

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARTIN T. SIGILLITO,

Defendant.

No. 11-CR-168-LRR

SENTENCING MEMORANDUM

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I. INTRODUCTION

The matter before the court is the sentencing of Defendant Martin T. Sigillito (“Sigillito”).

II. RELEVANT PRIOR PROCEEDINGS

On April 28, 2011, the government filed a twenty-two count Indictment (docket no. 2) against Sigillito, James Scott Brown and Derek J. Smith. Counts 1 through 9 charged Sigillito with committing wire fraud in violation of 18 U.S.C. §§ 1343 and 2(b). Counts 10 through 15 charged Sigillito with committing mail fraud in violation of 18 U.S.C. §§ 1341 and 2(b). Count 16 charged Sigillito, Brown and Smith with conspiracy to commit wire and mail fraud in violation of 18 U.S.C. § 371. Counts 17 through 22 charged Sigillito with engaging in and attempting to engage in money laundering transactions in violation of 18 U.S.C. §§ 1957 and 2(b). The Indictment also contained a forfeiture allegation. On September 16, 2011, Brown and Smith pled guilty to Count 16. Sigillito elected to proceed to trial.

On March 19, 2012, a jury trial on Counts 1 through 22 of the Indictment commenced. On April 9, 2012, at the close of the government's evidence, the government moved to dismiss Counts 14 and 15, and the court granted the motion. Sigillito moved for a judgment of acquittal on the remaining counts, which the court denied. On April 11, 2012, at the close of all of the evidence, Sigillito again moved for a judgment of acquittal on the remaining counts, which the court again denied. On April 13, 2012, the jury returned guilty verdicts on Counts 1 through 13 and 16 through 22.

Following the trial, Sigillito filed a "Motion for [Judgment] of Acquittal" (docket no. 261) and a "Motion for New Trial" (docket no. 262), which the court denied on August 7, 2012. *See* August 7, 2012 Order (docket no. 325).¹ Sigillito later filed a "Motion for New Trial on the Basis of Newly Discovered Evidence" (docket no. 349), which the court denied on October 1, 2012. *See* October 1, 2012 Order (docket no. 357).²

Also following the trial, the government filed a "Motion . . . for Preliminary Order of Forfeiture" (docket no. 276). The court received extensive briefing and heard oral arguments on the forfeiture issue. On October 18, 2012, the court entered a "Preliminary Order of Forfeiture" (docket no. 366).³

Meanwhile, the United States Probation Office conducted a presentence investigation. On August 28, 2012, the Presentence Investigation Report ("PSIR") (docket no. 339) was filed. The court ordered briefing on the contested issues. *See* August 28, 2012 Order (docket no. 341). On September 11, 2012, the government filed its Sentencing

¹ The court's August 7, 2012 Order provides a more thorough procedural history regarding Sigillito's Motion for Judgment of Acquittal and Motion for New Trial.

² The court's October 1, 2012 Order provides a more thorough procedural history regarding Sigillito's Motion for New Trial on the Basis of Newly Discovered Evidence.

³ The court's October 18, 2012 Order (docket no. 365) provides a more thorough procedural history regarding the government's Motion for Preliminary Order of Forfeiture.

Memorandum (docket no. 345). The following day, Sigillito filed his Sentencing Memorandum (docket no. 346). On October 3, 2012, the court held a sentencing hearing. *See* Minute Entry (docket no. 358). Evidence was offered and received, and the parties argued their positions. Sigillito was given the opportunity to address the court. Following the hearing, the court took the matter under advisement, indicating it would issue a written order and thereafter would reconvene the hearing and impose the sentence.

The court makes the following findings and will impose sentence accordingly on December 28, 2012.⁴

III. RELEVANT TRIAL EVIDENCE⁵

Viewed in the light most favorable to the government, the trial evidence is as follows:

A. Participants in the Scheme

Sigillito was an attorney in the St. Louis, Missouri, area and he is also a bishop in the American Anglican Church. Brown was an attorney in the Kansas City, Kansas, area. Smith is a real estate developer in England. Smith owns Distinctive Properties (England) Limited (“Distinctive Properties”).

B. Scheme to Defraud

From approximately 1999 to 2010, Sigillito organized and operated a fraudulent loan program that induced individuals to loan money to Smith and Distinctive Properties for purported land purchases in England. The loan program was known as the “British Lending Program,” or “BLP.”

⁴ The court declines Sigillito’s suggestion that the court not reconvene the hearing and merely enter judgment in writing, *see* Waiver of Formal Imposition of Sentence (docket no. 367), finding no support for the same in the law and concluding it to be a poor idea.

⁵ When relevant, the court relies on and discusses additional facts in conjunction with its analysis of the law.

1. Beginning

In the late 1990s, an Englishman named Kevin Cooper began soliciting funds to loan to Mark, Gilbert, Morse (“MGM”), a solicitor firm in England that needed working capital. Cooper presented the investment opportunity to Brown, and Brown and his family ultimately invested. In late 1999, Brown, who had previously met Sigillito at a continuing legal education program, told Sigillito about the investment. Sigillito indicated that he wished to present the opportunity to his clients. Together, Brown and Sigillito drafted a memorandum describing the investment opportunity, which Sigillito intended to use when marketing the opportunity to clients. At trial, Brown testified that the memorandum falsely represented that the loans were secured by real property.

In the beginning, the investment program included several borrowers, including MGM, JMIG, Symmtrex and Smith. Eventually, Smith became the primary borrower in the BLP.

2. Operations

In general terms, the BLP operated by using new investors’ funds to pay interest and principal to other investors. Sigillito sought out potential lenders through family and friends, his church and a private club in St. Louis known as the Racquet Club. The BLP offered, for the most part, one-year loans. The interest rates on the loans were high; on average, between 17.5% and 25%, although some loans offered rates as high as 48%. Sigillito made numerous false representations to potential lenders, including, for example, that the purpose of the loan was to invest in land in England; the investment had little to no risk because the borrower had more than sufficient assets to cover his liabilities; and the laws in England were specially suited to allow a lender to collect on a defaulted loan quickly and efficiently.

A lender could make either a cash investment or could invest funds through his or her Individual Retirement Account (“IRA”). After a lender made an investment, the

lender would receive, by mail, a loan agreement, which described the terms of the loan. After receiving a new lender's investment, either Sigillito or Brown deducted a fee, which was split between Sigillito, Brown, Cooper and any "recruiter," such as Hal Millsap, Roland Baer or Sharon Cobb, who was involved in soliciting the new lender. After fees were deducted, the remaining balance of a new investment was primarily used to pay interest or principal to other investors. Although the program was marketed as the "British" Lending Program, very little money actually crossed the Atlantic—Smith testified at trial that he received little money from the program and he sent no money back to the United States. When a loan matured, Sigillito encouraged the lender to roll over the loan, at which point additional fees were deducted.

The evidence at trial focused on four areas: (1) IRA loans; (2) marketing materials; (3) loan agreements; and (4) fees. The court shall summarize each in turn.

a. IRA loans

Sigillito solicited loans from IRAs because individuals who made loans from IRAs generally made long-term loans that they renewed annually. This delayed the demand for return of the principal or interest payments. By law, a person using an IRA must have an IRA custodian. Thus, IRA investments in the BLP required a slightly different procedure. First, the lender made a contribution to his or her IRA. That money would be transferred to the custodian of the IRA, and the custodian would then purchase a promissory note or a loan agreement. The money would then be transferred to Sigillito's or Brown's account, at which point Sigillito or Brown deducted fees and applied the funds just as they would a cash investment.

Prior to June 2008, Millennium Trust Company ("Millennium") served as the custodian for IRA loans in the BLP. Around June 2008, Millennium implemented a new policy regarding rollover loans. Under this new policy, prior to any reinvestment of IRA funds in the BLP, Millennium required "receipt of all money due on the note on the

maturity date and . . . the original new note.” Government Trial Exhibit 1308 at 1. This new policy posed a problem for the BLP because there was not enough cash in the program to cover such demands.

Due to this problem and to avoid detection of the fraud, Sigillito sought out a new IRA custodian. On June 2, 2008, Sigillito and Paul Vogel, another individual involved in the BLP, met with Marly Gurley, the Senior Vice President and Trust Counsel for Enterprise Bank and Trust (“Enterprise”), to discuss transferring approximately fifty IRAs owned by BLP lenders to Enterprise’s custody. During this meeting, Gurley learned that the purpose of the loans to Distinctive Properties was to purchase real estate in the United Kingdom. Gurley questioned the high interest rate, but she was assured that, despite the real estate collapse in the United States, it was a good time to invest in real estate in England. Following this meeting, Enterprise became the new IRA custodian.

Shortly after Enterprise became the new custodian, lenders who had invested their IRAs in the BLP received a letter, which was on “Martin T. Sigillito Associates, LTD.” letterhead, explaining that “lines of communication” between Millennium and Sigillito’s office had broken down and, as a result, Sigillito’s office was “strongly urging” lenders to transfer their accounts to Enterprise. Government Trial Exhibit 2568 at 1. Despite Enterprise’s higher administration fee, many lenders initiated the transfer.

As custodian, Enterprise performed various duties, including receiving and posting interest payments, making distributions at the direction of its customers and reporting IRS tax information. Also as part of its custodial duties, Enterprise mailed statements to BLP lenders who had their IRAs in Enterprise’s custody. These statements showed the amount loaned, the interest rate and the maturity date for each loan.

b. Marketing materials

When discussing the program with some lenders, Sigillito used marketing materials that were prepared by various individuals, including Brown and Baer, and included

Sigillito's input. These marketing materials contained numerous false representations regarding, among other things, the risk of the loan and the ease of collecting on a defaulted loan.

For example, a May 2005 brochure described the purpose of the program as "British real estate-related, either development or redevelopment or rehabilitation of English properties." Government Trial Exhibit 1115 at 1. According to that brochure, "No [b]orrower is eligible for any loan unless the collateral he offers is more than twice the value of the loan," and each loan is secured by all of a borrower's underlying assets, "down to one's last cufflink." *Id.* at 3. As of May 2005, Smith was the only borrower left in the program, and both Smith and Brown testified at trial that Smith did not have this promised asset-to-liability ratio.

Another brochure made similar representations regarding Smith's financial state. This brochure further provided that, not only were the loans secured by Smith's assets, but a lender could also easily collect on a defaulted loan because "British law is so 'pro-lender' versus other countries like the U.S.[;] it allows the lender the confidence to know that if the borrower misses an interest payment, the asset seizure is commenced immediately and assets are sold and monies returned to the borrower within 60 days." Government Trial Exhibit 1368 at 5. The brochure described the "WORST case scenario" as Smith defaulting on the loan and the lender waiting sixty to ninety days to receive his or her loan principal, along with accrued interest. *Id.* at 6. However, at trial, Giles Wheeler, a solicitor in Britain, testified that British law is not, in fact, "pro-lender" and that, under British law, it is extremely unlikely anyone could collect on a defaulted loan within sixty to ninety days.

c. Loan agreements

After a lender invested in the program, he or she would receive a loan agreement. In the earlier years, after a lender made an investment, Brown's office would prepare an

indication of loan terms, which was then sent to Swinburne & Jackson, a solicitor firm in London. Swinburne & Jackson prepared the loan agreement and then sent the agreement to Smith, who would sign the agreement and send it back to Swinburne & Jackson. Swinburne & Jackson then sent the loan agreement to Brown, who forwarded it onto Sigillito or another recruiter. In the first few years of the program, Sigillito kept the loan agreements in his office. However, that practice changed over time and, eventually, Sigillito began mailing the loan agreements to the lenders.

By the end of the program, however, Swinburne & Jackson was no longer involved in preparing the loan agreements. Instead, Sigillito directed his secretary, Elizabeth Stajduhar, to prepare the loan agreements. Despite the fact that the agreements were being prepared by Sigillito's office in Missouri, the agreements still initially listed Swinburne & Jackson as the solicitor and Sigillito directed Stajduhar to print the agreements on A4 paper, a particular length of paper not typically used in the United States, to give the appearance that the loan agreements had been prepared in England. In the later years, Sigillito also stopped sending loan agreements to Smith, as Swinburne & Jackson had done in the earlier years. Instead, as Stajduhar testified, she would send a large number of signature pages to Smith, who would sign the signature pages and return them to Sigillito's office. Stajduhar would then prepare a loan agreement and attach a signature page without ever sending the entire loan agreement to Smith in England.

Each loan agreement described Distinctive Properties as the "Borrower" and Smith as the "Surety." *E.g.*, Government Trial Exhibit 1708 at 2. The loan agreement specifically stated that Smith and Distinctive Properties borrowed the money "for the business purposes of the Borrower." *E.g.*, *id.* At trial, lenders testified that, based on Sigillito's representations, they understood their funds were sent to Smith in England to purchase real properties. Each loan agreement included an "Asset & Liabilities Statement," which it referred to as "[t]he Schedule." *E.g.*, *id.* In the loan agreement, the

“Surety,” Smith, represented and warranted that “the Schedule is a true, accurate and current statement of his assets and liabilities.” *E.g., id.* at 6. However, as Smith testified at trial, these Asset & Liabilities Statements substantially overstated Smith’s assets and understated his liabilities.

d. Fees

After receiving a lender’s investment, either Sigillito or Brown would deduct a fee, which was a certain percentage of the loan, pursuant to a Fee Deduction Authority (“FDA”) signed by Smith. The fee was divided either three or four ways. Sigillito, Brown and Cooper each received one-fourth of the fee. If another recruiter had solicited the lender, the recruiter would get the remaining one-fourth. If Sigillito, Brown or Cooper had solicited the loan, that individual would get the remaining one-fourth. There were three points at which fees were deducted: (1) when the lender first made the loan; (2) if the lender rolled over the loan; and (3) if the lender redeemed the loan when it matured—the so-called back-end fee. Stajduhar, Sigillito’s secretary, prepared spreadsheets that tracked the fees. Stajduhar testified that, for many of the years of the BLP, the fee was 32% of the loan amount.

Sigillito told some investors that he received a fee for his services in the BLP. For example, Phillip Rosemann, one of the investors in the program, testified that Sigillito had disclosed that he received a finder’s fee; however, Sigillito represented that this fee was paid by the borrower and that 100% of Rosemann’s investment went to the borrower in England. Other investors were not aware of any fees at all. Charles Davis, one of the investors in the BLP, as well as other investors, testified that they would not have invested in the program had they been aware of the fees.

3. Collapse

By approximately June 2009, most of the loans in the BLP were in default. When lenders requested their overdue interest payments or principal, Sigillito gave various

excuses as to why the payments were late and assured lenders that payment was forthcoming. For example, on February 22, 2010, Sigillito emailed a concerned lender, Kim Walker, and told her that the funds had been delayed because of “banking/exchange control issues” and lamented that “[s]uch is the world of international funding/transfers now.” Government Trial Exhibit 394 at 1. Over a month later, Walker still had not received her funds. Once again, Sigillito emailed Walker; this time, Sigillito cited various reasons why her funds were still delayed, including a “shortfall in a third-party payment to the borrow[er]” and “delays in other matters, primarily as a result of political (i.e., in Israel and Palestine) and unrelated economic events.” Government Trial Exhibit 401 at 2. Walker replied: “Marty, I’m tired of chasing you for our money and more importantly, I’m tired of you ignoring me.” *Id.* at 1.

Rosemann, another lender, was also growing frustrated by delayed payments. In March 2010, after a number of unsuccessful attempts to have Sigillito begin legal action on his behalf, Rosemann filed suit against Smith for breach of contract. Sigillito contacted Rosemann’s attorney on numerous occasions and requested that he dismiss the lawsuit. Sigillito cited concerns that refinancing efforts would fail if a lawsuit “appear[ed] on the public record.” Government Trial Exhibit 2894 at 1.

As Rosemann’s attorney continued to investigate, Stajduhar, Sigillito’s secretary, became increasingly concerned about the state of the BLP. In the spring of 2010, Stajduhar hired an attorney, who reached out to law enforcement on her behalf. On May 19, 2010, Stajduhar met with an agent and a private contractor of the Federal Bureau of Investigation (“FBI”) and lawyers from the United States Attorneys Office. Following the meeting with Stajduhar, the FBI obtained a search warrant for Sigillito’s office. On May 24, 2010, the FBI executed the warrant. Sigillito was present on the day of the search and met with two FBI agents. During this meeting, Sigillito made various statements regarding BLP operations, including that new investors’ money was “sometimes” used to pay back

old investors; that 90% of Rosemann’s substantial investment had gone to pay back old investors; that, over the course of the BLP, Smith had received less than \$1 million; and that Smith had never sent money back to the United States.

Between 2000 and the time the BLP collapsed in 2010, Sigillito defrauded approximately 140 individuals out of at least \$50 million. *See* Government Trial Exhibit 102 at 3. Due to limited bank record availability, many of the FBI-prepared financial summaries focused on the 2003 to 2010 period. Between 2003 and 2010, lenders invested approximately \$42 million in the BLP. *See* Government Trial Exhibit 118 at 1. Of that amount, Smith received only \$2.7 million, Brown netted approximately \$1.4 million, Sigillito netted approximately \$6.3 million and approximately \$27.9 million was disbursed to other lenders. *Id.*

IV. SENTENCING FRAMEWORK

A “district court should begin [a sentencing proceeding] with a correct calculation of the [defendant’s] advisory Sentencing Guidelines range.” *United States v. Braggs*, 511 F.3d 808, 812 (8th Cir. 2008). A defendant’s Guidelines range “is arrived at after determining the appropriate Guidelines range and evaluating whether any traditional Guidelines departures are warranted.” *United States v. Washington*, 515 F.3d 861, 865 (8th Cir. 2008).

“[A]fter giving both parties a chance to argue for the sentence they deem appropriate, the court should consider all of the factors listed in 18 U.S.C. § 3553(a) to determine whether they support the sentence requested by either party.” *Braggs*, 511 F.3d at 812. “The district court may not assume that the Guidelines range is reasonable, but instead ‘must make an individualized assessment based on the facts presented.’” *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)); *see, e.g., Nelson v. United States*, 555 U.S. 350, 352 (2009) (“Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.”).

The district court “has substantial latitude to determine how much weight to give the various factors under § 3553(a).” *United States v. Ruelas-Mendez*, 556 F.3d 655, 657 (8th Cir. 2009); *see also United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc) (“[I]t will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.” (quoting *United States v. Gardellini*, 545 F.3d 1089, 1090 (D.C. Cir. 2008)) (internal quotation mark omitted). “If the court determines that a sentence outside of the Guidelines is called for, it ‘must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” *Braggs*, 511 F.3d at 812 (quoting *Gall*, 552 U.S. at 50). “The sentence chosen should be adequately explained so as ‘to allow for meaningful appellate review and to promote the perception of fair sentencing.’” *Id.* (quoting *Gall*, 552 U.S. at 50).

V. EVIDENTIARY RULES

The court makes findings of fact by a preponderance of the evidence. *See, e.g., United States v. Bah*, 439 F.3d 423, 426 n.1 (8th Cir. 2006) (“[J]udicial fact-finding using a preponderance of the evidence standard is permitted provided that the [Sentencing Guidelines] are applied in an advisory manner.”). The court considers a wide variety of evidence, including the undisputed portions of the PSIR, as well as the testimony and other evidence the parties introduced at the trial and at the sentencing hearing. The court does not “put on blinders” and only consider the evidence directly underlying Sigillito’s offenses of conviction. In calculating Sigillito’s Guidelines range, for example, the court applies the familiar doctrine of relevant conduct. *See* USSG §1B1.3. The Eighth Circuit Court of Appeals has repeatedly held that a district court may consider uncharged, dismissed and even acquitted conduct at sentencing. *See, e.g., United States v. Whiting*, 522 F.3d 845, 850 (8th Cir. 2008). When relevant and “accompanied by sufficient indicia of reliability to support the conclusion that it is probably accurate,” the court credits

hearsay. *United States v. Sharpfish*, 408 F.3d 507, 511 (8th Cir. 2005). The sentencing judge is afforded great discretion in determining the credibility of witnesses and making findings of fact. *United States v. Bridges*, 569 F.3d 374, 377-78 (8th Cir. 2009).

VI. SENTENCING ISSUES

The instant Sentencing Memorandum addresses the following contested issues relative to the computation of the advisory Guidelines sentence before any departures: (1) the amount of the loss pursuant to USSG §2B1.1(b)(1); (2) the number of victims pursuant to USSG §2B1.1(b)(2); (3) whether a substantial part of the fraudulent scheme was located outside of the United States or the offense otherwise involved sophisticated means pursuant to USSG §2B1.1(b)(10); (4) whether Sigillito knew or should have known that a victim of the offense was a vulnerable victim pursuant to USSG §3A1.1(b)(1); (5) whether Sigillito was an organizer or a leader pursuant to USSG §3B1.1(a); (6) whether Sigillito abused a position of trust pursuant to USSG §3B1.3; and (7) whether Sigillito obstructed justice pursuant to USSG §3C1.1.

The Sentencing Memorandum first addresses the issues relating to Chapter Two of the Sentencing Guidelines and then turns to the issues relating to Chapter Three. After addressing the Chapter Two and Chapter Three issues, the Sentencing Memorandum turns to Sigillito's argument relating to consecutive terms of imprisonment before calculating the applicable pre-departure advisory Sentencing Guidelines range. With the pre-departure Guidelines range calculated, the Sentencing Memorandum then addresses Sigillito's request for a downward departure and a variance. Finally, the Sentencing Memorandum briefly discusses Sigillito's financial obligations.

VII. CHAPTER TWO: SPECIFIC OFFENSE CHARACTERISTICS

In order to calculate Sigillito's pre-departure adjusted offense level, the court must analyze Sigillito's offense conduct pursuant to three guidelines provisions in Chapter Two of the advisory Sentencing Guidelines: (1) USSG §2B1.1(b)(1); (2) USSG §2B1.1(b)(2);

and (3) USSG §2B1.1(b)(10).

A. Amount of Loss: USSG §2B1.1(b)(1)

The parties dispute the amount of loss calculated in the PSIR. Based on loss figures supplied by the FBI, the PSIR writer determined the loss to be either \$42 million or \$30 million depending upon the credits given for payments to lenders. The loss was calculated by adding the BLP deposits (\$51.2 million) to the amount Phillip Rosemann loaned to Metis Insaat ve Ticaret A.S. (“Metis”) (\$4.9 million). The PSIR writer then suggested that credits of either \$14 million (repayment of principal) or \$26 million (repayment of principal and interest) be applied. Either calculation results in an upward departure of 22 from the base offense level. *See* USSG §2B1.1(b)(1)(L) (providing for an upward adjustment of 22 levels when the amount of loss is more than \$20,000,000 and less than \$50,000,000).

“As a general rule, ‘loss is the greater of actual loss or intended loss.’” *United States v. Waldner*, 580 F.3d 699, 705 (8th Cir. 2009) (quoting USSG §2B1.1, comment. (n.3(A))). “‘Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense, while ‘intended loss’ (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur.” *Id.* (quoting USSG §2B1.1, comment. (n.3(A)(i)-(ii)) (internal quotation marks omitted). “Pecuniary harm” means harm that can be measured in money and does not include emotional distress or other types of non-economic harm. USSG §2B1.1, comment. (n.3(A)(iii)).

“Because the loss caused by fraud is often difficult to determine precisely, ‘a district court is charged only with making a reasonable estimate of the loss.’” *Waldner*, 580 F.3d at 705 (quoting *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009)). The Eighth Circuit takes “a broad view of what conduct and related loss amounts can be included in calculating loss.” *United States v. Jefferson*, 652 F.3d 927, 931 (8th Cir. 2011) (quoting

United States v. Lewis, 557 F.3d 601, 614 (8th Cir. 2009)) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 1068 (2012); *see also United States v. Boesen*, 541 F.3d 838, 850-51 (8th Cir. 2008) (affirming the lower court’s calculation that included loss attributed not only to charged crimes but also claims not in the indictment but part of the same scheme); *United States v. DeRosier*, 501 F.3d 888, 896 (8th Cir. 2007) (same).

In arriving at the loss amount, the court is required to consider what, if any, credits should be given to Sigillito for monies returned to the victims prior to the detection of the offense. USSG §2B1.1, comment. (n.3(E)). Application Note 3(F)(iv) to USSG §2B1.1 provides as follows:

In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor’s principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

Id.

The government bases a good share of its argument on its assertion that Sigillito was involved in a “Ponzi scheme.” The government argues that, once a Ponzi scheme is established, no further analysis is necessary in computing loss because Sigillito is not entitled to credit for repayment of principal to victims. The Eighth Circuit has rejected this blanket approach and instructed the lower courts to focus on the particularities of the fraudulent scheme at issue and the definitions of loss as set forth in the guideline. *See United States v. Hartstein*, 500 F.3d 790, 797 (8th Cir. 2007) (stating that the focus should be on “a defendant’s intent rather than making sentencing variations turn on the application of a label as vague as ‘Ponzi scheme’”)

Sigillito disputes the loss calculation in the PSIR, claiming that the loss figure

should be the restitution amount, \$30,670,714.13.⁶ Although Sigillito calculates loss differently than the PSIR writer, Sigillito agrees that a 22-level upward adjustment is appropriate under USSG §2B1.1(b)(1)(L).⁷ *See* USSG §2B1.1(b)(1)(L) (providing for an upward adjustment of 22 levels when the amount of loss is more than \$20,000,000 and less than \$50,000,000). Sigillito submits that using the restitution amount for the loss amount is the easiest and fairest way to calculate loss. The amount of the loss for purposes of the calculation of the advisory Guidelines sentence and the amount of the restitution are two different concepts. Although they could be the same figure in some cases, such is not always the case.⁸

The government claims that the intended loss is the proper measure of loss because it is greater than the actual loss. The government calculates the loss to be in the range of \$51,799,251.73 to \$75,424,569.75, which would result in a 24-level upward adjustment for a loss of more than \$50,000,000.00. *See* USSG §2B1.1(b)(1)(M) (stating that the offense level should be increased by 24 for a loss of more than \$50,000,000).

To determine the loss amount, it is essential to examine how Sigillito and his accomplices operated the fraudulent loan scheme. Generally, the loan agreements were for a one-year term. When a loan matured, the lender could redeem the loan—that is, the lender could collect the principal and interest owed and end participation in the BLP. Many of the lenders rolled their loans over so the principal on the new note would be the

⁶ The restitution amount for Brown and Sigillito is actually \$34,627,714.31. This includes the amount owed to Phillip Rosemann for the Metis loan.

⁷ The court notes that, in Sigillito's Sentencing Memorandum, he advocates for a 20-level upward adjustment pursuant to USSG §2B1.1(b)(1)(K). *See* Sigillito's Sentencing Memorandum at 14. However, at the sentencing hearing, Sigillito argued that the court should adopt the PSIR writer's conclusion that a 22-level upward adjustment applies.

⁸ *Compare* USSG §2B1.1, comment. (n.3(A)), *with* 18 U.S.C. §§ 3663A and 3664 and cases interpreting the same.

sum of the original loan principal plus the earned interest from the prior period. Sigillito encouraged lenders to roll over their loans when they became due. Sigillito also encouraged lending from IRAs so that the accrued interest would be reinvested. Thus, Sigillito would have been aware that the lenders who rolled their loans over thought their investment was worth the rolled over amount at the time a new note was issued. This was consistent with the way in which the BLP kept track of the amount owed to lenders.

With regard to the loss calculations, Government Sentencing Exhibit 1 (Government Trial Exhibit 102) shows how the government calculated the actual loss and the intended loss figures for the years of the BLP (2000 to 2010). Retired FBI Special Agent and CPA James Applebaum prepared the exhibit and explained it both at trial and at the sentencing hearing. On Government Sentencing Exhibit 1, each lender is listed in the first column. The second column represents the amount of the original loan to the BLP by that investor followed in the third column by the date of the original loan. The fourth column is the amount of money that investor loaned based on the BLP bank deposit, if bank records were available, or by circumstantial evidence.⁹ The fifth column is the amount of money returned to the investor. The sixth column is the principal amount of any rolled over loan. The amount in the sixth column does not include any accrued interest that was not yet due when the scheme was discovered and shut down on May 24, 2010.

As shown in Government Sentencing Exhibit 1, the total new money paid into the BLP by lenders was \$51,568,087.17. The amount of the original loans and the rolled over loans with interest calculated is \$70,524,569.75, as shown in Government Sentencing Exhibit 1. This does not include the Metis loan or the accrued interest on loans that had not matured as of the date of the search warrant. Were this amount included, the loss

⁹ Bank records from 2000 through mid-2003 were not available because the banks had destroyed them. Thus, the figures in columns 2 (loan agreement) and 4 (bank deposits) could not always be totally reconciled.

figure would increase by approximately \$6 million. Because of the way in which Sigillito and his co-conspirators actively solicited investors to roll over loans, it could be convincingly argued that the appropriate starting figure for intended loss is \$70,524,569.75.

Of all the investors in the BLP, only thirty-one lenders were owed nothing when the BLP collapsed on May 24, 2010. One hundred and eleven lenders were owed a total of approximately \$56 million, which was not returned to them. The court finds that the intended loss calculated in this fashion is \$56 million.

The amount of money paid out of the BLP to the lenders and others was \$25,834,035.49. The money paid out of the BLP is difficult to characterize as principal or interest. Included in the money paid out of the BLP are the following categories: penalty interest; required minimum distributions from IRAs to some investors; an out of court settlement to Wood Dickinson, an investor; a settlement with Mr. Levine, who was not a BLP investor; and repayment of Sigillito's personal obligations. A compelling argument is made that Sigillito should not be given credit for any payments to investors because the payments were made as part of the scheme to defraud and purely for the purpose of lulling noisy investors and building investor confidence, particularly during the time that he was running the scheme. *See Hartstein*, 500 F.3d at 799 (citing *United States v. Nichols*, 416 F.3d 811, 820 n.6 (8th Cir. 2005)). No credits should be deducted from loss.

The court finds that the amount of the loss for purposes of the Guidelines calculation exceeds \$50 million. The court concludes that a **24-level enhancement for the amount of loss under USSG §2B1.1(b)(1)(M)** is consistent with the provisions in the advisory Guidelines and fully supported by the trial evidence.¹⁰

¹⁰ In the final analysis, whether the loss figure results in a 22-level upward adjustment as advocated by Sigillito, or a 24-level upward adjustment as urged by the
(continued...)

B. Number of Victims: USSG §2B1.1(b)(2)

USSG §2B1.1(b)(2) directs the court to determine the number of victims. The PSIR recommends that the court increase the offense level by 4 levels to reflect that the offense involved fifty or more victims. The government agrees with the conclusion of the PSIR.

Sigillito objects, arguing that he was responsible for, at most, thirty-three victims. He makes several arguments in support of his position. Sigillito agrees that he was directly or indirectly responsible for introducing fifty-one people into the BLP but asserts that they were not victims. Sigillito argues: (1) the guideline enhancement went into effect in 2001 and, thus, the court cannot count those individuals who were investors prior to 2001 in the victim count; (2) it was impossible for him to foresee the number of victims independently brought into the BLP by Brown and others; and (3) there were no victims as of May 24, 2010, the date the FBI took the BLP down, because no loans were in default but, rather, the payment of interest on the loans was merely delinquent. The court will address these arguments in turn.

Although the enhancement for number of victims may not have been a part of the Guidelines calculation for fraud offenses prior to 2001, it is appropriate for the court to use the 2011 Sentencing Guidelines Manual because it is the edition in effect on the date of sentencing. USSG §1B1.11(a). The Guidelines Manual in effect on a particular date is to be applied in its entirety instead of using one guideline section from one edition of the Manual and another guideline section from a different edition of the Manual. USSG §1B1.11(b)(2). Furthermore, because Sigillito has been convicted of multiple offenses and at least one offense was committed before the effective date of a revised edition of the Guidelines Manual and another offense was committed after the effective date of a revised edition of the Guidelines Manual, the court shall apply the revised edition of the Guidelines

¹⁰(...continued)

government, makes no difference in the computation of the total offense level under the Guidelines as discussed more fully hereafter.

Manual. USSG §1B1.11(b)(3). In addition, in a complex case involving multiple counts of conviction that occurred under several different versions of the Guidelines Manual, the court is not required to compare more than two Manuals to determine the applicable Guidelines range. The Guidelines Manual in effect at the time of the last offense of conviction and the Guidelines Manual in effect at the time of sentencing are the two to be compared. USSG §1B1.11, comment. (backg'd). In this case, a comparison of the 2010 Guidelines Manual in effect on the date of the last conviction (Count 16, April 28, 2010) and the 2011 Guidelines Manual that is currently in effect does not demonstrate any difference in the computation for multiple victims. Therefore, Sigillito's argument is without merit.

Sigillito's argument that those who invested in the BLP are not victims is specious. For purposes of the guideline, "victim" is defined as "any person who sustained any part of the actual loss determined under subsection (b)(1)." USSG §2B1.1, comment. (n.1). The trial evidence establishes that at least ninety-six lenders did not recover the full amount of their principal investment in the BLP and, thus, are victims for purposes of the Guidelines computation. Their collective actual loss was \$30,677,714.13.

The argument that Sigillito could not possibly have foreseen the number of lenders in the BLP who would be enticed by Brown and the recruiters acting independently is disingenuous given the trial evidence. Sigillito constantly and doggedly sought out new lenders himself and encouraged Brown and the recruiters to find viable investors to keep his fraudulent scheme going. Thus, under USSG §1B1.3(a)(1), the relevant conduct guideline, he is responsible for not only the victims that he recruited but also those brought into the program by Brown and the recruiters.

The court finds that a **4-level enhancement for fifty or more victims under USSG §2B1.1(b)(2)(B)** is appropriate under the advisory Guidelines and fully supported by the evidence.

***C. Commission Outside the United States and/or
Sophisticated Means: USSG §2B1.1(b)(10)***

A 2-level upward adjustment is required where a substantial part of a fraudulent scheme was committed from outside of the United States or the offense otherwise involved sophisticated means. USSG §2B1.1(b)(10)(B), (C). The government argues that both bases for the adjustment could be scored under the facts of this case. The court agrees.

1. Commission of scheme outside the United States

Sigillito objects to the scoring of the 2-level adjustment under USSG §2B1.1(b)(10)(B), contending that an insubstantial part of the BLP was committed outside of the United States because the lenders were all from the United States, the loans were made in the United States, the majority of the money loaned never left the United States, interest payments were made from within the United States, the lenders used financial institutions within the United States, the accounting occurred in the United States, the alleged misrepresentations were made in the United States and two of the three co-conspirators resided in the United States.

The court agrees that this fraudulent scheme involved activities spanning at least two continents—Europe and North America. There were also portions of the relevant conduct that took place in Turkey, Palestine and Israel. The issue is whether a substantial amount of the scheme was committed outside of the United States.

“Substantial” is not a term of art, but, in ordinary usage, “substantial” is defined as “real,” “of ample or considerable amount,” “basic or essential.” *Random House Webster’s Unabridged Dictionary* 1897 (2d ed. 2001). In this case, a considerable amount of the fraudulent scheme took place outside of the United States. The primary “borrower” of the funds was Derek Smith, a resident of England. In the early days of the BLP, another individual, Kevin Cooper, also a resident of England, was Sigillito and Brown’s partner in the fraudulent scheme. In the early days of the BLP, there were European lenders. The loans were to be used to purchase and develop property located in England.

A London law firm, Swinburne & Jackson, drew up the specimen loan agreements, individual loan agreements and the Asset & Liabilities Statements and advised Smith, Brown and Sigillito. For a considerable period of time, Swinburne & Jackson individually prepared the loan agreements and notes that Smith signed in England. Then, Swinburne & Jackson sent the loan agreements and notes to the United States for distribution to the lenders. After the London solicitors were no longer involved, the signature pages of the loan agreements prepared in the United States were sent to England for Smith to sign and send back. Many emails were sent to and from England as part of the execution of the scheme. Having the borrower and the collateral outside the United States fostered the scheme by adding a romantic flair to the marketing push for lenders and by preventing prospective lenders from having the ability to inspect the property that was to be purchased or developed using the loaned money. Sigillito, Smith and Brown met in England to discuss the BLP. To lull current lenders and attract more, Sigillito took recruiters to England to woo them, secure their personal loyalty to him and encourage them to write and speak favorably about the BLP and the economic prospects of the developments. While the recruiters were outside of the United States with Sigillito, innumerable misrepresentations were made and parroted back in the United States to lenders by the recruiters. In addition, Sigillito reportedly was traveling extensively outside of the United States to attract lenders in Israel and the Middle East and sent emails and text messages in furtherance of the scheme from outside of the United States. Sigillito convinced many BLP lenders to set up offshore corporations to lend money to the BLP. Certainly, a substantial amount of fraudulently obtained loan proceeds was spent outside of the United States for travel, to purchase artifacts and books and for the personal gratification of Sigillito.

The court finds that a **2-level upward adjustment for a substantial amount of the fraudulent scheme being committed outside of the United States** is fully supported by

the advisory Guidelines and the trial evidence.

2. *Sophisticated means*

Sigillito objects to the scoring of 2 levels for use of sophisticated means, arguing that this scheme was not in the least bit sophisticated. USSG §2B1.1(b)(10) also provides for a 2-level enhancement where the offense involved sophisticated means not considered in USSG §2B1.1(b)(10)(A) or (B). “Sophisticated means” is defined in Application Note 8(b) to USSG §2B1.1 as:

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.

Id. When considering whether to apply the sophisticated means adjustment, the court must consider a defendant’s criminal conduct as well as other individuals’ relevant conduct in furtherance of a jointly undertaken criminal activity if such conduct was reasonably foreseeable by the defendant. *United States v. Jenkins-Watts*, 574 F.3d 950, 961 (8th Cir. 2009) (quoting USSG §1B1.3(a)(1)(B)). It is proper to apply the enhancement “when the offense conduct, viewed as a whole, ‘was notably more intricate than that of the garden-variety [offense].’” *United States v. Louper-Morris*, 672 F.3d 539, 564 (8th Cir. 2012) (alteration in original) (quoting *United States v. Hance*, 501 F.3d 900, 909 (8th Cir. 2007)). Courts have applied the enhancement when a defendant’s scheme involved a “multi-layered plot,” when a defendant “created and used numerous false documents,” when a “defendant’s scheme was not a single fraudulent act, but a complex series of fraudulent transactions” and when a defendant’s scheme involved forged notary stamps. *United States v. Edelmann*, 458 F.3d 791, 816 (8th Cir. 2006) (discussing *United States*

v. Halloran, 415 F.3d 940, 945 (8th Cir. 2005)) (internal quotation marks omitted). “Even if any single step is not complicated, repetitive and coordinated conduct can amount to a sophisticated scheme.” *United States v. Bistrup*, 449 F.3d 873, 882 (8th Cir. 2006).

As described in the above section, this scheme involved criminal activity in the United States, England and elsewhere. The fraud spanned over a decade and involved at least three co-conspirators and over 140 investors. Sigillito and his co-conspirators used recruiters to attract new lenders, promising those recruiters a share in the fees. Sigillito preyed on his friends; friends of friends; legal clients; parishioners of the American Anglican Church of which he was a priest and later a bishop; and family, friends and acquaintances of recruiters. False statements pervaded the communications with lenders, and numerous false Asset & Liabilities Statements were prepared and attached to loan agreements. In addition, Sigillito caused a number of useless shell corporations to be created outside of the United States on behalf of and at the expense of lenders—leading them to believe that the loaned money was going to be used in England to develop property and, thus, that an offshore corporation was necessary. To keep the scheme going after lenders began asking pointed questions, Sigillito and his co-conspirators made repetitive, collusive and coordinated false statements, orally and in writing, to achieve the roll over of existing loans, to lull existing lenders and to attract new lenders. The scheme was so involved and multilayered that it took the FBI months to unravel this fraud and trace the money, even after they received help from the cooperating individuals.

The court finds that a **2-level upward adjustment for sophisticated means** is fully supported by the advisory Guidelines and the trial evidence.

VIII. CHAPTER THREE: ADJUSTMENTS

There are four Chapter Three guidelines that must be considered in calculating the advisory Guidelines range: (1) USSG §3A1.1(b)(1); (2) USSG §3B1.1(a); (3) USSG §3B1.3; and (4) USSG §3C1.1. Each will be discussed below.

A. Vulnerable Victim: USSG §3A1.1(b)(1)

The PSIR writer recommends a 2-level upward adjustment because Sigillito knew or should have known that at least one of the victims of the offense was a vulnerable victim. The guideline defines “vulnerable victim” as follows:

“vulnerable victim” means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

USSG §3A1.1, comment. (n.2).

In determining whether or not the enhancement applies, the court cannot “apply a blanket assumption that an advanced age is sufficient to render a victim vulnerable.” *United States v. Vega-Iurrino*, 565 F.3d 430, 434 (8th Cir 2009) (quoting *United States v. Anderson*, 440 F.3d 1013, 1018 (8th Cir. 2006)) (internal quotation mark omitted). The court is required to provide a “fact-based explanation of why age or some other characteristic made one or more victims ‘unusually vulnerable’ to the offense conduct, and why the defendant knew or should have known of this unusual vulnerability.” *United States v. Anderson*, 349 F.3d 568, 572 (8th Cir. 2003); *see also Anderson*, 440 F.3d at 1017-18 (holding that, in a mail fraud and money laundering scheme, a victim was vulnerable in light of the victim’s education, work history, lack of experience in investing and susceptibility to persuasion by a church leader). For example, in a clear-cutting land scheme where the defendants studied the tax rolls to find out-of-state land owners because they would be unlikely to check on their land, the elderly victims were particularly vulnerable because they had no experience in the logging industry and were in desperate need of money. *United States v. Washington*, 255 F.3d 483, 486 (8th Cir. 2001).

Analysis of the facts of the instant case demonstrates that the vulnerable victim enhancement is appropriate. Sigillito’s criminal conduct involved primarily vulnerable

victims. Among the most vulnerable were Mary O’Sullivan (“Ms. O’Sullivan”) and Neil O’Sullivan (“Neil”). At all times material, Ms. O’Sullivan was a membership services employee at the Racquet Club, an exclusive private club in St. Louis where Sigillito was a member. Ms. O’Sullivan had been an employee of the Racquet Club for nineteen years and she lived with her parents in the St. Louis area. Ms. O’Sullivan saw and talked to Sigillito nearly daily, babysat his children and fell prey to his investment pitch for the BLP. Tom O’Sullivan, her uncle, had accumulated a substantial amount of money working with an investment advisor. When he became ill, Ms. O’Sullivan was appointed as a co-trustee to look after her uncle and his money. Sigillito referred Ms. O’Sullivan to his friend, Kathie Winter, for investment counseling. Sigillito persuaded Ms. O’Sullivan to invest her uncle’s money in the BLP so that there would be sufficient income to pay for her uncle’s nursing home care and other expenses. Sigillito assured her that the BLP was a safe investment because of Smith’s asset-to-liability ratio. Ms. O’Sullivan talked to her brother, Neil, who was also terminally ill, about the BLP. Initially, Neil would not approve the investment in the BLP. Sigillito told Ms. O’Sullivan that she did not need her brother’s consent to invest her uncle’s money. Four or five days later, Neil changed his mind after reviewing Sigillito’s credentials and, shortly thereafter, Ms. O’Sullivan invested \$500,000 of her uncle’s money in the BLP. Four months later, Sigillito solicited another loan from Ms. O’Sullivan in the amount of \$100,000. For a while, she was receiving payments from the BLP to meet her uncle’s obligations. When Neil became gravely ill with cancer, Sigillito told Ms. O’Sullivan that he would draft a will and trust free of charge for Neil. Neil met with Sigillito. After discussing Neil’s assets and financial affairs, Sigillito drafted a trust document naming Ms. O’Sullivan as the trustee. Sometime later, Sigillito asked Ms. O’Sullivan about a check from Neil. Ms. O’Sullivan knew nothing about it and asked Neil if he had invested in the BLP. Neil said that he had not invested in the BLP but merely told Sigillito that he would think about it. When Ms. O’Sullivan told Sigillito that

Neil had not committed to any BLP investment, Sigillito told her that Neil had said that he was investing and, if Neil did not give him the amount agreed, Neil and Sigillito would be sued because the money had been committed. Eventually, Sigillito was able to secure the BLP loan from Neil. After Neil passed away, Ms. O'Sullivan became the trustee of Neil's estate. Ms. O'Sullivan was required to invest Neil's estate so that the return on the investment would be sufficient to support Neil's two minor children, who were left to the care of Ms. O'Sullivan after his death. Sigillito was aware of the tragedies in the O'Sullivan family, the responsibilities left to Ms. O'Sullivan, the stress under which Ms. O'Sullivan was making decisions, her lack of an advanced education and her lack of investment experience. He knew that she was desperate to earn a substantial return on her uncle's money and brother's money so their assets would stretch to meet their obligations. Using his influence as a member of the Racquet Club and his prestige as a self-proclaimed international lawyer, investor and bishop and preying on her weaknesses, Sigillito latched onto Ms. O'Sullivan and bilked her brother and, later his estate, out of a substantial amount of money.

Many other investors were also "vulnerable victims," as that phrase is understood under the advisory Sentencing Guidelines. Sigillito intentionally sought out victims who were at or approaching retirement age in an attempt to gain control of savings that were in IRAs. Although the loans were primarily for one-year terms, Sigillito knew that IRA-holders would incur penalties if they withdrew their funds early. Thus, they would be less likely to demand repayment of their principal and would give the conspirators additional time. Sigillito explained this concept to Smith to keep him in the program. In addition, with respect to the lenders who were retired or near retirement, they were vulnerable due to their age, lack of investment sophistication and blind trust of Sigillito, whom they knew through his parents or through Sigillito's activities as a cleric. Sigillito presented himself as a sophisticated and well-educated international attorney and businessman. These

retirement age or retired individuals were looking for substantial returns on their investments during a time when the fiscal health of this country was poor, interest rates on more conservative investments such as savings accounts and CDs were extremely low and stock market investments involved high risk. Given their circumstances and blind confidence in Sigillito, they were vulnerable. Among the investors in this category were: Charles Davis, Noel Bosse, Linda Givens, Richard Aguilar and Henry Barthel.

The court finds that a **2-level upward adjustment for vulnerable victim** is fully supported by the advisory Guidelines and the trial evidence.

B. Organizer or Leader: USSG §3B1.1(a)

The PSIR recommends a 4-level addition to the offense level because Sigillito “was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.” USSG §3B1.1(a). Sigillito objects, claiming that a 2-level role adjustment under USSG §3B1.1(c) is appropriate because there were only three participants in the offense—Brown, Smith and himself—and because that is the enhancement given to Brown, who Sigillito claims is equally culpable.

Sigillito is partially correct. “Participant” is defined as “a person who is criminally responsible for the commission of the offense,” regardless of whether he or she has been convicted of the offense. USSG §3B1.1, comment. (n.1). However, this enhancement can also be assessed if the criminal activity was “otherwise extensive.” USSG §3B1.1(a). Application Note 3 to USSG §3B1.1 provides:

In assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

Id. Further guidance is given on how to distinguish between a leadership or organizational role and a mere management or supervision role:

Factors the court should consider include the exercise of

decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

USSG §3B1.1, comment. (n.4).

Clearly, the 4-level role enhancement is supported by the trial evidence. Brown, Smith and Sigillito were involved in the fraudulent scheme. Numerous “outsiders” were also involved. They include, but are not limited to: Christian Swinburne, Elizabeth Stajduhar, Robert Mack, David Fazio, Hal Milsap, Sharon Cobb, Paul Vogel, Roland Bear and Kathie Winter. Particularly, in the later years of the BLP, Sigillito was the person making the decisions. Sigillito brought in the majority of the money to the fraudulent scheme by recruiting lenders and he also had the leading role in convincing lenders to roll their loans over instead of cashing them out. He decided the loan agreement terms; loan agreements were prepared at his direction; and he authorized the amount and timing of any payouts to existing investors. He directed Brown, Smith and Stajduhar as to what to say to investors who inquired. Notably, he took \$6.3 million in fees during the existence of the BLP and Brown took approximately \$1.4 million. The trial exhibits and testimony establish that Brown and Smith basically did and said what Sigillito told them to do and say.

The court finds that a **4-level upward adjustment for leader or organizer role** is fully supported by the advisory Guidelines and the trial evidence.

C. Abuse of Position of Trust or Special Skill: USSG §3B1.3

A 2-level increase in the offense level is appropriate if Sigillito abused a position of trust or used a special skill. USSG §3B1.3.

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,

increase by 2 levels.

Id. (emphasis omitted).

There are two factual circumstances under which this enhancement can be applied. One is where the facts establish an abuse of a position of public or private trust. The other is where the facts establish that the perpetrator used a special skill. In this case, the enhancement for abuse of a position of trust is appropriate. As noted by the government, Sigillito had little to no actual legal practice, but the lenders were led to believe the opposite. Sigillito performed legal work for a number of the victims and led them to believe that he was acting on their behalf. The case law which discusses this enhancement relative to a licensed attorney is set forth in the government's Sentencing Memorandum. *See* Government's Sentencing Memorandum at 36-37.

The victim who loaned the most money to the BLP, Phillip Rosemann, was Sigillito's legal client. Sigillito acted for Rosemann on international business matters involving a substantial amount of money. Sigillito established an offshore corporation for Rosemann and often served as Rosemann's legal counselor. The amount of trust Rosemann placed in Sigillito can be quantified. Rosemann, after receiving \$15 million in proceeds from the sale of a business, turned over the entire amount to Sigillito to manage. Rosemann followed Sigillito's advice to loan money to the BLP as well as to Metis, a Turkish company, after Sigillito was given broad authority to conduct due diligence on these investment opportunities.

Sigillito was also in a position of private trust with victims Noel Bosse and the Givens family. They were billed as legal clients for services Sigillito rendered in opening offshore accounts, which were totally unnecessary. Sadly, on the eve of her husband's death, Linda Givens placed significant trust in Sigillito to act in her best interests as a legal advisor and investment advisor.

The court finds that a **2-level upward adjustment for abuse of a position of trust**

is fully supported by the advisory Guidelines and the trial evidence.

D. Obstruction of Justice: USSG §3C1.1

The PSIR assesses a 2-level upward adjustment for Sigillito's obstruction of justice, presumably because he testified falsely under oath at trial.

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

USSG §3C1.1 (emphasis omitted). This adjustment is proper where the defendant has committed, suborned or attempted to suborn perjury. *Id.*, comment. (n.4); *see also United States v. Titlbach*, 300 F.3d 919, 924 (8th Cir. 2002) ("A defendant who commits perjury is subject to an obstruction enhancement under USSG §3C1.1."). "A witness commits perjury 'if [he] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Taylor*, 207 F.3d 452, 454-55 (8th Cir. 2000) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)).

Sigillito made the decision to testify at trial. The undersigned presided over Sigillito's trial and made findings independent of the jury. Based on the trial evidence that the court credited, the court finds that Sigillito lied under oath at trial. The court finds that Sigillito's lies were willful and not a result of confusion, mistake or faulty memory. Further, the false statements were material because they related directly to the nature and circumstances of his involvement in the offenses of conviction and were obviously made in an attempt to avoid conviction. Sigillito falsely stated that: (1) the lenders' funds were not sent to England primarily because of oversight; (2) he did not at any time intentionally mislead anyone or intentionally omit some major fact regarding the BLP from his

presentations to potential lenders; (3) he did not actively or intentionally represent to lenders that borrowed funds were going to go to England to be used to buy property and develop options; (4) he did not deceive lenders by not making disclosures; (5) he did not know the amount of loans outstanding against Smith; and (6) he passed on the Asset & Liabilities Statements to investors in good faith.

The court finds that a **2-level upward adjustment for obstruction of justice** is fully supported by the advisory Guidelines and the trial evidence.

IX. CONSECUTIVE TERMS

Sigillito argues, relying on language in *Southern Union Co. v. United States*, ___ U.S. ___, 132 S. Ct. 2344 (2012), that the court cannot impose a sentence beyond the twenty-year maximum for mail fraud and wire fraud because no facts were found by the jury that would support consecutive sentences. The government resists, arguing that: (1) contrary to Sigillito's suggestion, the Supreme Court of the United States did not address consecutive sentences in *Southern Union* and, rather, reaffirmed its position in *Oregon v. Ice*, 555 U.S. 160 (2009), which found that the courts could run sentences consecutively in multi-count cases; and (2) the power of the court to impose consecutive sentences derives from the statute and not the Sentencing Guidelines.

The court agrees with the government's analysis and finds that there is no prohibition to imposing consecutive sentences if necessary to achieve the "total punishment" recommended by the Guidelines. USSG §5G1.2(d).

X. PRE-DEPARTURE ADVISORY SENTENCING GUIDELINES RANGE

Prior to the consideration of any departures, the court finds that the adjusted offense level is 47. The court adopts the PSIR on all calculations except the loss amount, which is increased from a 22-level upward adjustment to a 24-level upward adjustment.

The highest offense level on the sentencing table is 43, and, therefore, the effective total offense level for Sigillito is 43. Sigillito is a criminal history category I. Therefore,

the recommended sentencing range under the advisory Guidelines is life in prison.

No count of conviction has life as the statutory maximum. Because the count carrying the highest statutory maximum is less than the total punishment, the court is to impose consecutive sentences on one or more of the counts to the extent necessary to produce a combined sentence equal to the total punishment. USSG §5G1.2(d). In this case, the court could impose a sentence of 325 years by imposing the statutory maximum sentence on each count of conviction and running the sentence on each count consecutive to all other sentences imposed. A sentence of 325 years would be a life sentence. It is within the discretion of the court to determine how many years is sufficient to ensure an effective life sentence. *See United States v. Demeyer*, 665 F.3d 1374, 1375 (8th Cir. 2012).

XI. DEPARTURES

Sigillito has made a number of arguments for a downward departure. The court has carefully considered all of them, although the court will discuss only some of them. Sigillito seeks a downward departure under USSG §5K2, “primarily on the basis that the circumstances of this particular offense, including the charging decisions of the government[,] have not adequately been taken into consideration by the United States Sentencing Commission in determining the applicable Guideline[s] range.” Sigillito’s Sentencing Memorandum at 44. The government resists any downward departure.

A. Overview

In discussing the propriety of Chapter 5 departures generally, the Eighth Circuit has stated:

Departures are appropriate if the sentencing court finds that there exists an aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that

described.” USSG §5K2.0. The guidelines provide that sentencing courts [are] to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, a court may consider whether a departure is warranted. USSG §1A1.1, [comment. (n.4(b))].

United States v. Chase, 451 F.3d 474, 482 (8th Cir. 2006) (formatting altered).

The decision whether to depart from the advisory Sentencing Guidelines range rests within the sound discretion of the district court. *See, e.g., United States v. Thin Elk*, 321 F.3d 704, 707 (8th Cir. 2003) (reviewing for an abuse of discretion “because the decision to depart embodies the traditional exercise of discretion by the sentencing court” (citation omitted) (internal quotation marks omitted)). However, “[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases.” *Koon v. United States*, 518 U.S. 81, 98 (1996). The district court must “carefully articulate the reasons for departure, particularly where the waters are uncharted.” *United States v. Reinke*, 283 F.3d 918, 925-26 (8th Cir. 2002).

“The district court is not left adrift . . . in determining which cases fall within and which cases fall outside of the ‘heartland.’” *United States v. McCart*, 377 F.3d 874, 877 (8th Cir. 2004) (citing *Koon*, 518 U.S. at 94). In USSG §§5K2.1 to 5K2.24, “[t]he Sentencing Commission enumerated some of the factors that it believed were not adequately accounted for in the formulation of the Guidelines and might merit consideration as aggravating or mitigating circumstances.” *Thin Elk*, 321 F.3d at 708 (citing USSG §5K2.0).

B. Downward Departures

One of Sigillito’s major arguments is that the government’s charging decisions in this case have created a situation such that the policy of the Sentencing Guidelines of similar treatment of defendants for similar crimes cannot be achieved. Specifically,

Sigillito argues that he should get a substantial downward departure because co-conspirators Brown and Smith got significant and unwarranted charging breaks for cooperating with the government in Sigillito's prosecution. Sigillito argues that this is a situation not contemplated by the Sentencing Commission in promulgating the Sentencing Guidelines. The court disagrees.

The Sentencing Commission did anticipate that those who render substantial assistance could receive reductions in their sentences. True, under the Guidelines, breaks for substantial assistance are given at the time of sentencing upon motion of the government and by the discretionary decision of the sentencing judge. In this case, a sentence reduction for substantial assistance was awarded via the charging decisions as well as a motion for reduction of sentence. At sentencing, those who cooperate with the government are not similar to those who elect to put the government to their burden at trial. Cooperators are frequently essential to unravel complicated and long-running fraudulent schemes and to prove the elements of the crimes charged against those who elect not to plead guilty. Such were the circumstances in this case with Brown and Smith, both of whom were considerably less culpable than Sigillito in this fraudulent scheme. In addition, because Smith resides in England and extradition of him might not have been prompt or even feasible, the charging decision as to him made sense when coupled with his much more limited role in the fraud than Sigillito or Brown.

Sigillito also argues that this fraudulent scheme was different than most. Sigillito avers that, in this case, substantial funds were returned to the investors in principal and/or interest. The court is not able to substantiate this assertion. There is nothing in the record that would support this theory. The trial evidence, however, did show that in the later years of the scheme, when Sigillito was running it, those investors who brought legal action, or threatened to do so, received payments from the BLP via Sigillito. This is not an atypical event in a long-running fraudulent scheme. Sigillito also argues that this

fraudulent scheme was different because it started as a lawful program. Again, the court has no information that would tend to substantiate this assertion. Finally, Sigillito argues that this scheme was different because there were “real investments in a legitimate real estate operation.” Sigillito’s Sentencing Memorandum at 45. Initially, the court notes that this was a lending scheme where the investors were told that the borrowed funds would be sent to England for the purpose of buying and developing property. The alleged assets of the borrower were misrepresented. Some of the properties were not even owned by the borrower and the balance of the property interests were substantially overvalued. Sigillito has failed to establish that there was anything atypical about this fraudulent scheme to warrant a downward departure.

Finally, Sigillito argues that his age (sixty-three years) and infirm health, coupled with the unusual charging decisions of the government, the unusual nature of the fraud, Sigillito’s lack of criminal history and his religious orientation, support a departure. The court disagrees. None of these factors alone, or in combination, support a departure. The Sentencing Commission has specifically provided that age can be but normally is not a basis for a departure. USSG §5H1.1. There is no evidence that Sigillito is infirm. The only information provided in the PSIR relative to Sigillito’s mental or physical health is that Sigillito has suffered in the past from depression and panic attacks, which are controlled with medication. As noted above, there is nothing unusual about the nature of this fraud. Sigillito’s lack of criminal history has been taken into consideration when computing the advisory Guidelines range and, although this might be a valid basis for a departure in some circumstances, it is not in this case. Sigillito’s religious orientation is not a basis for a downward departure. In spite of his presentation as a religious man, his religious orientation did not prevent him from making innumerable false and misleading statements to his victims and stealing millions from them so that he could lead a privileged lifestyle and be undeservedly regarded in the community as an upstanding person and Man

of God.

After carefully reviewing Sigillito's arguments in support of a downward departure, the court finds no basis for departing downward under the circumstances of this case. Accordingly, the motion for downward departure is denied.

XII. VARIANCE

Next, the court turns to consider Sigillito's motion for a downward variance. Post-*Booker*,¹¹ the court must determine whether a non-Guidelines sentence is appropriate after determining the Guidelines range and any permissible departures within the Guidelines structure. *United States v. Myers*, 503 F.3d 676, 684 (8th Cir. 2007). The court has a "responsibility to select a sentence that [is] 'sufficient, but not greater than necessary' to comply with the statutory sentencing purposes." *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (quoting 18 U.S.C. § 3553(a)); see also *United States v. Butler*, 594 F.3d 955, 967-68 (8th Cir. 2010) (same). "[A] district court's job is not to impose a reasonable sentence, but rather to impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of § 3553(a). *United States v. Lytle*, 336 F. App'x 587, 588 (8th Cir. 2009) (citation omitted) (internal quotation marks omitted). In analyzing a motion for a downward variance, a "district court has wide discretion to weigh the factors in each case and assign some factors greater weight than others." *United States v. Kane*, 552 F.3d 748, 755 (8th Cir. 2009) (citation omitted), *vacated on other grounds*, 131 S. Ct. 1597 (2011).

Sigillito argues that a variance is warranted because this was not a typical Ponzi scheme in that some money was returned to the investors and it started out as a legitimate program with real investments in a legitimate real estate operation. As noted in the preceding section, there is nothing in the record that demonstrates this was or was not a typical Ponzi scheme. "Ponzi scheme" can describe a wide variety of criminal behavior.

¹¹ *United States v. Booker*, 543 U.S. 220 (2005).

The court has addressed the amount of the loss and restitution in other sections of this Sentencing Memorandum. This was an unsecured loan program and some of the properties listed on the Asset & Liabilities Statements shown to investors were not owned by the borrower and none of the assets were reported to investors at fair market value. Funds were solicited from lenders to pay off other lenders with only a small amount of the loaned funds being sent to England to acquire or develop property.

In support of a variance, Sigillito also argues that he and Brown invested some of their own and relatives' money in the scheme. The court recalls that Brown invested early in the life of the BLP and, according to him, contributed additional funds over the years. The court further recalls testimony that Sigillito invested money from his IRA account. Sigillito's wife and mother also made investments. There is nothing in the record from which the court can determine if this is typical of a Ponzi scheme. What is known is that Sigillito used the fact that he, his wife and his mother were investors in the BLP in his sales pitch to lure new lenders. New lender money was used to make periodic payments to his mother while other lenders who were owed money received nothing. Sigillito still netted over \$6 million even if he lost his relatively minor investment.

The court does not agree with Sigillito's assertion that he expended a great deal of effort in advancing the interests of the program. Sigillito's efforts were directed at attempting to avoid the collapse of the scheme by recruiting or causing others to recruit new lenders into the BLP, thereby furthering the fraudulent scheme. There is no evidence that Sigillito made any efforts to advance the interests of the BLP that were independent of the scheme to defraud.

Sigillito further argues that he is entitled to a variance because he was not a professional con man and he was in over his head when he became involved with the BLP. The court again is not aware if the majority of perpetrators of Ponzi schemes have criminal records. Based on the court's state and federal judicial experience, it is not uncommon for

perpetrators of white collar frauds to have no criminal history and to appear to be upstanding community leaders and sometimes philanthropists. Lack of criminal history plays into the seemingly legitimate nature of the loans or investment schemes and gives the perpetrator a legitimate aura. Sigillito's attempt to cast himself as a victim of Brown rings hollow in light of the trial evidence that established, without any doubt, the fraudulent activities of Sigillito. Perhaps, Brown's initial representations concerning the BLP alerted Sigillito of the fraud possibilities that the program offered.

The image of Sigillito, as revealed by the trial evidence, is of a person who used his education, standing as a lawyer, mastery of numerous languages, foreign travel, private club membership, lavish lifestyle and position of priest and bishop of the American Anglican Church to create an impression with lenders that he had made substantial money in the BLP and that he was smart, worldly and yet a Man of God that was looking out for them and their money.

Sigillito's argument that he obtained legal opinions indicating that his operation of the BLP was lawful is simply not supported by the trial evidence. There was no evidence that Sigillito or his co-conspirators made all of the details of the BLP and the representations to lenders known to any lawyer for the purpose of determining whether their conduct was within the bounds of the law.

The court is well aware that, after the scheme was exposed, Sigillito suffered disastrous consequences. Unfortunately, so have the victims of his offenses. The difference is that Sigillito is responsible for his own consequences. He knew that the representations he was making to potential lenders were false. He piled on false representations. If he was in over his head, he had ten years to stop and take responsibility. Instead, he led lender after lender into a scheme, took their money, lied to them and collected his fees. He has lost his property because some of it was purchased with proceeds of illegal activity and the balance is needed to repay the victims of his

criminal conduct.

This is a serious offense with disastrous consequences for the victims. The Guidelines calculations reflect the wisdom of the Sentencing Commission in providing stiff punishment for nonviolent offenders who cheat and steal and leave a substantial number of victims without any effective recourse for full financial recovery.

Sigillito argues that the need to avoid unwarranted sentence disparities is a basis for a variance in this case. Not all sentence disparities are precluded by federal law; only unwarranted disparities are disallowed. Disparity between the sentence of a defendant who accepted responsibility and cooperated and another defendant who elected to go to trial and contest all of the elements of the charged offenses does not in and of itself give rise to an unwarranted sentence disparity. *United States v. Brunken*, 581 F.3d 635, 638 (8th Cir. 2009). The court has responded to this argument and incorporates its prior analysis. Co-conspirators Brown and Smith are not similar to Sigillito. Neither Smith nor Brown profited from the scheme to the extent Sigillito did. Neither Smith nor Brown took as active a role in the BLP as did Sigillito during the later years. Both Smith and Brown admitted their criminal conduct when confronted by law enforcement and provided valuable assistance in unraveling ten years' worth of complicated financial transactions, interpreting emails and recalling important events. Both Smith and Brown forfeited the majority of their assets to the government to be used to make victims whole and showed remorse for the harm inflicted on the victims of this fraud. The options and property in England that Smith owned were forfeited as part of his plea agreement and will be disposed of in favor of the victims. Brown has also voluntarily forfeited his assets in favor of the victims. Of course, more assets were forfeited from Sigillito because he kept more of the ill-gotten money than Smith or Brown.

Thus, the court exercises its discretion not to vary.

XIII. FINANCIAL OBLIGATIONS

The amount of restitution has been calculated in the PSIR as \$34,627,714.31. The parties do not object to that figure.

Sigillito will be required to pay a \$2000 special assessment—that is, \$100 on each count of conviction. 18 U.S.C. § 3013.

The court will not impose a fine in this case because of the amount of restitution owed to the victims. 18 U.S.C. § 3572(b) (providing that a court shall not impose a fine or monetary penalty if such imposition will impair the ability of the defendant to make restitution).

The court will order final forfeiture pursuant to the court's Preliminary Order of Forfeiture.

XIV. CONCLUSION

After considering all of the factors at 18 U.S.C. § 3553(a), even those not specifically discussed herein, and considering all oral and written arguments by the parties, the court finds that the sentence that is sufficient but not greater than necessary to achieve the statutory goals of sentencing is 480 months in federal prison followed by a supervised release term of 3 years. This would be the court's sentence even if the court has erred in making any Guidelines calculations.

Sigillito's criminal conduct was calloused and calculating, causing fear and anguish to the people who trusted him. Sigillito has not taken responsibility for the economic and emotional damage that he has caused to his victims. The majority of the victims of this scheme are of an age and station in life where they will never be able to earn their way back to where they were before they got mixed up with the BLP. It is a certainty that proceeds from the forfeiture of the assets of Sigillito and his co-conspirators will not begin to make the victims economically whole. It has become necessary for many victims to scale down their lifestyles, which had never been extravagant before they invested in the

BLP. Sigillito had many years of prestige, luxury and comfort at the expense of the victims. A significant sentence is appropriate to reflect the nature and circumstances of the offenses and the seriousness of the offenses, provide just punishment to Sigillito, promote respect for the law and serve as a deterrent to Sigillito and to others who might be tempted to engage in similar conduct.

The court is aware that, because Sigillito is sixty-three years old, a forty-year sentence has the effect of a life sentence. Even with maximum credits of fifty-seven days per year after service of each year of incarceration, Sigillito is unlikely to be out of prison before he expires of natural causes. In this case, there is little to no practical difference between a forty-year sentence, a sentence of 325 years and a life sentence. To impose a term of imprisonment of the maximum of 325 years would serve no purpose other than to provide a dramatic headline.

IT IS SO ORDERED.

DATED this 20th day of December, 2012.


LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA