U.S. Department of Justice

United States Attorney
Eastern District of New York

SBK:SLT
#2002R01364

195 Montague Street
Brooklyn, New York 11201

Mailing Address: *147 Pierrepont Street*
Brooklyn, New York 11201

August 7, 2007

The Honorable Arthur D. Spatt
United States District Court Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11201

Re: United States v. Stephen Barker,
Criminal Docket Number 02-767 (ADS)

Dear Judge Spatt:

The government respectfully submits this letter in connection with the sentencing of the above-referenced defendant, currently scheduled for August 9, 2007. By letter dated July 30, 2007, Defendant Barker objects to the Sentencing Guidelines calculation set forth in the Presentence Investigation Report ("PSR") and seeks a Fatico hearing on all disputed issues. For the reasons set forth below, the government opposes virtually all of Barker's requested adjustments to the Guidelines range and disputes the necessity of a Fatico hearing.

I. DEFENDANT BARKER IS RESPONSIBLE FOR LOSSES EXCEEDING $4.3 MILLION

Barker objects to the PSR's calculated loss of $2,236,249.97 and contends that he should be held responsible for absolutely no losses (Def. Let. at 1-3). The government also believes that the loss amount calculated in the PSR is incorrect. In fact, because of his joint participation in a false invoice scheme that caused over $12.5 million in actual losses, Defendant Barker should have been held responsible for a much greater loss amount. At the very least, Barker should be held responsible for

losses of $4.3 million, representing the amount of his ill-gotten profits from the scheme.[1/]

A. Barker And Drayer Were Jointly Responsible For Up To $12.5 Million In Losses Stemming From The False Invoice Scheme

Joint defendants are responsible for all foreseeable losses within the scope of the agreement of their jointly undertaken criminal activity. United States v. Studley, 47 F.3d 569, 574 (2d Cir. 1995). United States Sentencing Guideline § 1B1.3 states, in pertinent part, that a defendant will be held 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). Even where losses stemming from portions of a criminal activity are not caused at the explicit direction of one or more defendants, those defendants will be held responsible for those losses if they are reasonably foreseeable. United States v. Escotto, 121 F.3d 81, 86 (2d Cir. 1997). One factor in determining whether a criminal activity was "jointly undertaken" is the defendant's participation in designing and executing the scheme. Studley, 47 F.3d at 575.

Defendants Barker and Drayer were charged, prosecuted, and convicted of participating in a single scheme, the predominant facet of which was the use of false invoices to fraudulently procure loans by misrepresenting the loans as secured equipment leases, when in fact the loans often had little or no collateral. The fact that Defendant Drayer also engaged in a number of schemes independent from Barker does not change the fact that Barker was his partner and an integral member of the false invoice scheme. Barker and Drayer jointly engaged in the same fraudulent conduct — both created sham companies purporting to be medical equipment vendors: Barker created MedPro, while Drayer created Riteway. Both defendants engaged in the exact

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[1] The PSR attributes a loss of $1.9 million to Barker for money he diverted for his personal use (PSR ¶¶ 11, 30, 33, 39 and 47). This calculation misconstrues the nature of those funds. In fact, the $1.9 million that Barker received was part of the $4.3 million in ill-gotten commissions he earned for his participation in the scheme. As explained below, Barker should be held responsible for the full amount of this $4.3 million in illicit profits from the fraud, but the $1.9 million discussed in the PSR is not a separate amount and does not reflect money that Barker converted from loan proceeds as suggested in the PSR.

same scheme: using false invoices from MedPro and Riteway to doctor up loan contracts and obtain risky loans under false pretenses. MedPro and Riteway were virtually identical — both were sham companies with no employees, no offices, no warehouses, no equipment, no payroll records, never filed taxes and had no legitimate business. Moreover, as proved at trial, Barker did all of his business, 99.9% by his own admission, with Barry Drayer and PLS. Barker's entire business was built on his criminal partnership with Drayer. It was not only reasonably foreseeable – it was an absolute certainty that Drayer was also engaging in the same scheme using other fraudulent invoices.

In fact, as established at trial, Barker's formation of MedPro and the paperwork he used to perpetuate the false invoice scheme — particularly the invoices themselves — were modeled on Drayer's framework for Riteway. As Susan Cottrell testified, PLS provided all of the templates for Barker to use; in essence, Barker signed on to the scheme and began expanding it by bringing it to the West Coast. (Tr. 2357).[2/] Together, with Drayer defrauding doctors and dentists on the East Coast, and Barker doing the same on the West Coast, the Barker-Drayer partnership succeeded in defrauding over forty different financial institutions of more than $30 million.

In an effort to avoid a Fatico hearing with respect to co-defendant Drayer, the government agreed to reduce the actual loss amount, which exceeded $30 million, and rely on the $12.5 million in actual losses proved at trial. Accordingly, based on Barker's joint participation in the false invoice scheme, the losses of which were all directly attributable to or reasonably foreseeable to Barker, he is similarly responsible for $12.5 million in actual losses, with the caveat explained below.

B. Since The Exact Losses From The False Invoice Scheme Are Impossible To Determine, Barker Should Be Held Accountable For the $4.3 million In Ill-Gotten Gains He Received As A Result Of The Scheme

While Barker should be held jointly responsible for all of the losses attributable to the false invoice scheme in which he partnered with Drayer, the exact amount of losses stemming from this scheme is impossible to determine. Specifically, many of the fraudulent loans that were procured using false MedPro and

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[2] All citation to ("Tr. __") are references to the trial transcript. Citations to ("GX __") are references to government exhibits offered into evidence during the trial.

Riteway invoices also suffered from defects related to other fraudulent schemes devised and executed by Drayer. For example, in addition to obtaining the loans under false pretenses using MedPro and Riteway, Drayer also procured fraudulent proceeds from some of these loans through the use of multiple funding, converting monies from prepayments of the loans, and/or hiding the prepayments from the financial institutions through the use of false checks and the mailboxes etc. scheme. The government does not take the position that Barker was involved in these other fraudulent schemes. Accordingly, he should be held responsible only for the loss amount that is directly attributable to the false invoice scheme. Given the overlapping nature of these fraudulent schemes, however, and the fact that many loans suffered from more than one type of fraud, it is impossible to determine with any precision the exact amount of loss that was directly caused by the false invoice scheme separate and apart from the other fraudulent acts.

Under U.S.S.G. § 2B1.1, where the amount of actual losses cannot be reasonably determined, "the Court shall use the gain that resulted from the offense as an alternative measure of the loss." U.S.S.G. § 2B1.1, commentary 3(b); see also United States v. Canova, 412 F.3d 331, 354 (2d Cir. 2005). Since the precise amount of actual losses sustained by the financial institutions as a direct result of the false invoice scheme jointly devised and executed by Barker and Drayer is impossible to determine, the Court should use the alternative loss amount reflected by the profit realized by Barker as a result of his participation in the fraudulent scheme. At trial, the government offered undisputed evidence that Barker received over $4.3 million in commissions from his use of false MedPro invoices to procure loans from the victim financial institutions. The government respectfully submits that the Court should use this amount as the measure of loss for sentencing purposes.[3/]

In addition, the nature of the fraudulent scheme provides an even greater reason to use the alternative measure of loss – Barker's profit – rather than actual losses (even if they could be determined). As the Second Circuit has explained,

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[3] A loss amount of $4.3 million would result in an enhancement of 18 points rather than the 16-level enhancement provided in the PSR (¶¶ 39, 47). However, as discussed below, the government agrees that the 2-level enhancement for abuse of trust should not apply. Accordingly, the applicable Guidelines Range should be an offense level of 32 and a Guidelines Range of 121 to 151 months.

"[w]here a victim has sustained a loss, the precise amount of which is not *readily quantifiable*, the profit realized by the defendant may also provide an alternative loss estimate." Canova, 412 F.3d at 354 (emphasis added). The insidious character of Barker and Drayer's false invoice scheme goes far beyond the quantifiable out-of-pocket losses suffered by the financial institutions as a result of loans that actually defaulted. Indeed, a substantial portion of the real loss sustained by the victim financial institutions was the additional risk these institutions took on as a result of Barker and Drayer falsely representing risky working capital, debt consolidation and sale-leaseback loans as fully-secured equipment leases. Through their criminal acts, Barker and Drayer caused the victim financial institutions to fund much riskier loans without any notice as to the true nature of the loans, without any possibility of balancing the additional risk in their portfolios, without any ability to curb the additional risk by capping the amount of the loans or limiting the number of riskier loans allowed in each batch and without any additional compensation for taking on the higher level of risk. It is this last element that is particularly troubling, as even the most cursory knowledge of lending practices supports the obvious conclusion that as the risk of the loan increases, so does the cost that the borrower must pay to offset the higher risk.[4/] All of these items represent actual losses sustained by the victim institutions as a result of Barker and Drayer's false invoice scheme, but none are capable of being quantified with any precision. Accordingly, even the amount of actual losses established in this case does not completely reflect the true losses caused by Barker's fraudulent conduct.

The court's discussion in United States v. Hairston, 2006 WL 3519338 (E.D. Mo. Dec. 6, 2006), is particularly instructive. Hairston, much like the case at bar, involved a fraudulent loan procurement scheme perpetuated by a defendant in the loan brokerage business. As in this case, the defendant in Hairston falsely represented the nature of loans (mortgage loans in Hairston) in order to procure loans for third-parties that were riskier than the victim banks were led to believe. In

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[4] Take, as a simple example, the purchase of a new car with financing from a bank loan. As the amount of the loan increases, and the credit score of the borrower decreases, the risk level of the loan goes up. To compensate for this higher risk, the bank will undoubtedly charge the borrower a higher interest rate on the loan, or reduce the risk by imposing other conditions such as a shorter repayment schedule.

discussing why the actual losses of $21 million may have grossly underestimated the seriousness of the risk that the defendant put upon the victim financial institution, the district court reasoned that:

> Where all mortgages have not been foreclosed, lenders were caused to loan more money on loans than they otherwise would have loaned with a higher risk of default . . . Even though a mortgage broker may have intended that loans would be repaid, the broker intended to have lenders with loans that were riskier and less valuable than the lenders thought.

Hairston, 2006 WL 3519338 at *13. For the same reason, Barker's intentional fraudulent conduct left the victim financial institutions with loans that were riskier and less valuable than the victims were led to believe. This unquantifiable but real loss provides an additional reason for the Court to use the alternative loss calculation based on the profits Barker derived from the fraud.

II. BARKER SHOULD BE HELD RESPONSIBLE FOR AN ABSOLUTE MINIMUM OF $336,249.97 IN LOSSES FROM UNPAID MEDPRO LOANS

Even if the Court determines that Defendant Barker should not be held responsible for the amount of loss attributable to the entire false invoice scheme, Barker must be held accountable for the actual losses sustained on loans that he personally procured through the use of false MedPro invoices. Barker's contention that he should not be charged with any losses at all because of Drayer's independent fraudulent conduct is completely unsupported by both the facts and the law.

For each MedPro loan, Barker was directly responsible for preparing all of the fraudulent paperwork. The false invoices were created at his direction. The schedules falsely listing old equipment as new equipment were completed at his behest. Barker supervised the preparation of delivery and acceptance receipts that were included with the loan paperwork for the purpose of doctoring working capital and sale-leaseback loans to appear to the banks as if they were new equipment finances. Barker also personally participated in hundreds of conference calls with medical practitioners that created the false impression that MedPro was selling new equipment to those practitioners. Finally, MedPro itself was entirely Barker's

creation. Barker formed the company as a sham – a shell corporation with no assets, no physical location, no warehouses, no equipment, no employees, and absolutely no legitimate business. Barker created MedPro for the sole purpose of churning out false invoices for his criminal partnership with Drayer, a partnership that represented the entirety of Barker's operations. Moreover, Barker opened and maintained sole control over a sham bank account formed in the name of MedPro, which account was used to funnel the fraudulent proceeds from PLS to Barker as a means of hiding the true nature and source of the funds, and creating the false impression to the financial institutions that MedPro was an actual equipment vendor that was being paid to provide new medical equipment that would secure the loans. For each and every dollar lost on a MedPro loan, Barker was proximately responsible for the money being fraudulently obtained from the financial institutions. Without Barker's active and integral participation, none of these loans would have been fraudulently obtained, and the financial institutions would not have suffered any losses from these loans. As such, it is patently absurd for Barker to seek to insulate his criminal liability by hiding behind the equally culpable criminal acts of his partner, Barry Drayer.

Barker argues that he should not be held responsible for actual losses of $336,249.97 that were the result of unpaid and/or defaulted MedPro loans, because these losses resulted from the diversion of funds by PLS and its ultimate collapse. This argument is without merit. Barker's entire business relationship with Drayer was built on fraud and deception. Not a single one of the MedPro loans was legitimate, and Barker clearly knew, at the absolute minimum, that each and every one of the "many hundreds of loans to physicians" (Def. Let. at 2) that Barker brokered for PLS was the product of fraud. As explained at trial by numerous witnesses from the victim financial institutions, the result of Barker and Drayer's criminal partnership is that the banks agreed to fund much riskier loans than they otherwise would have. Indeed, given that many of Barker's MedPro loans were working capital, debt consolidation or sale-leaseback loans, which were all considered by the financial institutions to be high-risk loans, it was certainly foreseeable to Barker that many of the loans would never be paid back to the financial institutions. Moreover, since his entire business was built on fraud, it should have been reasonably foreseeable to Barker that the PLS "house of cards" would ultimately collapse, as it did, and that the victim financial institutions would suffer significant losses as a result of that collapse – which they undisputably have.

Barker cannot escape liability on the flimsy pretense, offered post-conviction on the eve of facing judgment for his crimes, that he wanted, or even expected, the loans he fraudulently obtained to be paid back. The stark reality is that Barker showed a complete lack of regard for the risk of loss his actions were virtually certain to produce. Once again, Barker is merely attempting to insulate his own criminal conduct by pointing the finger at his co-defendant Barry Drayer and suggesting that since Drayer was worse, Barker should be let off the hook. This tactic failed at trial and must similarly be rejected at sentencing.

III. A TWO-POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE APPLIES BECAUSE BARKER FAILED TO COMPLY WITH A GRAND JURY SUBPOENA AND LIED TO FEDERAL AGENTS REGARDING HIS POSSESSION OF SUBPOENAED BUSINESS RECORDS

Barker disputes the applicability of a two-level enhancement for obstruction of justice (3C1.1; PSR ¶¶ 45, 51). Barker's failure to comply with a grand jury subpoena and false statements to agents regarding his possession of subpoenaed evidence firmly supports the obstruction of justice enhancement.

On August 5, 2003 a grand jury sitting in the eastern District of New York issued a subpoena ordering Defendant Barker to produce all Carefree and MedPro business records by 21, 2003. On November 19, 2003, Defendant Barker was served with a second grand jury subpoena directing the production of the same business records. The subpoena was addressed to Stephen Barker, d/b/a MedPro Equipment Company and Carefree Financial Services. (Tr. 2898-99; GX 132). The grand jury subpoena directed Barker to produce all business records for MedPro and Carefree including, among other things, "all files related to medical providers requesting funding...to include but not limited to: agreements, promissory notes, contracts, assignment of leases, applications, credit information, phone messages, *vendor information*, and terms of agreement."

Barker eventually produced documents responsive to the subpoena. The documents Barker produced included Carefree loan files going back for only two years. Before producing these files, Barker deliberately removed all documents from the files that referenced MedPro. Specifically, Barker removed hundreds of false MedPro invoices as well as Bills of Sale that purported to transfer title of old equipment from medical providers to MedPro. Except for a few invoices that appear to have been inadvertently left in the files, all of the MedPro invoices (which totaled in the hundreds) were removed from the files prior to their being

turned over to the government. Not a single Bill of Sale was found in any of the documents produced by Barker.

On February 10, 2004, Barker was interviewed by Special Agents Brad Howard and Rondie Peiscop-Grau from the FBI. The agents questioned Barker about his missing records from 1996 through 1999. According to the trial testimony of Special Agent Howard, Barker told the agents that he did not have any records from 1996 through 1999 because "most of the lease deals were from 3 to 5 years, and he only retained records for two years to make sure that the doctors did not default." (Tr. 2911).

On August 10, 2005, nearly two years after the original grand jury subpoena was served, and after Barker was indicted, Barker appeared at the offices of the United States Attorney for the Eastern District of New York with his attorney Craig Lytle. This meeting, which occurred shortly before the originally scheduled trial date, was requested by Barker and his counsel for the sole purpose of convincing the government to drop the charges against Barker. At this meeting, Barker produced a laptop computer containing business records from MedPro, none of which had been produced pursuant to the subpoena issued two years prior. These records including hundreds of MedPro invoices and hundreds of Bills of Sale purporting to transfer title from medical providers to MedPro. Many of these documents were dated during 1996 to 1999, a time period for which Barker previously claimed he kept no records. It was at this meeting that Barker, for the first time, unveiled his new strategy of blaming Barry Drayer for the entire crime and attempted to explain how MedPro was really a legitimate "title" company. The purported Bills of Sale had never been produced to the government to that point – indeed, the government had no idea of their existence until Barker brought them to the August 2005 meeting.

Barker's failure to comply with the grand jury subpoena and false statements to investigating agents regarding his possession of business records clearly obstructed justice. The MedPro invoices were a critical component in the government's case. Barker's concerted efforts to hide these false invoices resulted in the government having to piece together evidence from multiple other sources – including a search warrant executed at the offices of PLS in New York, and resulted in the collection of less evidence since the PLS records were not complete. Barker's ultimate production of the documents was prompted not by any perceived obligation on his part to comply with the subpoena, but as a last-ditch gambit to avoid criminal liability. The fact that Barker lied about the existence of the records and concealed them until the very last minute (at the point Barker produced

these documents a trial date in this complex case had already been set for October 2005) demonstrates his intent to obstruct justice and further supports the two-level enhancement.

Non-compliance with a grand jury subpoena for the production of documents and deliberate concealment of material records clearly warrants an enhancement for obstruction of justice. See, e.g., United States v. Charria, 919 F.2d 842, 845, 849-50 (2d Cir. 1990) (upholding obstruction enhancement under § 3C1.1 where defendant lied to agents about his possession and the existence of documents and attempted to destroy the documents). In fact, such conduct has even been found sufficient to support additional criminal charges. See, e.g., United States v. Ruggiero, 934 F.2d 440, 444-46 (2d Cir. 1991) (holding that defendant's failure to produce records ordered by grand jury subpoena and lying to government agents by telling them that he had, in fact, produced all subpoenaed documents in his possession, supported conviction for substantive crime of obstruction of justice). Moreover, the fact that Barker eventually produced the documents, when he perceived it to be in his interest to do so, doesn't render his conduct any less obstructive because his "overall conduct was calculated to mislead or deceive the authorities." Charria, 919 F.2d at 850 (holding that district court properly considered defendant's initial lie to authorities as obstructive conduct, even though it was quickly recanted).

Accordingly, the two-level enhancement for obstruction of justice is warranted against Defendant Barker.

IV. THE SOPHISTICATED MEANS ENHANCEMENT APPLIES BECAUSE BARKER CREATED A SHELL COMPANY AND SHAM BANK ACCOUNT FOR THE SOLE PURPOSE OF PERPETUATING THE SCHEME AND HIDING THE TRUE NATURE AND SOURCE OF THE FUNDS

Barker contends that the two-level enhancement for sophisticated means (2B1.1(b)(9)(C); PSR ¶ 41) should not apply because his criminal conduct was limited simply to the "creation of fraudulent invoices," which "does not elevate the simple alleged fraud to a sophisticated event" (Def. Let. at 4). This argument completely misrepresents the evidence adduced at trial and grossly distorts Barker's actual role in the fraudulent scheme. The creation of false MedPro invoices, while an integral part of the overall fraud, represents just a minor aspect of Barker's participation in the criminal partnership.

As established at trial, Barker created MedPro, a sham entity that was formed for the singular purpose of duping the

victim financial institutions into believing that Barker's high-risk loans were actually fully secured by new medical equipment purchased from a legitimate equipment vendor. Modeled after Drayer's creation of Riteway, another sham entity, MedPro's entire reason for existence was to perpetuate a complex fraud scheme. Barker incorporated MedPro and obtained a tax identification number (although he never actually paid any taxes for MedPro). Barker also established a MedPro telephone number (which he instructed employees like Tallie Jo Allen to answer as if they were actual employees of MedPro even though the phone line went straight to Barker's offices at Carefree). Barker even established a sham bank account in the name of MedPro, which he used to receive loan proceeds from PLS in an effort to further bolster the appearance that PLS was paying a legitimate vendor for new medical equipment. The vast majority of those funds were then immediately transferred to Barker's Carefree bank account. Barker undertook all of these actions as part of an elaborate plan to misrepresent MedPro to the victim financial institutions as a legitimate vendor that was purportedly selling new equipment to medical providers, while at the same time, keeping the medical providers completely in the dark as to the existence of MedPro. As established by the trial testimony of Tallie Jo Allen and Susan Cottrell, Barker carefully hid the existence of MedPro from the medical providers by removing any mention of the MedPro name from documents submitted to the medical providers, by vigorously instructing his employees never to send MedPro invoices to the medical providers, and scrupulously avoiding any mention of MedPro during the hundreds of verbal audit calls Barker participated in with the medical providers. Moreover, Barker transferred the loan proceeds from the MedPro account to his Carefree account before distributing it to the medical providers so as to prevent them from questioning why the source of their loan funds was a company they never heard of.

The law is well-settled that the sophisticated means enhancement applies whenever a defendant creates and utilizes a shell company or fictitious entity for the purpose of committing the fraud or hiding the nature and source of fraudulent proceeds. See United States v. Robertson, 2007 WL 2141430, *6 (11th Cir. July 27, 2007) (affirming application of sophisticated means enhancement to mail/wire fraud case in which defendant fraudulently obtained goods without paying for them by hiding behind false names and using fictitious entities to prevent detection and continue the scheme); U.S.S.G. § 2B1.1, commentary 8(B) (noting that "[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"); see also cf. United States v.

Lewis, 93 F.3d 1075, 1082-83 (2d Cir. 1996) (applying sophisticated means enhancement to tax evasion case where defendant used fictitious entities with the sole purpose of evading taxes and avoiding IRS detection). Barker's establishment and use of the fictitious MedPro Equipment Company and the sham MedPro bank account are paradigmatic examples of the sophisticated means contemplated by U.S.S.G. § 2B1.1(b)(9)(C).

In any event, Barker's creation of a myriad of false documents to misrepresent the true nature of the loans and the numerous steps he took to conceal the fraud from both the victim financial institutions and the medical providers is more than sufficient to support the two-level enhancement for sophisticated means. See also United States v. Amico, 416 F.3d 163, 169 (2d Cir. 2005) (holding that sophisticated means enhancement clearly applied to mortgage fraud scheme in which defendant inflated the assessment of home values by creating false bank documents, false appraisals and false blueprints, and engaged in "other tactics designed to conceal the scheme").

V. ENHANCEMENTS FOR MULTIPLE VICTIMS AND RECEIPT OF $1 MILLION

Barker disputes the applicability of a two-level enhancement for his receipt of more than $1 million from a financial institution (2B1.1(b)(13)(A); PSR ¶ 42), and a two level enhancement for more than ten victims (2B1.1(b)(2)(A); PSR ¶ 40). Both of these enhancements depend entirely on the Court's decision with respect to the loss calculation. If the Court agrees with the government's position that Barker should be held responsible for $4.3 million in losses as a result of his joint participation in the false invoice scheme, then there is no dispute that both of these enhancements apply, as the evidence at trial established that the false invoice scheme resulted in losses to more than 10 financial institutions.[5/] If the Court

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[5] To the extent that Barker suggests he should not be held responsible for obtaining $1 million from a financial institution because his profits were in the form of commissions rather than direct payments from the banks, this argument is utterly without merit. As established at trial, the payment structure of the loans resulted in PLS receiving profits from each of the loans they procured, including the MedPro loans that originated from Barker. Although the checks for Barker's commissions came from PLS, the money for those commissions was a direct and proximate result of Barker and Drayer's joint scheme and the ultimately source of all of the fraudulent proceeds was, in fact, the financial institutions.

instead decides that Barker is responsible only for the losses suffered on MedPro loans (approx. $336,000), or is responsible for no losses at all, then the government concedes that these enhancements do not apply.

VI. THE ABUSE OF TRUST ENHANCEMENT DOES NOT APPLY

Defendant Barker also opposes a two-point enhancement for abuse of trust, pursuant to U.S.S.G. § 3B1.3 (PSR ¶ 44). The government agrees that the enhancement for abuse of a position of trust should not apply to Defendant Barker. Barker was not a manager or employee of a financial institution, nor was he responsible for overseeing pension funds, or some other similar position that would impose a fiduciary or trust obligation.

Moreover, Barker did not have direct access to the financial institutions themselves — he relied on Defendant Drayer's connection to the banks in order to perpetuate the scheme. While Barker certainly violated the trust of the medical providers he defrauded throughout the course of this illegal scheme, this is simply not the type of abuse of trust contemplated by U.S.S.G. § 3B1.3.

VII. NO *FATICO* HEARING IS NEEDED WITH RESPECT TO ANY OF THE ISSUES REGARDING THE APPLICABLE LOSS CALCULATION

Defendant Barker requests a Fatico hearing on all of the disputed sentencing issues. As detailed above, the facts underlying virtually all of the disputed issues have already been litigated at trial. Substantial evidence of Barker's partnership with Drayer and his involvement in the false invoice scheme was the basis of the government's case against Barker. Moreover, the appropriate loss calculation is a legal question for the Court to decide. No additional facts need to be adduced in order to make that determination. Accordingly, absolutely no Fatico hearing is warranted with respect to the issue of loss or any of the enhancements based on the loss amount.

With respect to the enhancement for obstruction of justice, Special Agent Brad Howard from the FBI already testified at trial regarding the aspects of the subpoena and Barker's response. There is also no dispute that Barker and his attorney produced those records nearly two years later, after Barker had been indicted, during a proffer session requested by Barker, the sole purpose of which was to convince the government to drop the charges against Barker. Finally, there is no dispute as to what records Barker and his attorney produced, since many of them were offered as exhibits at trial (mainly by the Defendant himself).

Accordingly, much like the loss calculation issue, the facts have already been established and the sole remaining issue is a purely legal question that remains in the Court's discretion – do the undisputed facts warrant the enhancement for obstruction of justice.

To the extent that any factual disputes remain, the government is prepared to call Special Agent Rondie Peiscop-Grau from the FBI, who served as the case agent throughout this investigation and who will be prepared to testify regarding the issues surrounding Barker's obstruction of justice.

CONCLUSION

For all of the foregoing reasons, the Court should adopt a loss calculation of $4.3 million and reject Defendant Barker's objections to the PSR without the need for a Fatico hearing.

Respectfully submitted,

ROSLYNN R. MAUSKOPF
United States Attorney

By: /s/
Steven Tiscione
Assistant U.S. Attorney
(718) 254-6317

Copies to:
Kevin Keating, Esq. (by ECF)
Clerk of the Court (by ECF) ,