying a minor role adjustment because Asmar's role was not significantly less culpable than the average mortgage fraud participant's.

E. The district court acted reasonably in declining to sentence Asmar to a lower non-guidelines sentence.

1. Relevant facts

Asmar's calculated advisory guidelines range was 57-75 months. Asmar PSR ¶ 64. The day be-

fore Asmar's sentencing hearing, the district court, which had also presided over the trial, sentenced Werner to a term of imprisonment of 48 months. GA2303. The government argued that in order to avoid unwarranted sentencing disparities, Asmar should receive a below-guidelines sentence in the range of 49 to 57 months. GA2313. This was slightly higher than Werner's sentencing range of 46-57 months to reflect that Asmar had been involved in two more intended deals and was a member of the conspiracy for a longer period of time. GA2314.

The district court detailed the § 3553(a) factors it was required to consider and expressly told Asmar that it had considered each of those factors. GA2315. The court detailed what it had reviewed, including the parties' sentencing memos, the "numerous letters that were attached to your counsel's memorandum in support of you," the evidence at trial, the sentencing of co-defendants and other participants in the scheme, remarks by counsel, "as well as your own remarks and the people who spoke on your behalf." *Id.*

The court noted the need for the sentence to serve the various purposes of a criminal sentence, and that the sentence should be "sufficient but not greater than necessary to serve these purposes." GA2315. The court then specified which § 3553(a) factors it believed warranted particular consideration including the "need to

impose a sentence that constitutes just punishment,” and “the need to deter others from committing the offense committed by you.” *Id.* The court then stated that it was going to impose a non-guideline sentence in order to harmonize the sentence imposed on Asmar “and the other people who have been sentenced and will be sentenced” GA2315-16. The court noted that it was “particularly looking at Ms. Werner, who is quite comparable to you” noting that “there are a number of similarities and there are a couple of dissimilarities which make you slightly more culpable than her.” GA2316. The court then imposed a below guidelines sentence of 52 months. GA2315-16.

2. Governing law and standard of review

See governing law and standard of review for Nawaz’s argument regarding a non-guidelines sentence, Part II.B.2.

3. Discussion

Asmar argues that he should have received a lesser sentence given the remarks by his family and a tenant at sentencing, his lack of a criminal record and his volunteer efforts. Asmar Br. at 33-34. But the district court heard and considered all of those factors and expressly told Asmar that it had done so. The court thoroughly considered the § 3553(a) factors, detailing them

on the record and specifying those factors it believed merited special consideration in Asmar's case. The fact that Asmar wanted the court to give certain factors more weight than it did does not make the sentence unreasonable.

Further, the 52-month sentence imposed by the district court was below Asmar's guidelines range of 57-71 months. That the district court did not impose an even lower sentence was a matter "firmly committed to the discretion of the sentencing judge" and was entirely reasonable. *Fernandez*, 443 F.3d at 32.

IV. The claims of Morris Olmer are without merit.

A. The district court used reliable information in finding that Olmer's loss amount exceeded \$1,000,000.

1. Relevant facts

The PSR calculated Olmer's offense level as follows. The base offense level under U.S.S.G. § 2B1.1(a)(1) was 7. Olmer PSR ¶ 26. The PSR found a loss amount of \$2,040,865, and thus increased the base offense level by 16 since the loss exceeded \$1,000,000 under U.S.S.G. § 2B1.1(b)(1)(I). Olmer PSR ¶ 27. Two levels were added for sophisticated means under U.S.S.G. § 2B1.1(b)(9)(C), and two additional levels were added for Olmer's use of a special skill as a trained lawyer under U.S.S.G. § 3B1.3.

Olmer PSR ¶¶ 28-29. Olmer’s total offense level was therefore 27, which with a criminal history category I yielded a sentencing guidelines range of 70 to 87 months of imprisonment. Olmer PSR ¶ 66.

Olmer filed a sentencing memorandum objecting to the loss calculations in the PSR. Olmer contended that the “government’s figures [were] based on fire-sale prices” and appraisals during a volatile real estate market. OA82. Olmer challenged the accuracy of appraisals during a “totally unpredictable market,” as well the use of estimates based on websites such as Zillow.com.

At a hearing on loss issues, the government made clear that the methodology for the government’s loss calculations were based on *Turk*, 626 F.3d 743, and *Mallory*, 709 F. Supp. 2d 455. GA2236. The government also made clear that in taking the loan amount fraudulently obtained by the defendants, and reducing it by the amount of the collateral pursuant to U.S.S.G. 2B1.1 cmt. 3(E)(ii), the government used the resale of the property in foreclosure or an actual appraisal, and not figures taken from the internet. GA2236. Neither Olmer nor any other defendant disputed this fact at that hearing, or at any time thereafter in the district court. Nor did Olmer or any other defendant inquire about the particulars of the appraisals, such as how they were conducted or what they were based upon.

At another point during that same hearing, the government further confirmed that the actual loss figures were based on actual re-sale price or an actual appraisal. GA2254-55. Again, no defendant, including Olmer, claimed otherwise at that time, or inquired further about the appraisals that provided the basis for the value of the properties that were unsold at the time of sentencing and which amounts would be deducted from the loan amounts fraudulently obtained.

2. Governing law and standard of review

For the governing law for loss calculation, see part II.A.2, above. For the law governing plain error review, see part II.C.2, above.

3. Discussion

Olmer's claim in this Court should be reviewed for plain error only. While Olmer made an initial objection in his sentencing memorandum about the accuracy of the re-sale and appraisal values, as well as about the use of Zillow.com, Olmer never pursued the argument at the loss hearing. At that hearing, the government stated that the amounts by which the loan amounts were reduced for guidelines loss purposes were based on re-sale prices and appraisals. GA2236. Olmer never challenged that assertion or inquired further about the appraisals, even though in this Court he has raises issues

about the appraisals. Olmer Br. at 17. Surely the time for his inquiries was at a hearing on loss in the district court, not in his brief to this Court after remaining silent on the issue at the loss hearing. Olmer and the other defendants certainly preserved their loss argument as to the use of re-sale prices and appraisals versus the use of the Superior Court appraisals. *See* part II.A, above. But his other claims should be reviewed for plain error only, if not outright waiver.

But there was no error, plain or otherwise, in the district court's loss calculation for Olmer, including the information on which it relied. Olmer's main complaint seems to be that the district court relied on estimates from Zillow.com, but in fact it did not. As set forth above, the government's loss amounts were based on the amount of the fraudulently obtained loans less the re-sale price or, if there was no re-sale, an appraisal. GA2236. While Olmer's PSR (at ¶ 21) refers to one property for which Zillow.com was used (84 Forest Street), that was simply not the case for the government's calculations by the time of the loss hearing.

In fact, the government *opposed* using Zillow.com estimates, which were put forth by the *defense* at the loss hearing to cast doubt on the government's appraisals, because the Zillow.com estimates were higher. GA2242-44. As the gov-

ernment explained at the hearing, the Zillow.com estimates were unreliable. GA2248.

Indeed, one of the properties on which the defense pressed their argument for Zillow.com estimates was 88 Hazel Street. Asmar purchased the property for \$10,000, and it was fraudulently “sold” to Nicolas for \$180,000. GA700, GA1276-82, GA220-43. Olmer caused \$76,591.09 to be wired out of the “sale” proceeds from the loan to Sheda Telle Construction. GA1283. The house at 88 Hazel Street was uninhabitable. GA1294-96. The appraisal proffered by the government was \$36,000, making the loss on the property \$139,655 (the amount of the loan (\$177,655) reduced by the fair market value of the property (\$36,000)). Olmer PSR ¶ 21 (chart). It was the defendants, not the government, who proffered a Zillow.com estimate for 88 Hazel Street of \$101,000, an amount that the trial evidence showed was absurd. GA2242.

Olmer also raises a series of questions about the appraisals used for the properties that did not re-sell out of foreclosure. Olmer Br. at 17. But neither Olmer nor any other defendant ever posed any such questions at the loss hearing in the district court. GA2236-50. Olmer should not now be allowed to come to this Court and raise issues about the appraisals that he did not raise in the district court at a hearing specifically held to discuss the very issue.

Olmer also raises an issue with respect to the value of 221 Starr Street, a property for which no appraisal was available. Olmer Br. at 17. He claims that the government proposed an “arbitrary” number for the value of this property that was “about a quarter of the estimate in the initial PSR.” Olmer Br. at 17. This is simply not true. Asmar purchased 221 Starr Street out of foreclosure for \$20,000 in May 2009. GA700, GA1466. He then conspired with Babar, Olmer, Gallagher and the others involved to sell the property on paper to a straw buyer in January 2010 for \$125,000, while the actual sales price to Asmar would be \$70,000. GA1475, GA67-68, GA1505-06, GA2171, track 1. The government simply advocated that because Asmar’s purchase of the property was so close in time to the attempted fraudulent re-sale of it that the court use the \$20,000 figure, doubled to be as conservative as possible, for the fair market value of the property for an intended loss. Olmer PSR ¶ 21.

Finally, even if one were to set aside 84 Forest Street and 221 Starr Street from the loss calculation, Olmer’s loss amount would still be far above the \$1,000,000 threshold for sentencing guidelines purposes. Olmer’s final loss amount was \$2,137,577. OA111-12. Even assuming *arguendo* that one were to exclude the loss amount on 84 Forest Street (\$102,500) and 221 Starr Street (\$85,000) from the calculation, the loss

amount would still be \$1,950,077, and thus the loss would still far exceed more than \$1,000,000 under U.S.S.G. § 2B1.1(b)(1)(I). Accordingly, Olmer cannot show that any error in the loss calculation affected his substantial rights because he cannot show that it had any effect on his guidelines calculation.

B. The district court did not err in denying Olmer a reduction for acceptance of responsibility.

1. Relevant facts

Olmer was found guilty by a jury on April 12, 2011. OA51-53. The PSR recommended against any reduction for acceptance of responsibility, noting that such an adjustment is generally not intended for a defendant who went to trial. Olmer PSR ¶ 24. Olmer did not object to the PSR's recommendation not to give a reduction for acceptance of responsibility, PSR, Addendum, and subsequently filed a sentencing memorandum that likewise, failed to object to the PSR's recommendation. OA76-92.

At Olmer's September 21, 2011 sentencing hearing, Olmer's counsel confirmed that the only guidelines objections it preserved were those in the sentencing memo, and those objections raised at the prior hearing on loss, restitution and other guidelines issues. OA108, GA2225. Olmer made no mention of acceptance of responsibility at that hearing. GA2225-70. In ruling on

Olmer’s objections to the guidelines, the district court reiterated that the defendant “objects to two aspects of the guidelines calculation,” neither of which was the lack of a two-level reduction for acceptance of responsibility. OA113.

2. Governing law and standard of review

“Whether a defendant has carried his burden to demonstrate acceptance of responsibility is a factual question’ on which we defer to the district court unless its refusal to accord such consideration is ‘without foundation.” *United States v. Broxmeyer*, 699 F.3d 265, 284 (2d Cir. 2012) (internal quotation omitted), *cert. denied*, 133 S. Ct. 2786 (2013). “[T]he adjustment is generally not available to a defendant . . . ‘who put[] the government to its burden of proof at trial by denying the essential factual elements of guilt,’ even if, after conviction, he admits guilt and expresses remorse.” *Id.* (quoting U.S.S.G. § 3E1.1(a) cmt. n.2). “[T]he adjustment can apply in ‘rare situations’ to a defendant who goes to trial to assert and preserve issues that do not relate to factual guilt where pre-trial statements and conduct evidence acceptance.” *Id.*

For a discussion of plain error review, see part II.C.2, above.

3. Discussion

Because Olmer never objected to the absence of a reduction for acceptance of responsibility, this Court's review of whether the district court erred in declining to grant such a reduction should be for plain error only. But there was no error, plain or otherwise, because Olmer went to trial and contested his factual guilt.

Olmer's argument to the contrary turns on the district court's comments at the sentencing hearing. Olmer's lawyer stated that "[p]eople can be sorry and they can express regret and remorse and admit their conduct and still go to trial." OA149. His lawyer argued that "that should be taken into consideration, just as much as somebody like Mr. Gallagher who comes here after day three and pleads guilty." *Id.* (Gallagher, the appraiser, pleaded guilty during trial, and the court gave him a two-level reduction for acceptance of responsibility. *See United States v. Gallagher*, No. 11-2562, 2012 WL 1352689 (2d Cir. April 19, 2012) (affirming Gallagher's sentence).) Olmer's lawyer asked that such remorse "should be taken into consideration." *Id.* Olmer never asked for a two-level reduction in the guidelines, and he never objected to the reduction's absence.

The district court soon thereafter told Olmer that "[y]our attorney made a very valid point, which is just because you go to trial doesn't mean you can't accept responsibility, and that's

true.” OA151. The district court went on to say that the “picture of you that I’ve gotten over the course of this case” is “not flattering.” OA151. That was the reason the district court was having “trouble reconciling the Mr. Olmer you’re tell me I’m seeing today with the Mr. Olmer that I have a picture of.” OA152. Olmer’s lawyer asked the court for more time to prepare Olmer to address the court’s concerns, and the court gave the additional time. OA153.

The district court cautioned, however, that regardless of what Olmer said, “the court still may not be persuaded.” OA153. At the next hearing, Olmer’s attorney emphasized that Olmer understood this. She stated that Olmer had “prepare[d] another statement entirely of his own accord, knowing that there was absolutely no quid pro quo, that there were no promises.” OA158. Counsel twice emphasized that there were no promises made and no quid pro quo. OA159.

In other words, contrary to Olmer’s argument to this Court, there was no arrangement by which Olmer was to get a reduction for acceptance of responsibility if he admitted his guilt. Indeed, there was no guarantee of any consideration of his statement by the district court whatsoever, even though, as even Olmer admits in his brief, the district court did in fact give Olmer consideration for his statement in

imposing a below-guidelines sentence. Olmer Br. at 20; OA176.

Olmer did make a further statement to the court in which he admitted that he “did wrong,” and “knew that [he] was doing wrong while [he] was doing it.” OA159. Contrary to Olmer’s argument, the district court never formally “accepted” Olmer’s statement, and was in no way bound to give Olmer a two-level reduction in his offense level. This is particularly so given the fact that Olmer *never* asked the district court for it or objected when the district court proceeded to sentence him without any such reduction. The district court committed no error, much less plain error, in not adjusting Olmer’s guidelines offense level by two levels for acceptance of responsibility.

C. The district court clearly understood Olmer’s role in the scheme as a former lawyer.

1. Relevant facts

The PSR made clear that Olmer was not a lawyer at the time of the offense: “Morris Olmer was a former attorney who worked in New Haven.” Olmer PSR ¶ 9. Olmer had been a lawyer, but had surrendered his law license due to his involvement in a fraudulent real estate transaction with Gallagher that pre-dated their conspiracy with Babar and others. Olmer PSR ¶ 9.

Olmer continued to maintain his old law office in New Haven. Olmer PSR ¶ 9.

Notwithstanding the loss of his law license, Olmer continued to conduct real estate closings as though he were a lawyer using the IOLTA (Interest on Lawyer's Trust Account) of the lawyer he shared an office with, David Avigdor. Olmer PSR ¶ 11; GA706. Olmer conducted 14 closings on fraudulent real estate transaction for Babar involving straw buyers. Olmer PSR ¶ 11. Approximately \$3,520,000 in loan proceeds flowed through the IOLTA account of David Avigdor as a result of these fraudulent transactions.

At trial, evidence was admitted pursuant to Rule 404(b) showing that Olmer had engaged in a deceptive real estate transaction while a licensed lawyer in 2006 involving Gallagher. The stipulation between the government and Olmer about that incident clearly stated that Olmer had surrendered his law license as a result of that conduct. GA2135.

At the sentencing hearing, the district court referred to "several things about your case and your conduct":

[T]here's your role as an attorney, an officer of the court, a person with a duty to the legal system and to the law. And your conduct included just so many things that were a violation of the oath you took when you were admitted to the bar, including

having other people sign sworn documents that everybody knew were untrue.

And in addition, there is the fact that you were instrumental in obtaining the assistance of lawyers to facilitate the scheme.

OA176-77. The district court also pointed out “the unlicensed practice of law” Olmer was engaged in “after you were indicted in this case.” OA177.

2. Governing law and standard of review

A defendant has a due process right to be sentenced on the basis of accurate information. See *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Juwa*, 508 F.3d 694, 700-01 (2d Cir. 2007).

Where, as here, an objection at sentencing is not preserved, this Court reviews for plain error only. For a discussion of plain error review, see part II.C.2, above.

3. Discussion

The district court committed no error, plain or otherwise. Olmer has taken a single comment out of context and claims that the district court thought Olmer was a licensed attorney during the course of the scheme and sentenced him on that basis. This argument is meritless. The dis-

trict court read the PSR and adopted its factual findings, OA121, OA173, and the PSR makes clear that Olmer was not a licensed attorney during the scheme. Olmer PSR ¶ 9.

The district court presided over Olmer's lengthy trial, at which the evidence showed clearly that Olmer was not a licensed attorney when he engaged in the scheme. Olmer had lost his law license due to his involvement in a fraudulent transaction prior to the beginning of his role in the offense conduct. Olmer PSR ¶ 9. That transaction was the subject of a motion *in limine* by Olmer to preclude evidence of the transaction, which the government had noticed under Rule 404(b). OA9. The court ruled in favor of the evidence's admissibility, which Olmer does not challenge here. OA11. Olmer and the government thereafter entered into a stipulation: "Stipulation Re: Morris I. Olmer's Law License Suspension." GA2135. The stipulation, which was read to the jury and marked as an exhibit, provided as follows:

The defendant Morris I. Olmer agreed to a suspension of his license to practice law effective February 15, 2007, as the result of his violation of the Connecticut Rules of Professional Conduct for lawyers. Mr. Olmer was never licensed to practice law again after February 15, 2007.

The suspension of Mr. Olmer's license to practice law resulted from his involvement

in a real estate closing in which he did not inform his client, the lender, of material facts. Specifically, Mr. Olmer did not inform the lender that the actual sales price of the property as between the parties was not the sales price listed on the HUD-1 Settlement Statement, and that the actual sales price was less than the amount of the loan.

GA2135. Olmer did not become involved in the offense conduct charged against him until *after* February 15, 2007, GA700, and the district court was well aware of this. Indeed, Olmer's defense was based largely on the fact that he was *not* a lawyer, but rather just a notary public. GA634-38 (Olmer summation). The notion that the district court did not understand at sentencing that Olmer was not a licensed attorney during the scheme is utterly baseless.

That the district court knew as much when sentencing Olmer is eminently clear from the part of the district court's statement that follows *immediately after* the portion that Olmer takes out of context. After the district court noted Olmer's "role as an attorney" and the "violation of the oath" he took when admitted to the bar, OA176, the district court expressly stated that Olmer was "instrumental in obtaining assistance of lawyers to facilitate the scheme." OA177. The district court clearly understood, having presided at the trial, that Olmer conducted the fraudu-

lent real estate closings, but that because he was *not* a licensed attorney during the course of the scheme, he needed the “assistance of lawyers to facilitate the scheme.” Olmer PSR ¶ 11.

The district court mentioned Olmer’s oath that he took when admitted to the bar because he had in fact taken such an oath, and his conduct in the fraud scheme was in clear violation of that oath. It did not mean that the district court misunderstood Olmer’s status, or lack thereof, as a licensed attorney during the course of the fraud scheme.

Indeed, Olmer’s own attorney at sentencing used a phrase that made it sound like Olmer was a practicing attorney: “It’s so easy to talk about Mr. Olmer being a lawyer and being held to a higher standard.” OA149. But in the next paragraph, she stated: “Mr. Olmer is no longer an attorney. He lost his license.” OA150. Just like the district court, Olmer’s lawyer clearly understood that Olmer was not a licensed lawyer when she talked about “Mr. Olmer being a lawyer,” but used the phrase the way the district court did—to describe his status as a former attorney.

Finally, Olmer is wrong that there is “no indication either that he acted as a [lawyer] or held himself out as one.” Olmer Br. at 21. Olmer acted as the functional equivalent of a closing attorney for many of the fraudulent transactions in the case. Indeed, witting participants in the

scheme thought Olmer was a lawyer; they would have had no reason to think differently given the fact that he was operating as the closing attorney on the “deals.” GA59-60, GA266. And Olmer did in fact hold himself out as an attorney. For example, Olmer faxed fraudulent HUD-1 Settlement Statements to lenders with the fax traffic “Attorney Olmer” on them. GA1248.

D. The district court correctly applied an enhancement for use of a special skill.

1. Relevant facts

The PSR applied an enhancement for use of a special skill that significantly facilitated the commission of the offense. Olmer PSR ¶ 29. That special skill was as a former lawyer. Olmer “conducted about 14 closings on fraudulent real estate transactions for Babar involving straw buyers.” Olmer PSR ¶ 11. “Approximately \$3,520,000 in loan proceeds flowed through David Avigdor’s IOLTA . . . account as a result of these bogus transactions.” Olmer PSR ¶ 11. Babar had been using different lawyers to close on the fraudulent transactions until he found Olmer, after which he used only Olmer because, Olmer did whatever the conspirators needed doing. GA59; Olmer PSR ¶ 11. As Olmer concedes, he did not object to the enhancement in the district court. Olmer Br. at 13.

2. Governing law and standard of review

Section 3B1.1 provides for a two-level enhancement if “the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.” U.S.S.G. § 3B1.3. The commentary to the Guidelines defines a special skill as “a skill not possessed by members of the general public,” and includes lawyers as an example of people possessing such a special skills. U.S.S.G. § 3B1.3 n.4. This Court has recognized the special skill enhancement for defendants trained as attorneys who employ their legal knowledge when committing their crimes. *See United States v. Reich*, 479 F.3d 179, 191-92 (2d Cir. 2007).

Because Olmer did not object in the district court to an enhancement for use of a special skill, this Court’s review should be for plain error only. For a discussion of the plain error review, see part II.C.2, above.

3. Discussion

The record clearly shows that Olmer used his expertise as a trained lawyer to execute and conceal the mortgage fraud scheme. He used his special skill to assist in the scheme’s execution by conducting the closings for the fraudulent real estate transactions, and he assisted in the concealment of the scheme by providing advice

to co-conspirators on how to respond to lender inquiries and avoid detection.

First, as to the closings, Olmer does not contest the fact that he conducted 14 real estate closings involving millions of dollars in loan proceeds. GA700, GA59-60. Rather, he seems to argue that he did nothing more than act as a notary and therefore used no special skill. But Olmer did far more than that. He was the *de facto* closing attorney on the transactions, even if he was not a licensed attorney. He orchestrated the flow of loan proceeds and the misrepresentations about the transactions on the HUD-1. While Olmer did fraudulently notarize a host of documents, Olmer did not just act as a notary. He supervised the preparation of the closing documents and conducted the closings under the name of an attorney with whom he shared office space, David Avigdor. And while Olmer argues that a notary can conduct closings in Connecticut, the issue was irrelevant at trial because Olmer always used an IOLTA account and a lawyer's name as settlement agent in order to control the transaction and the flow of funds in it. He used his special skills as a former real estate attorney, and the fact that he had previously lost his law license from similar fraudulent conduct matters not.

Second, Olmer used his special skill as a lawyer (albeit an unlicensed one) to counsel the co-conspirators on how to deal with potentially

damaging inquiries by lenders about problems with the loan documentation. For example, cooperating witness Kenneth Perkins went to Olmer's office on February 9, 2010, with news that a lender had detected indications of fraud in a straw buyer's loan application for 221 Starr Street. Perkins told Olmer that the bank deposits did not match, and that the social security number on the bogus pay stubs was not correct. GA1761-62, GA2173 track 22. Olmer counseled Perkins in the recording, "just don't respond," and stated that the mistakes were not a "smart thing" because the lenders "are checking everything now." GA1762-63, GA2173 track 22. Olmer further counseled Perkins to "withdraw the applications, quickly." GA1764, GA2173 track 22. The next day, February 10, Nathan Russo, a mortgage broker and co-conspirator who pled guilty prior to trial, withdrew the application. GA1773. As Olmer told Perkins, "it's not a healthy situation . . . to try to explain it [to the lender] . . . for a very simple reason." Olmer laughed and said, "there is no explanation." GA1765, GA2173 track 22. Olmer advised Perkins: "We don't need them investigating . . . what's happenin' and apparently that's what's . . . gonna happen very quickly . . . unless you can change it. You know what I'm sayin'?" GA1766. Olmer added, "it's not the same as it was two years ago," referring to lenders' heightened awareness of mortgage fraud in 2010. GA1766, GA2173 track 22, GA146-47.

E. The district court's below-guidelines sentence of 60 months was substantively reasonable.

1. Relevant facts

The district court sentenced Olmer to 60 months of imprisonment. Olmer's sentencing guidelines range was 70-87 months. After reciting the materials it reviewed in preparation for sentencing and the various factors under § 3553(a) that it needed to consider, the district court explained its reasoning behind Olmer's sentence at length at his sentencing hearing:

As I alluded to earlier, going into the sentencing last week I had a very serious concern as to whether the factors to which I should be placing dispositive weight were specific deterrence and protecting society. Because if that were the case, it . . . would suggest there was a need for a longer sentence—longer, in fact, than the Guidelines range And if not, then that meant that I should be putting weight on factors that might suggest a shorter sentence. That's why I wanted to give you an opportunity to make more of a showing as to the type of person that you said you are when you spoke last week.

. . . . A lot of people . . . who would have been otherwise able to write letters on your behalf or come and speak on your be-

half are no longer living. So I have to take that into account when I'm sort of looking at the picture you present and the picture presented by your codefendants. And that really left me having to give a lot of thought about to what extent I could rely on your representations, which is why I wanted to hear more from you last week.

I have concluded that I can be at least comfortable enough that I do not need to be most aware of the need for specific deterrence and for protecting society. I think you've gotten the message. And in any event, if you're able to survive serving the sentence I impose, I don't think you'll be in any shape to commit any further offenses.

So I'm now looking mostly and putting the most weight on the need to provide just punishment and the need to promote respect for the law, and let me explain why.

I have a suggested Guideline range, but I really look at that range and assessed whether it is an appropriate measure of your culpability, and it is not. There are several things about your case and your conduct that really make you more culpable than would be subjected by the Guideline range when I look at other defendants in this case in similar activity.

First of all, there's your role as an attorney, an officer of the court, a person with a duty to the legal system and to the law. And your conduct included just so many things that were a violation of the oath you took when you were admitted to the bar, including having other people sign sworn documents that everybody knew were untrue.

And in addition, there is the fact that you were instrumental in obtaining the assistance of lawyers to facilitate the scheme.

Third, while . . . an enhancement under the Sentencing Guidelines for obstruction of justice was not appropriate because the conditions of such an enhancement were not satisfied, it's clear I think that you engaged in obstructive conduct.

And fourth, there is the unlicensed practice of law after you were indicted in this case.

When I look at all of those factors together I ask myself, well, what would be an accurate representation of your degree of culpability? It's really a range that's sort of the range of what Mr. Nawaz was at, and that range was 87 to 108 months.

So I start with that as a point where I think about now the mitigating factors.

The [PSR] has several paragraphs about your serious medical conditions and the number of medications that you take. And particularly, given the number of them, the fact that they are either recent or they're ongoing, I think that such a sentence of incarceration as I've identified as the appropriate measure of culpability would have a disproportionate, harsh impact on you, given those medical conditions. So I am going to impose a sentence that is less than that. But it is still one that's a very significant sentence and I regret that's my conclusion.

And I'm going to impose the same sentence on each count, and it will be 60 months.

OA174-78.

2. Governing law and standard of review

For a discussion of substantive reasonableness, *see* part I.B.4.b, above.

3. Discussion

Olmer's sentencing guidelines range was 70 to 87 months, and the district court thoughtfully and carefully assessed the factors under § 3553(a) in imposing a below-guidelines sentence on Olmer of 60 months. The sentence is

hardly one which “exceed[s] the bounds of allowable discretion.” *Fernandez*, 443 F.3d at 27.

Olmer’s offense conduct in this case was egregious. As but one example, in the span of a little over one month, Olmer conducted five closings for straw buyer Mohammed Saleem, all on houses that were represented to five different lenders to be for use as Saleem’s primary residence. GA700, GA1124. Indeed, even though Olmer had David Avigdor sign the fraudulent Form HUD-1 settlement statements, Olmer signed several of the occupancy affidavits in which Saleem represented that he would occupy the house as his primary residence. GA1101, GA1106, GA1155. Saleem did not occupy any of those houses, much less as his primary residence, and defaulted on the loans. GA700. All five properties went into foreclosure. GA700. When creditors started asking questions about Saleem after the defaults, Olmer and Babar discussed the possibility of obtaining a death certificate for Saleem, who had returned to Pakistan. GA96-97.

Saleem was not the only straw buyer for whom Olmer conducted multiple closings on houses that were supposed to be occupied as the borrower’s primary residence. In addition, there was Marc Jean (GA1083, 1089), Lisa Depa (GA1168, GA1175), and Wilson Nicolas (GA1246, GA1281). Indeed, the closing on the two houses for Marc Jean were 3 days apart, and

the closings for Lisa Depa's two houses just 2 days apart.

Not only did Olmer conduct closings on the fraudulent transactions, he tried to reap continuing benefits from them beyond his normal share in the ill-gotten gains from the diverted loan proceeds. For instance, Olmer conducted a closing of the sale of 211 Lloyd Street from Asmar to straw buyer Martineau on October 1, 2009. GA1332. Olmer had Avigdor wire \$49,375 of the proceeds from the federally-insured loan to the bank account of fictitious construction company Sheda Telle. GA1336, 1GA397. Although Olmer prepared and signed the occupancy affidavit, he began renting out the same property to a tenant, Michael Stancil, just days after he conducted the closing on the "sale" to straw buyer Martineau. Indeed, Stancil testified that he looked at 211 Lloyd Street within a week before signing the rental lease, which was dated October 5, 2009. GA1405 (lease), GA280-87 (Stancil testimony). Olmer, in other words, was showing the house to Stancil to rent at the same time that Olmer was closing the sale of the house to Martineau. There is little wonder that Olmer did not even provide the keys to Martineau at the closing, not even for show; he needed them to rent out the house. GA304. Indeed, Stancil's lease required Stancil to pay \$600 per month at 419 Whalley Avenue, Olmer's office. GA1405.

These are but a few examples to justify the district court's view of the offense conduct as serious fraudulent activity. Yet as the district court noted, other conduct by Olmer, including post-indictment conduct, was also damning. On February 18, 2011, the Statewide Grievance Committee in Connecticut issued a disciplinary action against defendant Olmer, finding that he had engaged in the unlicensed practice of law in connection with the sale of property to an individual. OA71. The individual was unsophisticated and had limited English proficiency. Olmer tried to represent her by discussing her legal rights with the seller's attorney, reviewing the contract, scheduling the closing to occur at his office, and speaking on the person's behalf. The Committee found that Olmer's actions constituted the practice of law, and the unlicensed practice of law is a crime in Connecticut. Conn. Gen. Stat. § 51-88. Astonishingly, Olmer's conduct occurred in July 2010—*after* he had been indicted by a federal grand jury in this case.

In short, while the government believed that a sentence within the guidelines range of 70 to 87 months would have been appropriate given Olmer's offense conduct and other conduct, the district court was surely well within its discretion in imposing a sentence of 60 months of imprisonment.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 5, 2013

Respectfully submitted,

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that on April 15, 2013, the government filed an unopposed motion seeking permission to file an oversized brief of no more than 37,995 words, pursuant to Local Rule 27.1. The Court granted that motion on July 17, 2013. This brief contains fewer than the requested number of words, in that the brief is calculated by the word processing program to contain approximately 37,882 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "Susan L. Wines". The signature is written in a cursive, flowing style.

SUSAN L. WINES
ASSISTANT U.S. ATTORNEY

Addendum

**18 U.S.C. § 3663A Mandatory Restitution
to Victims of Certain Crimes**

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

* * *

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(iii) The value (as of the date the property is returned) of any part of the property that is returned.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence —

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a

sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

USSG § 2B1.1(b)(10)

If (C) the offense otherwise involved sophisticated means, increase by **2** levels.

Application Note 8(B)

Sophisticated Means Enhancement.—For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

USSG § 3B1.2 Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Application Note 3:

- (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

Application Note 4:

Minimal Participant. —Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those in-

volved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

Application Note 5:

Minor Participant.—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.