IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	:	
		CRIMINAL NO. 4:10-cr-79
Plaintiff,	:	
vs.	:	
CLARENCE ALLEN RICE,	:	DEFENDANT RICE'S SENTENCING MEMORANDUM
	:	AND MOTION FOR VARIANCE
Defendant.		AND DOWNWARD DEPARTURE
	:	

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SUMMARY OF THE ARGUMENT

Due to the difficulty in calculating "actual" loss to Frontier, the court should substitute "gain" to Mr. Rice as of October 1, 2006. Given the emphasis by the government upon Mr. Rice's day-trading activities using C&J loans which included commingled pay-off monies, "gain' is the appropriate measure of loss in this case.

Moreover, Frontier has sustained no fraud loss on the defaulted leases because the cause of any loss is the customer's failure to pay. Frontier has no actual loss on the SIF/PIF leases because they received payments from C&J substantially in excess of amounts retained by C&J. Actual loss premised upon Frontier's loss of value on their portfolio of 2699 leases is contrary to the Guidelines. USSG §2B1.1, Application Note 3 (D).

Mr. Rice advances two *Kimbrough* challenges to USSG § 2B1.1 and Loss Table, requesting variance or departure from any actual loss finding. Whether viewed as a intervening cause affecting loss, or 3553(a) factor warranting downward variance, or *Koon* factor, Frontier's conduct in permitting the advance payments on defaulted leases effects both loss calculation and bears upon the "sufficient but not greater than necessary sentence." Mr. Rice contends that an enhancement for sophisticated means should be rejected.

He contends that his advisory Guideline range is Criminal History Category I, advisory Guideline range 37-46 months and following appropriate consideration of Section 3553(a) factors and other departure/variance, requests a sentence of 24 months.

ARGUMENT

CALCULATION OF LOSS

THE PROXIMATE CAUSE OF ANY PORTFOLIO VALUE LOSSES FOR "DEFAULTED" LEASES WAS THE CUSTOMERS' FAILURE TO PAY.

Of the 2699 leases Frontiers in existence from C&J as of October of 2006:

a. approximately 100 are Royal Links leases, including advances totaling $875,108.00;
b. C&J has advanced payments on 285 leases totaling $2,725,999.00;
c. approximately 1794 are simply leases not in default; and
d. approximately 294 are DIF/SIF or other where C&J net advance exceed cash received by $1,274,734.00.

(Govt's Trial Ex. 174B- Rice Spreadsheet October 2006 & Govt's Trial Ex. 167- Lyon Summary)

"It is well established that for 'acts to constitute relevant conduct [for purposes of calculating the total loss attributable to the defendant], the conduct must be criminal.' Before a court must attribute losses to a defendant's fraudulent conduct, there must be some factual basis for the conclusion that the losses were the result of fraud." *United States v. Bernegger*, ___WL___, (5th Cir. Oct. 20, 2011)(loan loss excluded in absence of evidence defendant obtained them by fraud).

With regard to defaulted lessees, losses could potentially be predicted on a lease-by-lease basis only if the government can prove that Defendant Rice originated a particular lease or sold a particular lease to Frontier in a fraudulent manner. Whether viewed as a lack of criminal conduct perspective or proximate cause analysis, the true reason the vast majority of claimed losses on defaulted leases occurred is because the lessees failed to pay.

Thus, whether the court views C&J Leasing Corp.'s advance payment as part of the scheme to defraud or not, the advance payments do not cause any loss on this category of leases, however calculated. In fact, it is just the opposite. The advance payments on defaulted leases reduced the "loss."

ANY PORTFOLIO LOSS FOR "ROYAL LINKS" LEASES WAS NOT REASONABLY FORESEEABLE.

Ed McConnell met Defendant in 1989 when he represented him on a matter concerning a business partner. He began representing the Defendant's companies from 1994 to approximately September – October of 2006. (Trial Tr. pp. 1104-1105) In 2004 McConnell began pursuing legal remedy against defaulted leases from various C&J clients who had leased golf beverage carts. McConnell was to contact the lessees to attempt to cure the defaults, or to bring suit on behalf of C&J against those in default. A supplier called Royal Links had made entirely separate transaction agreements with these individual lessees to reimburse them for promotional advertising that would be placed on the golf beverage carts leased by the individual lessees from C&J entities. In October of 2004 Royal Links stopped making the advertising reimbursement payments to the lessees, which should have had no impact on the then separate leases from C&J for the actual equipment. The lessees, regardless of any other breach of contract or defects in the equipment, stopped paying C&J for the equipment. McConnell testified that some of the lessee golf courses continued to pay and some defaulted. (Trial Tr. pp. 1105-1106)

On October 4, of 2004, Royal Links mailed to these lessees correspondence that led the individuals to believe that they did not have to pay any of the third-party leasing companies. McConnell testified that the National Golf Course Owners Association posted a website containing information about the Royal Links "scam" against the leasing companies and the NGCOA solicited contributions from member golf courses to set up a litigation fund to pursue a class action against Royal Links. (Trial Transcript 1105-1107) Sufficient contributions were collected and the NGCOA retained the Chicago law firm of Lord, Bissell & Brook. McConnell

testified that he believed that a class action lawsuit was never filed because Royal Links declared bankruptcy in early to mid 2005. (Trial Tr. pp. 1110-1111). After being shown a copy of Exhibit R6, though, McConnell admits that it appeared to reflect that six actions in four different states had been filed, but he was unaware if these cases filed were actually class action suits. (Trial Tr. p. 1112) McConnell responded to Attorney General inquiries regarding consumer protection matters on behalf of C& J entities and Frontier. McConnell also responded to Andrew Gifford of Lord, Bissell & Brooks concerning C&J's position that the leases were enforceable. Gifford responded to McConnell's correspondence stating that it was his position that the C&J leases were not enforceable. (Trial Tr. pp. 1112-1114)

McConnell testified that during the time period of October 2004 while he was attempting to collect on the Royal Links defaulted leases for C&J entities, he was also representing Frontier Leasing Corp., and also attempting to collect on 24 of the defaulted leases they had originated in the Royal Links scandal. (Trial Tr. pp. 1115) (Def's Trial Ex. M7, M7B, M7C See e.g. *Frontier Leasing Corp. v. Bowlers Country Club*, 759 N.W.2d 813 (Iowa App. 2008)(Unpublished)("On August 26, 2004, Frontier Leasing Corporation, an Iowa corporation, and Bowlers Country Club, Inc., an Indiana company, entered into a lease agreement for a beverage cart that was to be provided by Royal Links USA, Inc....Frontier Leasing filed suit against Bowlers in Iowa on February 3, 2005, for breach of contract and demanding the full amount due under the lease."); *Frontier Leasing Corp. v. Treynor Recreation Area*, 776 N.W.2d 886 (Iowa App. 2009)(Unpublished); *Frontier Leasing Corp. v. Waterford Golf Assoc., LLC.*, 791 N.W.2d 710 (Iowa App. 2010)(Unpublished)(purchased from C&J entity in April of 2005).

McConnell started filing suit against the defaulted lessees of behalf of both C&J entities and Frontier Leasing on late 2004. (Trial Tr. pp. 1116-1124) In November of 2005 the first of these cases, *C&J v. Hendren Golf Management,* actually went to trial in the Polk County District Court. At the conclusion of trial, Honorable Judge Hutchison, in chambers, indicated to the counsel present that McConnell would probably win the case. (Trial Tr. p. 1129). Based on the comment from Hutchison, McConnell reported to Rice that he was going to win this case and then "ratchet down" on the collections and get the remaining lessees to pay C&J. (Trial Tr. p. 1129). However, in January of 2006 Honorable Judge Hutchison ruled that although there was no fraud or agency, the leases were in fact unconscionable and "all the brakes went on. Nobody paid on any of those leases, and that caused the C&J Leasing entities severe distress". (Trial Tr. pp. 1129-1130) McConnell took the *Hendren* case on appeal to the Iowa Court of Appeals and requested Honorable Judge Arthur Gamble to stay the remaining cases until the appeals court either overturned or affirmed the lower court decision. (Trial Tr. pp. 1130-1131)

McConnell was at that time convinced that because these were commercial contracts that Hon. Judge Hutchison had applied the wrong rule of law, and that C&J would prevail on the appeal. (Trial Tr. p. 1131) McConnell ended his representation of C&J in May of 2007 but continued to work these cases when Frontier took over the remaining leases from C&J (Trial Tr. p. 1131)

Meanwhile, Defendant Rice and Dave Lyon did discuss the Royal Links litigation (Trial Tr. pp. 498, 500, 504; Def's Sent Ex. OO3- Transcript of January 4, 2006 phone call) Dave Lyon knew that Royal Links leases bought in the April of 2005 purchase were likely to go bad. (Trial Tr. p. 499) It is apparent from the course of conduct and representation by Mr. McConnell that

the parties were optimistic that Royal Links would be collected. Due to the advance payment obligation Defendant Rice believed existed and the size of this portfolio, it was important to Defendant Rice to prevail in litigation.

Frontier was so optimistic, it appears, that given the advance payments procedure by C&J, Frontier took Royal Links Leases out of the "Warehouse Line' and placed them into Securitization V in April of 2006. (Def's Sent. Ex. C8 & KPMG H)(Trial Tr. p. 546- Dave Lyon Testimony) This offering occurs after the 2005 Warehouse "AUP" and in comparing the confirmation difference spreadsheet (C&J balance v. Frontier's balance as of 9/30/05) to the Warehouse line of leases sold to Securitization V for the leases with payments advanced by C&J spreadsheet (Def's Trial Ex. C8), the following is reflected:

-9 leases that were on the confirmation difference spreadsheet ((Def's Trial Ex. C8) were also on the Warehouse listing of leases sold to Securitization V.

-8 of the 9 leases had been Wells Fargo leases (originally put into Frontier's Warehouse Line).

-8 of the 9 were Royal Link leases (7 of the 8 were past due > 2 lease payments)

-All 9 of the leases were part of the final 13 leases added on by KPMG, out of order, at the end of the confirmation listing. Ten of the 13 added were Royal Link leases.

(Def's Sent. Ex. C8, KPMG H)

Since Frontier and KPMG determined that C&J's advance payments were reasonable (Trial Tr. pp. 909-912- Testimony of M. Starr), and Frontier and C&J shared identical legal counsel on Royal Link's collection matters who was giving optimistic advice (Trial Tr. p. 499- Dave Lyon Testimony), it is reasonable to conclude that neither Frontier or Mr. Rice foresaw that the Royal Links leases would be uncollectable. As Mr. Lyon put it, "from Frontier's perspective, that it's a collectible account because Allen Rice says that it is, and that's good

enough for me." (Trial Tr. pp. 513-14) One has to doubt whether that would have been good enough for Frontier's investors. Dave Lyon felt no need to notify Securitization V that Royal Links was in the tank and C&J was making the payments. (Trial Tr. p. 559 - Testimony of Dave Lyon)

On the 31st day of January, 2007, the Iowa Court of Appeals reversed the district court in *Hendren*. *C&J Leasing Corp. v. Hendren Golf Mgt.*, 728 N.W.2d 852 (Iowa App. 2007). *Hendren* was reversed in part. *C&J Vantage Leasing Co. v. Outlook Farm Golf Club, Inc.*, 784 N.W.2d 753, 756 n.3 (Iowa 7/2/10)("Given the substantial body of law dedicated to determining whether an agreement is a lease or a transaction with a security interest under the Uniform Commercial Code (UCC), and the different UCC sections creating default provisions based on the distinction, it is incorrect to suggest an agreement can be both. ***Hendren*** is therefore overruled in this respect."). It was not foreseeable to Defendant Rice how the Royal Links' litigation would unfold. *See Generally, Frontier Leasing Corp. v. Links Engineering, LLC.*, 781 N.W.2d 772 (Iowa 2010).

CLAIMED LOSS FOR LOSS OF VALUE OF PORTFOLIO IS DIRECTLY CONTRARY TO THE GUIDELINES AND FAILS TO ACCOUNT FOR CREDIT AGAINST SIF AND PIF LEASES

C&J remitted more monies to Frontier than retained.

Throughout 2006, Frontier wrote off millions of dollars of leases, including many of their own. (Def's Sent. Ex. KKK6) Defendant proffers that any lease number beginning 40000 was not a C&J originated lease. "During the year ended December 31, 2006, the Company incurred a net loss of $5,814,422, resulting in accumulated deficit of $4,742,318 at December 31, 2006, primarily due to a bad debt provision against lease financing receivables totaling $5,935,357." (Def's Sent. Ex. KKK7)

Meanwhile, when the C&J portfolio is put under the microscope, Frontier received more money from C&J on the SIF or PIF leases than was received by C&J. Frontier received, even though over time, the total pay-off amounts Frontier was entitled to. This is true mathematically even if Frontier does not show a particular SIF/PIF lease as having been paid. The reason is simply that the excess money found its way to Frontier as advances on defaulted leases.

These payments are a recognized "Credit Against Loss" under USSG § 2B1.1 cmt. 3 (E)(i).

For specific leases listed by Defendant Rice in September of 2006 (Govt's Trial Ex. 174B) the amount C&J paid in monthly payments on "Amounts Paid by C&J" exceeded by $1,274,734 the amounts "Cash Collected by C&J" per report prepared by Dave Lyon. (Govt's Trial Ex. 167) Exhibits 167 and 174B can be contrasted below:

When reading Govt's Ex. #167 there are six types of leases listed by section.

The “Final Totals” section is marked “Final Totals”. Underneath the “Final Totals” section is another line with 294 leases. This is a redundant subtotal from the information immediately above. The 294 leases is 200 + 89 + 2 + 3 listed immediately above. This line should not be added in. The total paid in excess of the amount received is $1,274,734.

The exhibit marked 174 has various sections.

The section marked 1794 leases has leases where everything went along in a normal way. No advances.

The 96 leases had minor adjustments made to the security deposit as would be normal in the business and have no impact on the analysis.

	Frontier Payoff	C&J Payoff
Leases where we have had additional sums added to the security deposit.	2,588,467.62	897,330.17
Leases where we have advanced payments :	3,036,923.24	5,762,922.31

Royal Links:	1,126,574.50	2,001,682.19
Total:	6,751,965.00	8,661,935.00
Difference	1,909,969.00	

The other sections are small and immaterial.

The difference between $1,909,969.00 on exhibit #174 and the $1,274,734 on exhibit 167 is primarily legal fees, penalties and residuals C&J normally added into payoffs.

At minimum for the SIF and PIF leases, Frontier has no loss. The $1.2M difference should be credited against the rest of the portfolio, i.e. pay-off leases deemed "unpaid", leases in default, and the miscellaneous "Campline", and re-writes, etc. [1]

This method is somewhat like Magistrate Judge Walter's approach in Frontier versus BB&T litigation (SDI No. 08-cv-00077). With regard to tort damages for C&J's misappropriation of defaulted leases (DEF), settled in full leases (SIF) and paid in full leases (PIF), the court held that BB&T's measure of damages was not the portfolio value of the leases, rather the difference between the cash collected by C&J and the amount paid by C&J. (Def.'s Sent. Ex. B4 Magistrate's Order, SDI No. 08-cv-00077, Doc. # 56, pp. 39-40, fn 18)

Although the Government has ascertained that the first pay-off retained was in 2003, Defendant Rice contends that the "advance payment" duties to Frontier began as early as 1999. Defendant contends that Frontier garnered over a million dollars in advance payments by C&J between 1999 and 2003. (Def's Sent. Ex. KPMG-B- KPMG 3/31/03 audit workpaper: "However, to ensure a steady stream of income from Frontier, if a customer does not make payment, C&J pays Frontier for these missed payments. These funds are debited to an account

[1] **When C&J did a "re-write" Frontier retained security interest in the equipment because C&J would issue or file a new UCC listing the secured party "Wells Fargo Trust" (Def's Sent. Ex. ____)**

entitled 'Frontier Security Deposit Advances.'"). Government Trial Exhibit 215 supports this, reflecting $1,593,645 advanced to Frontier as of March 31, 2003.

Frontier's "write-off" loss less recoveries is contrary to USSG §2B1.1, Application Note 3 (D)

The government's analysis is directly contrary to the Guidelines, which direct that:

(D) Exclusions from loss -- Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based upon agreed-upon return or rate of return, or similar costs.

USSG §2B1.1, Application Note 3 (D)

The gross loss figure taken from Frontier's loan value write-off even after excluding the SIF and PIF amounts, is an erroneous starting point because it includes, at minimum, some measure of agreed upon return or rate of return or interest payments. Rather than "writing off" the challenged leases, at minimum the stream of payments on a lease-by-lease basis should be discounted to some present value. *United States v. Peel*, 595 F.3d 763, 772 (7th Cir. 2010).

ALTERNATIVE LOSS CALCULATION PREMISED UPON FRONTIER'S LOAN COST.

Although Defendant Rice contends *infra* that his net "gain" is the appropriate measure of loss given the complexity of the formulae that might be employed to attempt to calculate loss, an alternative loss calculation that does not offend USSG §2B1.1, Application Note 3 (D) can be identified. This method is not without flaws as well.

Because the Guidelines recognize that loss of portfolio value and expected return is not an appropriate measure of actual loss, one reasonable measure to calculate loss would consist of:

1. Calculate Frontier's initial investment or cost for each of the defaulted/cancelled, re-written leases, less

2. C&J payments made on that lease (USSG § 2B1.1 cmt. 3 (E)(i)), less

3. Total payments made by customers on that lease to date, and/or value of collateral repossessed by Frontier (USSG § 2B1.1 cmt. 3 (E)(ii)), less

4. Reserve value applicable to each lease.

Defendant contends that using this formulae, Frontier's loss is less than $1,000,000.00. However, there is a problem with this method of calculating actual loss. Frontier's conduct in permitting advance payments constitutes an independent or intervening cause of their losses on this block of the portfolio.

CLAIMED ACTUAL LOSS FOR DEFAULTED LEASES WAS CAUSED BY INDEPENDENT OR INTERVENING CAUSE OR FACTOR.

The amount of loss, whether intended or not, must be reasonably foreseeable. USSG § 2B1.1 cmt. n.3(A)(i)-(iv). In addition, loss may be caused by an independent and intervening cause. The sentencing court must attempt to differentiate what loss stems from offense conduct and was loss is caused by independent factor. *United States v. Rutkoske*, 506 F.3d 170, 178-79 (2nd Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005).

There is undisputed proof in the record supporting the inference that Defendant Rice believed that he was required to advance lease payments in excess of the security deposit amounts to Frontier. It is further evident at as of approximately 2004 in conjunction with failings in the Royal Links line of leases, this advance pay practice began to take its toll on cash flow at C&J. Defendant Rice's continued use of monies in the C&J account (which included pay-offs commingled therein) to fund shareholder loans for day-trading caused other short-term problems. It is clear that a major impetus for retaining pay-offs was to fund the advance pay responsibilities Defendant Rice believed he was required to make.

Clear evidence exists to conclude that more than one Frontier representative was put on notice by Defendant Rice and KPMG that C&J was making advance payments far in excess of the security deposit amounts. Frontier knowingly acquiesced in this practice regardless of whether they knew the specific leases and percentage of portfolio Defendant Rice was advancing payments on behalf of lessees.

Trial and Sentencing evidence can be summarized as follows:

a. KPMG's Michelle Starr was the manager of both the audits of Frontier and C&J, and the special "Agreed Upon Procedures" audits of C&J portfolio during the course of audits of Frontier.

b. As early as 2004, Defendant Rice informed KPMG during C&J audits that C&J was advancing lease payments in excess of the security deposit "per agreement' with Frontier. (Def.'s Trial Ex. C8, Sent. Ex. KK15, KK2B),

c. KPMG knew that Defendant Rice was "booking" the advance payments through the "4302' entry in his accounting system. (Trial Tr. p. 890)

d. From 1999 to 2004, KPMG conducted the annual audit of the C&J entities. For C&J Leasing, KPMG required that Defendant Rice prepare "confirmations" of amounts due on leases selected at random by KPMG. KPMG noted in work papers that C&J was making payments on behalf of lessees in advance of the security deposits. (Def.'s Sent. Ex. U1, U2, K12)

e. In addition to the annual C&J entities audit, KPMG conducted special agreed upon procedures (AUP) audits of randomly selected leases purchased by Frontier and serviced by C&J for each of the applicable securitizations. (Trial Tr. p. 866, Govt's Ex. 240, 242) 75 confirmations were sent out for each of the securitizations. (Trial Tr. p. 905) This occurred through 2005. For the AUP KMPG picked the sample from lists provided by Frontier. (Trial Tr. p. 898) Ms. Starr testified that this was "attribute sampling." (Trial Tr. p. 877) During this AUP confirmation process, the advance payment agreement or practice was readily observed (See Def.'s Trial Ex. C8, KK15, KK2B, Govt's Ex. 218) as an "obligation of C&J" declared by Frontier. (Trial Tr. p. 904) Ms. Starr testified that

the AUP confirmation information was turned over to Kathleen Wilson at Frontier. (Trial Tr. p. 907)[2]

f. **Ms Starr testified that KPMG and Frontier "discussed" the source of payments issue and it was declared "reasonable", thus there was no reason to mention C&J's advance payments to the securitizations. (Trial Tr. pp. 910-11)**

g. Def.'s Trial Ex. C5 documents as of November 16, 2005 that AUP reflected advance payments by C&J on several leases taken from the sampling of confirmations. On lease #19303, C&J had made 29 payments. Frontier's claim that they thought that C&J was only to advance to the value of security deposits is patently false. See also Def.'s Trial Ex. C5B.

h. Def.'s Trial Ex. C6 is the spreadsheet Defendant Rice sent Frontier in 2005 reflecting the amounts "we have advanced against the security deposit or more."

i. Nearly five years after the claimed "discoveries" by Frontier, Dave Lyon disclosed at least one instance of advance payment agreement. (Def.'s Sent. Ex. PPPP2) Frontier did not take the “Griffin” leases out of the applicable securitization, it is believed. (Def Sent Ex. PPP4) Furthermore this disclosure occurred after FBI interview of Suzie Schoofs. (Def Sent Ex. PPPP3)

j. Def.'s Sent. Ex. K11 says that for the AUP "KPMG will select 30 contracts at random and verify that the payments received with respect to each C&J contract for the months of March, June, September and December were forwarded to the Trustee each Tuesday after its receipt by C&J." Obviously, if C&J is advancing payments to the Trustee, C&J is not "receiving" or properly forwarding some payments from the lessee, because they are not paying.

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[2] **The government and Frontier (KPMG claims they did not know the purpose other than what they reported up the chain. e.g. Def's Sent. Ex. KKK11, Trial Tr. p. 868) would have the court believe that the purposes of these Agreed Upon Procedures was merely to determine if Frontier's numbers (amounts paid and owing on leases) were the same as C&J's, as Ms. Starr put it, "regardless of source". (Trial Tr. p. 909) This claim is belied by KPMG's work papers. (Def.'s Sent. Ex. K11) Because Defendant Rice prepared confirmations reflecting his numbers, it is obvious that he believed that the test sample sought to determine what the lessees had actually paid, rather than merely what numbers Frontier had on their books. By its very definition, the "attribute" is obviously the status of payments made by the lessee. See "Attribute Sampling", *Barron's Accounting Dictionary*, www.answers.com. Furthermore, the attribute sampling results in a statistical estimation of the accuracy of the particular attribute in the entire population of leases sold to Frontier, which according to testimony was approximately $40,000,000.00 at any given time. *Id*. (Trial Tr. p. 894) In statistics, this is the Bayesian method of statistical inference. When one knows the percentage of red jelly beans in a sample, you can mathematically arrive at a degree of confidence that the entire jar is equal to the probability distribution reflected by the sample.**

k. Def.'s Sent. Ex. K12 is the AUP Sample for Securitization 1 performed on March 31, 2004, noting eight leases in which "C&J payment directly to Frontier as customer did not pay. PDW Allen Rice and Lisa Negrete, there is a requirement that even if the customer does not pay within 30 days, C&J is still required to send money to Frontier."

l. Def.'s Sent. Ex. KKK3 is KPMG's analysis of C&J's 4300, 4301, 4302 accounts and other booking entries for the March 31, 2004 audit of C&J. KPMG knows that: "4302: represents payments made to Frontier out of the security deposit. This may also include payments made to Frontier which exceed the security deposit amount." Def.'s Sent. Ex. KKK8 contains the identical entry as of March 31, 2006 when performed by the successor auditing firm.[3]

m. Frontier's Securitization Offering Memorandum for Securitization V in April of 2006 denotes that C&J is a subservicer with Frontier. In the provision for "SERVICING THE CONTRACTS", the document provides in part - "In addition, the Subservicer will be obligated to make certain advances (the "Servicer Advances") on Receivables due but not received. The Subservicer will be obligated to make advances provided the Subservicer has been able to determine in good faith that such advance is ultimately recoverable." (Def.'s Sent. Ex. F15 p. 76)

n. **Frontier had advance payment obligations with third parties including "BB&T". (Def.'s Sent. Ex. B1) In the BB&T litigation, which included leases sold to Frontier by C&J, Frontier sought as a credit or recovery, advance payments made to BB&T on behalf of lessees in default. (Def.'s Sent. Ex. B4 Magistrate's Order, SDI No. 08-cv-00077 Doc. #56, 2/23/10)**

Servicer advances obligation is not an invention by Defendant Rice. C&J had to come up with the money at the end of the month. (Def's Sent. Ex. AA2) Neither was "zeroing up" leases during bulk purchases. (Def's Sent. Ex. AA1)(1999 bulk purchase spreadsheet). Financially it

[3] **Defendant Rice never deprived KPMG of any data during their audits. (Trial Tr. p. 883). Despite the claim of inattention to the security deposit accounts and other asset accounts, the audit work papers reflect that KPMG did evaluate the content of 4300 and 4302 and other entries. (Def.'s Sent. Ex. AA3, AA4) The sample "GENERAL LEDGER TRIAL BALANCE" available to KMPG and successor reflect exactly what entries are made for which leases. (Def.'s Sent. Ex. AA5, AA5, AA6, AA7, AA7B, A8) In addition to the entries themselves, these general ledgers contain obvious acronyms such as "SIF", "PIF". It is readily apparent that these entries are not regular security deposits being booked to the liability account (4300) and asset account (4302)**

worked to C&J's detriment. Under the Master Sales and Servicer Agreement (MSSA) with Frontier there were limits as to how much Frontier could charge against the reserve Account. *Infra pp. 27-28.*

It is a fundamental principle of common law that a person intends the natural consequences of their acts. While this evidence did not wholly exculpate Defendant Rice at trial, Frontier's knowledge and acquiescence in C&J advancing payments in excess of the security deposits had the following effects:

1. Authorization of continuance of the practice;
2. Enhanced a good faith belief on Defendant Rice's part that C&J had to continue to make good on bad loans; and
3. By permitting the advance payment policy and practice, Frontier's acts caused any claimed "losses" on that part of the portfolio consisting of leases in default as of October 1, 2006.

   What is left is the "Campline" category of leases and "re-writes".

GIVEN DEFENDANT'S EXPRESS DISCLOSURES TO FRONTIER IN NOVEMBER OF 2005 THAT LESSEE PAYMENTS WERE BEING ADVANCED AGAINST THE LOAN PORTFOLIO, ALL LEASES ORIGINATED AFTER THIS DATE THAT FALL WITHIN THE 2699 POOL OF LEASES SHOULD BE EXCLUDED FROM ANY LOSS CALCULATION.

It bears repeating that because Defendant Rice prepared confirmations reflecting numbers which would, depending on the lease, vary from Frontier’s balances, it is obvious he believed that the AUP tested what the lessees had actually paid.

The relationship between Frontier and C&J and its principals involved sophisticated arms-length transactions. Frontier's principals, many of them CPA's, were sophisticated themselves, with years of experience in the leasing business. Furthermore, as the government

points in the indictment and trial, Frontier was beholden to the "investors" in the lease pools which included large blocks of C&J leases.

If as the government contends, the advance payment practice is "fraud", or "default event" and other violations of the written agreements and responsibilities under the servicing agreements, then Frontier was put on notice and did nothing about it. Frontier's silence at this point in the chronology speaks volumes.

The confirmation process in the Fall of 2005 could have been a stop-the-merry-go-round event. The advance payments observed in the test leases was ignored. (see e.g. Def's Trial Ex. KK9-B, KK10KK13, KK16; Def's Sent. Ex. KK23, KK24, KK25, KK26) Specific leases that C&J was making advance payments were put into Securitization V by Frontier. (Def's Sent. Ex. KPMG H; Def's Sent. Ex. C8; Def's Trial Ex. C5; Def's Sent. Ex. C5-1, Def's Trial Ex. C5-B, C6, C8; Def's Sent. Ex. KK18, KK21)

Post-trial analysis of Frontier/C&J Audit and AUP work papers created by KPMG further cements that Defendant Rice had to make advance payments on leases. Some of these exhibits are defense trial exhibits. Most are new. These audits and AUP are very comprehensive. (e.g. Def's Sent. Ex. KPMG-B2, D4, D5, D6, D9, D11, D12, D13, D14, E2, E3, E4).

KPMG is so informed by C&J in the March 31, 2003 audit. (Def's Sent. Ex. KPMG-B). Another work paper from March 31, 2003 analyzing account #418 says: "Furthermore, as leases continue to be paid off, the deposits associated with those leases increase as a % of the balance." Def's Sent. Ex. KPMG-B1A work paper from March 31, 2004 audit of C&J analyzing "Security Deposit" accounting accounts, says in part: 4302: Represents payments made to Frontier out of

the security deposit. This may include payments made to Frontier which exceed the security deposit amount." (Def.'s Sent. Ex. KPMG-A1).

When auditing C&J, KPMG had C&J prepare confirmations. C&J prepared confirmations reflecting C&J's numbers. Exceptions were discussed with Rice. (Def's Ex. KPMG-C5) Agreed Upon Procedures were conducted for Frontier upon C&J leases annually using the same confirmation process for each securitization as well as for C&J's annual audits. (Def's Sent. Ex. KPMG-D, D1, D2, D8, D10, E, E1). Sentencing Exhibit KPMG-C7 (March 31, 2004 annual audit of C&J) is but one notation resulting from confirmations that "& C&J payment directly to Frontier, as customer did not pay. PDW Allen Rice and Lisa Negrete, there is a requirement that even if customer does not pay, within 30 days, C&J is still required to send money to Frontier." So when KPMG is reporting to Frontier and investors that all is well (Def's Sent. Ex. KPMG-C1, C2, C3, D3) they do so after reconciling the evidently non-issue with Frontier as Ms. Starr admitted at trial (and Frontier refused to admit) (Def's Sent. Ex. KPMG-D16 "if discrepancies were noted, KPMG worked with Ardie Cade to review the lease online to verify the payment activity supporting the remaining balance."). .

The confirmation process from 2004-2006 commonly identified many months, if not sometimes years behind on payments, and perhaps even paid off. (e.g. Def's Sent. Ex. KPMG-D7, D17, E7, E9, E19, E20, E22, F6, F7, F8, F9 etc.). When KPMG would compare the payment detain with C&J's confirmations, they would use *Frontier's master payment histories*. (Def's Sent. Ex. KPMG-E22, E23, E24, E25, 27, E28, G1, G6, G7, G8, G9 etc.). Somebody makes hand-written notations on the payment histories noting the amount of C&J payments. KPMG *knew from Frontier's records* which lessee payments were made by C&J on behalf of the

lessee. Kathleen Wilson at Frontier was the contact person for this data. (Def's Sent. Ex. KPMG-D18) Frontier's master payment histories contain "Check History" which sometimes clearly document C&J check numbers. (Def's Sent. Ex. KPMG-E28, E29) KMPG knows, with the help of Frontier which checks are C&J payments. (Def's Sent. Ex. KPMG-G7) KMPG figures it out even if it is one C&J payment. (Def's Sent. Ex, KPMG-G9) The Royal Links leases sometimes reflect discontinued payments in late 2004 and early 2005. (See e.g. Def's Sent. Ex. KMPG-G13)

For the AUP conducted in or about December 31, 2005, for Frontier Warehouse Funding Corporation II which listed numerous Royal Links leases, a notation states in part: *"KPMG identified variances between the C&J confirmations balances and balances maintained for these leases on the Frontier system. See <C1-A-2> for explanation of variances."* (Def's Sent. Ex. KPMG-E18, F5) Ex. KPMG-E18 and F5 were observed post-trial in KPMG's counsel's office. Both work papers <C1-A-2> are missing from the KPMG files. Counsel for KPMG, Fred Beaver's written response is Def's Sent. Ex. KPMG I.

All claimed loan portfolio losses, including new business were not proximately caused by Defendant's "acts or omissions." USSG § 1B2.3(a)(3). Courts uniformly interpret that provision to establish a causation requirement. See, e.g. *United States v. Hicks*, 217 F.3d 1038, 1048 (9th Cir.)(collecting cases). The declaration C&J's conduct was "reasonable" is an intervening or superseding cause.

If the measure of the loss is the difference between the amount of credit a bank extends based upon false representations and amount that it would have extended had it known the truth, *See, e.g. United States v. Miller*, 588 F.3d 560, 566 (8th Cir. 2009), then the reverse should be

true causation-wise. If Defendant Rice has disclosed the "fraud", or "default" event, and the now informed "victim" takes no action and endorses or ratifies the conduct, then Frontier has failed to both mitigate damages and the affirmative endorsement or inaction constitutes an intervening cause.

GIVEN THE COMPLEXITY OF LOSS CALCULATION, THE COURT SHOULD USE DEFENDANT'S NET GAIN FROM THE OFFENSE

Having conducted a lengthy jury trial, the court is in an advanced position to assess the evidence and attempt to make a reasonable estimate of the loss in this case based upon a preponderance of the evidence. *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009). From the outset to the end, the government emphasized Defendant's "day-trading" using loans from C&J to stockholder, sometimes but not always contemporaneously with C&J receipt of "pay-offs." The government's focus on this evidence should focalize as well on the Loss Amount at sentencing. This is particularly true where the undisputed evidence is that Defendant made payments to Frontier (Dave Lyon Report summarizing 1680 leases by branches) totaling $1,569,900 more than "cash Collected by C&J". (Govt's Trial Ex. 167, See also dovetailing Exhibits 209-14) In fact, it was the enormity of his payments that made the math "unsustainable" as S/A Agent Kohler testified at trial.

"If the loss cannot reasonably be determined, a 'court shall use the gain that resulted from the offense as an alternative measure of loss.'" *Id.* (citing USSG § 2B1.1 Application Note 3(B)). The clear testimony is that while Defendant lost vast sums day-trading, he also remitted back to C&J vast sums. As of September of 2006, Defendant's outstanding loan balance to C&J was approximately $800,000, and certainly less than $1,000,000.00.

Given lack of evidence of misconduct preceding 2000, Rice's receipt of loans to shareholder of approximately $990,000.00 as of June of 2000 was not unlawful or necessarily a precursor to the general fraud scheme found by the jury. This $990,000.00 is thus pristine. As of October of 2006, the loan balance had grown to approximately $1,600,000.00. (S/A Rump Trial Tr. 145-150)

Accordingly, the "gain" from the general fraud of receiving payoffs, commingling payoff monies with C and J Leasing Corp's general account, and taking more loans from C and J Leasing Corp which were used to fund his "day trading" is approximately $600,000.

Accordingly, the net gain at the time of discovery is the appropriate Loss Amount to be utilized in computing his advisory Guideline range. *See United States v. Hance,* 501 F.3d 900, 909 (8th Cir.2007) (“The trial court must use a rational calculation method that yields a reliable estimate of the loss; however, the methodology does not have to be mathematically precise.”)

For loss of more than $400,000.00 but less than $1,000,000.00, Defendant's 2B1.1 Base Offense Level would be 21.

THE COURT SHOULD DECLINE TO IMPOSE AN ENHANCEMENT OF TWO POINTS FOR SOPHISTICATED MEANS.

So-called "White Collar Crime' or economic crime have inherent sophistication, particularly in the business context. The statute of conviction requires proof of a "scheme" so the offense itself factors in sophistication.

The indictment and jury instructions set forth the various purported means in which the scheme was carried out or perpetrated. Given the jury's general verdicts, the court does not know what exactly the jury decided the scheme consisted of. The jury may well have taken the

government upon on their proposition that the retention of the pay-off proceeds on the four pled counts was a sufficient scheme and was done so with intent to defraud. The jury may have been undecided on whether advance payments on defaulted leases in excess of the security deposit was done with criminal intent. They well have decided that Frontier was generally accepting of this practice and Mr. Rice believed he had to advance payments consistent with his various disclosures to Frontier and KPMG.

Defendant Rice contends that neither the making the payments or retaining pay-offs and making their lease payments reflect sophistication of the type warranting a two point adjustment. This is an accountant's receivable case. The diversion of "AR", temporarily or permanently by the "Servicer" would be the most common, most foreseeable risk Frontier could contemplate in this business transaction. The second most common risk would be the funding and purchase of leases that were non-existent, not culminated or were re-written without Frontier's knowledge.

In the diversion context the money has to go somewhere. In this case it was commingled and borrowed and invested in Ameritrade activity. Much of it returned to C&J for transmittal to Frontier. *Contra, United States v. Jenkins*, 578 F.3d 745, 751 (8th Cir. 2009)(The sophisticated-means enhancement is proper when the offense conduct, viewed as a whole, "was notably more intricate than that of the garden-variety [offense]. Repetitive and coordinated conduct, though no one step is particularly complicated, can be a sophisticated scheme.")(Citation omitted).

A scheme which involved paying lease payments for the three categories of leases in the 2699 portfolio and failing to disclose their true condition, globally or lease-by-lease is hardly sophisticated. At best, Defendant Rice's actions reflect a sophisticated attempt to cause Frontier no losses while trying to maintain the viability of C&J Leasing Corp.

DEPARTURES/VARIANCE

FRONTIER'S CONDUCT ATTRIBUTED DIRECTLY TO THE COURSE OF CONDUCT CULMINATING IN THE GUILTY VERDICTS

a. The advance payment obligation lead directly to the retention of pay-offs.

Defendant incorporates by reference the trial testimony, closing argument and sentencing evidence and argument contained herein. In addition, he contends the following.

Available evidence more than supports the inference that Defendant Rice believed that he was required to advance lessee payments in excess of the security deposits. While funding his appetite for day-trading and the advance payment obligation, Defendant retained pay-offs to which Frontier was directly entitled to.

The monthly pattern of sending @f checks to Frontier, regardless of whether Dave Lyon "saw" the actual checks, is further corroboration. The confirmation process at least as early as December of 2005 establishes that KPMG and Frontier, presumably Kathleen Wilson, could figure out from Frontier's master payment histories which checks were C&J's for lease payments.

Moreover, When C&J would go to prove-up judgments against lessees in default, they would provide data to their counsel which reflected the C&J payments advanced to Frontier. (Def.'s Sent. Ex. PPP2, PPP3) The advance practice was not hidden information.

Additionally, Frontier had a right to obtain all data and information that KPMG acquired during the annual audits of C&J under the terms of the 1999 MSSA.[4] (Def's Sent. Ex. E1) Even if C&J retained some confidentiality or KPMG perceived such (AICPA Code of Professional

[4] Other than circa October of 2006 when litigation was likely, Frontier never exercised their unilateral rights to inspect at C&J, even after the claimed "discoveries" in March of 2006.

Conduct would preclude the disclosure of confidential information without consent of the client(s) - Rule 301), KPMG information was derived from audit of C&J for planning the extent and procedures on the audit of Frontier, including the AUP for the C&J leases in the securitizations. AT Section 201 Agreed-Upon Procedures Engagement: 201.40 Knowledge of Matters Outside Agreed-Upon Procedures- ".... if matters come to the practitioner's attention by other means that significantly contradict the subject matter.....the practitioner should include the matter in his or her report".

The "attribute" Frontier and its investors wanted KMPG to audit at C&J was whether the C&J's payment histories matched Frontier's. KMPG and Frontier knew that the reason test samples match was because C&J was making the payments.

b. The terms of the master sales and service agreements were not followed.

The government presented evidence that the agreement between Frontier and the C&J entities worked like this:

1. C&J would originate a lease;
2. Frontier would fund the purchase of the equipment;
3. C&J Special Purpose Corp. would sell the lease or bulk leases to Frontier;
4. C&J would service the leases, retaining authorized servicing fees;
5. Frontier would retain a 7% reserve for each lease sold;
6. If a lease went into default, C&J was supposed to charge that lease against the reserve, and C&J would have to buy the lease back.

Effectively, the government asserts that the transaction was "with recourse". Thus the government contends that Defendant Rice may not be entitled to any set-off or credit for the reserve monies Frontier retained against claimed loss on default or paid-off leases. The

government further contended that the agreement burdens were solely upon Mr. Rice. Under the terms of the written agreements, each of these propositions is faulty.

Under the terms of the various Master Sales and Servicing Agreements (MSSA) the transactions were without recourse. (Gov't Ex. 37, 40, 41, 42, 43, 44) Moreover, C&J had "no duty to maintain the Reserve Account at any specified level." (Gov't Ex. 37; Def's Sent. Ex. E1)

Under the 1999 MSSA, if a lease went into default:

1. Frontier had the discretion (not C&J) to charge the lease against the Reserve Account;
2. Frontier had the discretion ("may") to charge against the Reserve Account "a sufficient number of leases as to cause there to be less than 2 percent of the total portfolio in leases with payments more than 30 days past due;

(Gov't Ex. 37; Def's Sent. Ex. E1)

Although some leases were charged against the reserve, in reality we know that Frontier would send C&J the aging reports and specific leases they wanted payments on by the end of the month. (Def's Trial Ex. O23, O25, P4, P7, P9, P13, P18) It is also true that some form of advance payment agreement existed and Frontier had their own advance payment responsibilities to at least BB&T (Def's Sent. Ex.B1)("Prior to any lease becoming 60 days past due, the Servicer is to make "Servicer Advances" up to an advance equal to the delinquent lease payment due under the contracts....").

The original Master Sales and Servicing Agreement contained a "Guaranteed Yield" provision, which Dave Lyon testified they never followed. (Trial Tr. p. 429-430)(Gov't Ex. 37)(Def.'s Sent. Ex. E1) The Fourth Amendment to the MSSA eliminated the never followed "Guaranteed Yield" provisions. (Gov't Ex. 40)(Def's Sent. Ex. E2) In addition, the Fourth MSSA says that the maximum amount chargeable to the Reserve Account is "(b) 5% of the initial

aggregate implicit principal of the 2002-1 Securitized Pool (the 2002-1 AIPB)". This sets the limit on how much C&J obligation could be charged against the reserve under that securitization. Moreover, the Fourth Amendment specified that C&J had no right to repurchase leases in this pool except by paying prepayment penalty under the specified terms.

The Fifth Amendment (Gov't Trial Ex. 41) modified the charge against reserve language to specify:

Section 8, Items Chargeable to the Reserve Account, is hereby amended by adding new section 8(h)

> (h) Notwithstanding anything to the contrary contained in this Agreement, with regard to Leases falling within the 2004-1 Securitized Pool, the buyer may only charge to the Reserve Account an aggregate amount not to exceed the lesser of (a) the amount set forth in this Section 8; or (b) 5% of the initial aggregate implicit principal balance of the 2004-1 Securitized Pool ("200401 AIPB"). Buyer will provide Seller with the dollar amount of the 2004-1 AIPB as soon as practicable.

The Sixth Amendment to the MSSA effective April 5, 2005 pertaining to the "FWFCII Securitized Pool" does contain repurchase language if the lease is delinquent more than 120 days. (Gov't Trial Ex. 42) This "repurchase' requirement is conditioned upon application of complicated mathematical formulae utilizing the "FWFCII Discount Rate."

No trial evidence was presented that any requests for repurchase were done according to any contract formulae at least prior to April 5, 2005. Sometimes C&J bought back leases, sometimes they just kept making the customer's payments. Furthermore, it is a gross mischaracterization to say that the reserve amount was a dollar-for-dollar credit against the entire lease portfolio balance.

Trial evidence established that for the majority of the leases, the "lockbox" process was supposed to be utilized. This did not occur as specified and Frontier knew it because they cashed millions of dollars of C&J checks for lease payments.

c. The parties engaged in a course of conduct at variance with the strict terms of contracts.

Defendant Rice is an extremely intelligent businessman who operated a complicated and risky business. He designed much of the company's software and accounting booking entries. He knew that KPMG audited both C&J entities and Frontier. He would have known that what KPMG learned in their audits of C&J was not verboten when KPMG conducted the special AUP upon C&J for the securitizations when auditing Frontier. Moreover, he knew it was the same people, particularly Engagement Manager Michelle Starr and Concurring Reviewer Mike Wiskirchen.

Defendant Rice informed KPMG of advances beyond security deposits and expressly informed Frontier of that fact in November of 2005. He informed KPMG in multiple years via accurate "confirmations" that his numbers varied from Frontier's when determining for the test samples the actual customer payments. When this issue was discussed with Frontier in 2005 by KMPG, this conduct is approved as "reasonable". No objections are raised. Frontier creates Securitization V chock full of Royal Links leases, some of which were "confirmed" as in default in December of 2005. The advance payment practice continues. In fact, Defendant continued making advance payments up through September of 2006.

An executory contract "may be effectively modified by one party with the consent of the other provided it does not violate the law or public policy. Stated conversely one party to a contract cannot alter its terms unilaterally or without assent of the other party. However the

requisite consent may be either express or implied from acts and conduct." *Davenport Osteopathic Hospital Ass'n v. Hospital Service, Incorporated of Iowa,* 154 N.W.2d 153, 157 (Iowa1967). "Although the written contract states that any modifications must be in writing, a written contract may be modified by a subsequent oral contract having the essential elements of a binding contract. Consent to the modification may be either express or implied from acts or conduct. (Citations omitted) When a party to a contract modifies the scope of the work by requesting "extras" or additional work, the party must pay the fair and reasonable value of the extra work. *DeMuth Landscaping & Design v. Heggestad,* 461 N.W.2d 354, 356 (Iowa Ct.App.1990) (contract implied from the evidence when contractor hired to landscape north side of lakeshore bank but then requested additional landscaping of south side of bank); *S. Hanson Lumber Co. v. DeMoss,* 253 Iowa 204, 208, 111 N.W.2d 681, 684 (1961) (concluding that agreements made after the execution of a written contract which modify or add to it are valid and enforceable)." *Seneca Waste Solutions, Inc. v. Sheaffer Manufacturing Co., Inc.*, 791 N.W.2d 407, 412 (Iowa 2010).

Objectively and legally under Iowa contract law, the course of advance payment conduct, regardless of whether Frontier knew the extent, was ratified and approved. By permitting Defendant Rice to engage in this practice and ratifying it, Frontier directly contributed to the conditions that made C&J's advance pay practice unsustainable.

KOON DEPARTURE

Mr. Rice asks for serious consideration for a "downward departure" under Section 5K2.0 and a resulting "sufficient but not greater than necessary" sentence of one year and a day

pursuant to 18 U.S.C. Section 3553(a), (a)(1), (a)(2) considerations, and the permissible information authorized by 18 U.S.C. Section 3661. The basis for this departure as follows:

A. Mr. Rice's obvious motives for engaging in conduct the jury determined was fraud.

B. Frontier's acts and acquiescence which contributed to decisions by Mr. Rice resulting in a verdict of guilty.

C. Mr. Rice's personal character outside of his business relationships and community involvement.

D. Mr. Rice's dedication to his family and employees.

E. Mr. Rice's age and health problems.

F. The loss of face and shame in the community brought on by the fraud convictions.

G. The lapse of time between relevant offense conduct and the time of sentencing.

H. Substantial probability that Mr. Rice will not recidivate.

The combination of factors in this case establish “extraordinary” or “atypical” circumstances taking the case outside the “heartland” of the Advisory Guidelines. A combination of factors or "totality" of circumstances may warrant a sentence outside the guideline range, even if none standing alone warrant a departure. USSG § 5K2.0, *Commentary. United States v. Whitehorse*, 909 F.2d 316, 320 (8th Cir. 1990); *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993). When a case presents "atypical" features, downward departures may be granted. USSG. § 5K2.0.

While it is not "atypical" for a fraud victim to miss subtle or perhaps, in hindsight, obvious markers suggesting misconduct, the advance payment activity in this case is open and obvious, and the practice was known to Frontier. This feature, in combination with the other factors takes this case out of the heartland.

KIMBROUGH CHALLENGE

If the court finds that actual loss exceeds $2,500,000.00, Defendant contends the loss table in USSG § 2B1.1 overstates the seriousness of the offense for a defendant who intended no loss and otherwise recommends a Guideline sentence inconsistent with 18 U.S.C. § 3553(a). See *Kimbrough v. United States*, 552 U.S. 85 (2008). To address this consequence, Defendant requests downward variance from any advisory Guideline range.

The Guidelines are intended to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." USSG CHAPTER ONE, PART A- INTRODUCTION AND AUTHORITY, The Statutory Mission. The purposes of the Sentencing Commission is to establish Guidelines that:

> (A) assure the meeting of the purposes of sentencing set forth in section 3553(a)(2) of Title 18, United States Code.

28 U.S.C. § 991.

The Sentencing Commission, "in establishing categories of offenses for use in the guidelines" was required to take into account mitigating and aggravating circumstances of the offense. 28 U.S.C. § 994 (c)(2). The court is required to fix a sentence that avoids "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Defendant has two objections to the 2B1.1 "Loss table" and USSG Chapter 2B scheme and requests that the court vary from the advisory range pursuant to *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). First, the scale is not predicated upon empirical data tying the

increments to the "purposes" set forth in section 3553(a). Thus, the unscientific scale fails to further the basic purposes of criminal punishment."

Second, because USSG 2B1.1 fails to differentiate between "intended loss" offenders and "actual loss" offenders creating an unwarranted disparity in the context of blameworthiness, risk of recidivism and deterrence.

LOSS TABLE

The Loss Table in USSG §2B1.1(b) is not tied to empirical data justifying the incremental increases in a manner which reasonably assesses individual blameworthiness, risk of recidivism and deterrent effect. The Loss Table is bottom loaded. A defendant receives an eight point increase if his loss exceeds $5,000.00 but is less than $120,000.00. This scale is not tied to empirical data that the perpetrator of an $119,000.00 fraud is six levels more blameworthy and future risk than a $5,001.00 perpetrator. Nor can it be said that in a particular case that "deterrence" is furthered by the same six more levels. The $5,001.00 fraud may very well more devious, harmful or grander in hopeful scale (test run), than the loss of $119,000.00 in a dissimilar fraud scheme, particularly if that offender intended no loss.

Furthermore, the individual loss increments from (A) to (F) are not math increases associated with data tied to Section 3553(a)(1) factors or (a)(2) purposes other than policy grounds that economic offenders were not getting enough prison time, particularly in comparison to drug offenses. What they are tied to is Congressional view that "white collar criminals" were not sentenced to sufficient incarceration. Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988). Accordingly, the deterrence purposes were insufficient as a national policy. *Mistretta v. United States*, 488 U.S.

361, 375 n.9 (1989)(citing S.Rep. No.98-225, at 76(1983); *United States v. Ebbers*, 458 F.3d 110, 129 (2nd Cir. 2006)("{T}he Guidelines reflect Congress' judgment as to appropriate national policy for [white-collar] crimes..."); *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006)(noting the importance of the "minimization of discrepancies between white and blue-collar offenses.").

The Commissions' empirical analysis appears to be upon Pre-guidelines sentencing practices and use of loss amount in determining sentence length. See, e.g., *United States v. Hoffecker*, 530 F.3d 137, 200-01 (3rd Cir. 2008); USSG § 2B1.1, Background ("loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline."). Congress continued to direct adjustments in the Loss Table. USSG App. C. amendments 596, 637, 647, 653, 655 and 665. Amendment 647 added Levels "O" and "P" to the Loss table. None of the others affected the Loss Table. A later amendment added an additional point to the base offense level in USSG §2B1.1(a) to correspond with statutory maximum increases.

Amendment 617 consolidated 2F into 2B and amended the Loss Table to its present form (with the exception of "O" and "P"). The amendments to the Loss Table "provide substantial increases in penalties for moderate and higher loss amounts..." Amendment 617, **Reasons for Amendment**. See also, Ellis, Steer, Allenbaugh, *At Loss for Justice Federal Sentencing for Economic Crimes, Criminal Justice*, Vol. 25, Number 4, Winter 2011 (Tracing history of fraud guideline and sentencing data for economic offenses). The Commission further stated:

These higher penalty levels respond to comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that the offenses

sentenced under the guidelines consolidated by this amendment under-punish individuals involved in moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness under other guidelines.

Amendment 617, **Reasons for Amendment.**

The Commission did not identify in the Amendment any sentencing data supporting the under-punishing that existed under the prior Loss Table or the "offenses of similar seriousness." It is apparent that the Commission had concerns over the disparity between the sentences in economic crimes and drug offense sentences. Nor did the Commission appear to have responded to Congressional directive.

The Commission addressed the perceived necessity for higher Loss Table at the Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12-13, 2000, George Mason Law School, U.S. Sentencing Commission. In his keynote address, Deputy Attorney General Eric Holder (presumably one of the "others" referred to in Amendment 617) had this to say:

> It is significant that the median prison sentence for fraud in fiscal year 1999 was just 14 months, while drug trafficking it was 51 months. Now while drug trafficking, obviously, creates many societal harms that affect the health and the safety of our nation and warrant substantial punishment, many fraud offenses create significant harms as well, including non-monetary ones.... We urge the Commission to amend the loss tables so that the sentencing guidelines more accurately capture the magnitude and the seriousness of white collar crime. The problem of underpunished economic offenses is not limited to fraudulent activity, but extends to many new technology offenses, something that is increasingly clear as we gauge the broad impact that these crimes have on citizens, business, and government.

In their plenary session, the Commission discussed the need for deterrent effect for economic crimes and whether there was an economic crime/drug offense disparity. Day One-

Plenary Session III, *The Nature and Severity of Punishment for Economic Crimes; Determinants of Offense level Seriousness and Offender Culpability,* Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12-13, 2000, George Mason Law School, U.S. Sentencing Commission. The Commission noted that Criminal Law Committee of the Judicial Conference "has an interesting paper they put out on some of these issues, indicating that the fraud and theft guidelines are too lenient relative to street crime and that the slope of the loss table is not steep enough." Id. at 64.

Fiscal year 1999 sentencing statistics are not "empirical study", much less data supporting the proposition that higher Guideline ranges for economic offenses creates a higher deterrence level. It appears that the Loss Table in its present form was driven by a "get tougher" policy, particularly when contrasted with a wholly different genre of crime - drug trafficking. Given that, the court may express in a particular case, disagreements with and variance from the advisory Guideline range on its own policy grounds that the Guidelines application in the instant case results in overstatement of blameworthiness or seriousness of offense conduct. As commentators have said:

> It is time that the fraud Guideline is revisited by the commission. First, the commission should conduct a serious, scholarly analysis of how well the guideline achieves the purposes of sentencing and goals of the Sentencing Reform Act. Second, the commission needs to conduct a comprehensive comparison of sentences in relation to offense seriousness within the fraud guideline, in comparison to other white-collar offenses, and then in comparison to other offenses generally.

Ellis, Steer, Allenbaugh, *At Loss for Justice Federal Sentencing for Economic Crimes, Criminal Justice*, Vol. 25, Number 4, Winter 2011.

As with the case of the crack/powder ratio, where Chapter 2B1.1 Loss Table is not adequately supported by research and institutional factors, the district court has discretion to vary

based upon policy disagreement. While a "get tougher" policy may be within the Commissions institutional role, that policy is given less deference when the policy is not supported by measured research and data.

IDENTICAL TREATMENT OF DISPARATE OFFENDERS

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometime magnify, the crime and the punishment to ensue." *Pepper v. United States*, ___ U.S. ___, 131 S.Ct. 1229, 1239-40 (2011). Given the necessity to fashion an individualized sentence under Section 3553(a)(1) and fulfils the purposes of Section 3553(a)(2), uniform application of the Loss Table to "fraud" offenders can result in disparity intended to be avoided by the Guidelines . *United States v. Parris*, 573 F. Supp.2d 744, 754 (E.D.N.Y. 2008); *United States .v Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).

"Punishment must fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949); *Pepper v. United States*, ___ U.S. ___, 131 S.Ct. 1229, 1235 (2011). In deciding on punishment, a defendant's motive for committing the offense is an important and traditional sentencing factor. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). "Motive", meaning "reason for action" is an old Anglo/French word, and "motivus" in Medieval Latin. A clear distinction exists between "motive" and "intention" in the context of elements of the offense. Binder, Guyora, *The Rhetoric of Motive and Intent*, Buffalo Criminal L. Rev. (6) 2002. In the sentencing context - "nature and circumstances of the offense", intention is akin to motive. Motive is clearly a key component of nature and circumstances of the offense. Motive or

intentions are Section 3553(a)(1) factors, and the punishment for such must be intermeshed with the purposes of Section 3553(a)(2).

The Chapter 2B Guidelines and Loss Table make no distinction between offenders who intend the loss versus those who do not. Stated another way, no distinction is made between a defendant who intends harm where another defendant does not. The Guidelines merely require the court to fix the highest loss from those two choices. USSG § 2B1.1, cmt. Application Note 3(A). While the Commission has exercised its institutional role, somewhat, in analyzing the definition of loss, See, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines*, Report to the Commission, U.S. Sentencing Commission, 1998. Defendant is unable to identify scholarly research or data comparing the "purposes of sentencing" to the motivations of disparate economic offenders.

Placing the same defendants within the same mathematical equation (loss amount) when their motives or intentions are polar, results in a sentencing disparity - the same advisory Guideline range for disparate "nature of the offense." For Section 3553(a)(1) & (2) purposes, there is clear distinction between the fraud defendant whose motive and intent was to part others from their money permanently, as opposed to another who misappropriates money and collateral value of another with the hopes that the financial math will result in no loss to the victim. Furthermore, the Guidelines treat identically two disparate intended consequences (cause loss v. intend no loss), blameworthiness is the same so long as the loss is the same.

However, in the abstract, it would appear axiomatic that for purposes of nature of the offense, characteristics of the offender, recidivism risk etc. that the fraud who is caught while the loss is less is more blameworthy than the defendant whose unintended actual loss is greater. Yet

the latter's advisory Guideline range is higher. Although, sentencing judges "have broad discretion to consider various kinds of information" *Pepper*, ___U.S. at ___, 131 S.Ct. at 1240, the Chapter 2B scheme makes no distinction between a magnifying intent and a mitigating one.

Chapter 2B's failure to permit distinction between a defendants malevolent/less malevolent intentions is a sufficiently compelling reason to find policy disagreement with the advisory Guidelines.

> [Policy] disagreement is permissible only if a District Court provides sufficiently compelling reasons to justify it. A sufficiently compelling explanation is one that is grounded in the § 3553(a) factors....If a district court concludes that [the § 3553(a)] objectives are not achieved by a sentence within the ...Guideline range, and that belief is driven by a policy disagreement with the ...provision, then the court must explain why its policy judgment would serve the § 3553(a) sentencing goals better than the Sentencing Commission's judgment.

United States v. Merced, 603 F.3d 203, 221 (3d Cir. 2010).

The lack of distinction Defendant complains of here does not have the hallmarks of the Sentencing Commission fully acting in its "important institutional role." *Kimbrough*, 552 U.S. at 109.

Given the at best, vagrancies of the Loss Table, and at worst, near irrationality, the court has the authority to disagree with application of the Loss Table as the predominant sentencing factor in this case. It cannot be seriously questioned that the offender who obtains $100,000 in a roof repair scam should be considered differently than a businessman who misappropriates accounts receivable pledged to another in effort to keep afloat a business he deems economically viable enough that no loss will be suffered.

And where, as here, Defendant's motive is to intend no loss to Frontier or their proxies, the court has discretion to reject the "actual loss" amount on policy disagreement under *Kimbrough* and fix a sentence proportional to Defendant's motives. Such a sentence would not be extraordinary under Section 3553(a) and a non-Guideline sentence need not be justified by extraordinary circumstances. *Gall v. United States*, 552 U.S. 38, 47 (2007). Only by variance can the court assure the meeting of the purposes of sentencing set forth in Section 3553(a)(2).

THE SUFFICIENT BUT NOT GREATER THAN NECESSARY SENTENCE UNDER SECTION 3553(a)

CHARACTERISTICS OF THE OFFENDER

The following are descriptors delivered by people who know Mr. Rice the best. They are witnesses to his family, church and community work. This is not a case where Mr. Rice was being "generous with other people's money." He was generous with deed and action.

Upstanding citizen. Very dedicated to extended family, relatives. Has always attended family events, weddings, funerals, reunions, graduations and been very supportive of his nuclear and extended family.

Always living within his means, never ostentatious. If bought new cars – kept them for 10 years. Always humble and never boastful or proud.

He has always acted in good faith in all of his personal and business dealings.

Well respected, loyal, possessed honesty and integrity – devoted husband and father.

Honest, trustworthy and hard-working – always there for his wife and children. Has raised three daughters and a son, all of whom are college educated, respected and contributing members of society. Always made time for his children in their formative years, attending school events, sporting events, piano lessons, church. Came home every night for family dinners, even if he had to return to work afterwards. Always there to help neighbors with mowing, snow shoveling, and other things that some of the more elderly neighbors could not do for themselves. Impressed

upon his children that helping neighbors was a given, that everyone in the family would participate and that it was "non-negotiable".

Strong moral character and unwavering moral compass.

"If one needs help, one can always count on Allen."

"Allen was raised in a background where a man's word and a handshake is worth more than a written contract….trustworthy, honest and a man of his word."

Attentive to others, offering Christian support in its many forms to those who are suffering. Always there when loved ones passed away, or were ill or injured, lending emotional support and helping with tasks and chores.

Founded the Habitat for Humanity chapter at Valley High School, fundraisers and community projects for the Boy Scouts, Girl Scouts, Juvenile Diabetes Research Foundation, printed company t-shirts and sponsored employees on JDRF walks.

Helped his employees, advancing raises lump sum to help them realize their dreams of buying homes; paying employees full time wages when they were fighting cancer or other serious and debilitating illness, even though they could not work full time; was nominated by an employee and received award for Small Business Employer of the Year, presented by the Des Moines Business and Professional Women's group.;

Generous donations to Church and Goodwill. If Allen and his family no longer had need for things, instead of having yard sales – they donated to charity and Goodwill.

Allen is very trusting – and may have just executed poor judgment in having oral rather than written agreements.

"His actions were not motivated by any malicious desire to cheat or steal, but the result of his attempts to fix mistakes he made."

A good man who made bad decisions…poses no danger or threat to the public.

"cannot even imagine that he would knowingly do anything that would be against the law"

"His conviction is an aberration in an otherwise exemplary life."

Compassion and understanding are prominent qualities in their (Rice's) day to day life.

A man who has the courage to explain the situation to his extended family in person. He was very matter-of-fact and did not make excuses or place blame.

Allen is…an upstanding, ethical and honest businessman who practices Christian ethics.

"I have always known Allen to be completely honest in word and deed."

Has been teaching and leading a Bible study at Covenant Presbyterian Church since 1995. "Allen humbly leads the discussions and encourages other class members to participate. We trust Allen to teach us the way we should lead out lives."

Is committed to God and his church.

Valley High school Academic Booster Club. Active participant in the Valley High School Community Committee – in the expansion of Valley High School – an ongoing project.

NATURE AND CHARACTERISTICS OF THE OFFENSE

The light of lights looks always to the motive, not the deed, the shadow of shadows on the deed alone. William Butler Yates

Sentencing is retrospective action which assesses the features of a person's conduct. In assessing blameworthiness, the court chooses among the range of punishment appropriate for the wrongfulness of the defendant's conduct, based in part upon the individual characteristics of the offender and his crime.

A rational interpretation of the global trial and sentencing evidence is that Mr. Rice hand-built a complicated business that provided necessary economic opportunities for lessees and jobs for his employees. Like his customers who obviously rented rather than bought, the C&J entities needed cash. The C&J entities did not have the cash to fund their own originations. Wells Fargo rid themselves of Mr. Rice when the Royal Links portfolio began to go sour in later 2004. (Def's Sent. Ex. ___) On the Vantage side Liberty Bank funded the transactions. On the C&J Leasing side, Frontier paid for the equipment and in return bought the leases.

Advancing payments by C&J was not new to Frontier. C&J did this with Commercial Federal, formerly Liberty Leasing. (Def's Sent. Ex. A) At some point in time, which Mr. Rice

proffers as tied to 9/11, cash flow began to diminish. In what his wife finds to be severely out of character, Mr. Rice increased the day-trading activity. There is undisputed evidence that the strict terms of the agreements with Frontier were not followed. There is undisputed evidence that Mr. Rice believed that he had to make lessee payments and he did so in the millions.

It is reasonable to conclude that his motives were to save all that he had hand-built and that the math would cause no loss. It is apparent Defendant Rice sought sanctuary in the market. Day-trading "became a popular pursuit during the frenetic internet boom of the late 1990's, when the emergence of online trading companies brought the stock market into every Internet-equipped home and office." "What is Day Trading." www.allbusiness.com.

The denial all around (See e.g. Trial Tr. pp. 501-504-Testimony of Dave Lyon) associated with the Royal Link portfolio fiasco is one of the fingerprints of the motive. The day-trading activity using "loans" from C&J accompanied by and failure to remit the pay-offs is evidence of desperation the jury likely deemed the scheme to fraud.

RISK OF RECIDIVISM & PROTECTION OF SOCIETY

The unvarnished truth is that Clarence Allen Rice is in ruination. With presumably little more than a newspaper article in hand the Iowa Department of Revenue pounded for tax on $8,000,000.00. The remains of his personal holdings have yet to be picked. Depending upon the amount of restitution, he will have no seed money. What financier would lend him any money? He has lost whatever business reputation he had. His is 63 years of age with significant health issues, particularly his heart.

The details from the trial, including those suggesting some mitigation and motive distinct from a for-profit schemer, were immediately lost in the fog of time. The present state of his

reputation is that he stole "$8,000,000.00." Whether he feels none, some, or a lot of shame, he has been shamed. The life he and his wife intended to live on retirement and savings is dream damned.

His supporters describe an entirely different universal view of Mr. Rice. The court can comfortably predict that the man who emerges, if he does, from prison will be the man his friends and supporters know. His conviction, age, and potentially his health, remove him from the opportunities of the business world.

His life revolved around family and his business. He will never have the latter again.

GENERAL & SPECIFIC DETERRENCE EFFECT

While the court can evidently decide that the most important 3553(a) factors are general and specific deterrence, *United States v. De-Los Santos,* 650 F.3d 1157 (8th Cir. 2011), Mr. Rice urges the court evaluate these factors, in balance with other 3553(a) factors. The court has substantial latitude in determining how much weight to give these factors, *see United States v. Ruelas–Mendez,* 556 F.3d 655, 657 (8th Cir.2009*)*.

On the "general" factor side the effect of a greater versus lesser sentence is difficult to measure. In one analysis, U.S. District Judge Judge James S. Gwin concluded that "[t]he Guidelines and congressionally directed ranges are significantly higher than community sentiment recommends." Gwin, James S., Judge N.D. Ohio, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values*? 4 Harv. L. & Pol'y Rev. 173, 195 (Winter 2010)("retributive purposes should dominate sentencing, and we should ensure that such punishments approximate society's values regarding just punishment."). Judge Gwin's test sampling in Ohio may thus suggest that if community sentiment is lower than

the advisory Guideline level, the same would be true of deterrent effect the community would deem reasonable. Just punishment must require that the court attempt to serve this factor in the abstract while sentencing a real person. The utilitarian concept of general deterrence in contrast with retribution is not without debate:

> According to [Immanuel] Kant, no societal benefit could justify a sentence untethered to a defendant's conduct; a punishment used as a utilitarian tool to improve future societal conditions would be unjust. In contrast, [Jeremy] Bentham argued that a punishment used as anything but a utilitarian tool to improve future societal conditions would be unjust...

Gwin, James S., Judge N.D. Ohio, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values*?, 4 Harv. L. & Pol'y Rev. 173, 177 (Winter 2010)

"Specific deterrence discourages the particular offender from future unlawful conduct." *Id*. at 176. Mr. Rice is an intelligent man. He sat through a trial which was a detailed autopsy of his business activities. He has undoubtedly figured out that conduct placed under the microscope of a bright Assistant U.S. Attorney and two FBI agents may lead to inferences that incriminate him. Furthermore, the totality of the circumstances of which Defendant Rice will be presented with upon release from prison wholly tempers the likelihood of recidivism. He will have endured past and continuing depletion of financial resources. He will bear his stain in the community, a Scarlet Letter of "F" for fraud, if you will. While it may be speculative as to whether his health will improve or deteriorate in prison, he will not be any younger.

In this case, whatever "less" is versus "more", less is sufficient general and specific deterrence, and sufficient but not greater than necessary sentence to fulfill statutory purposes.

DEFENDANT'S REQUESTED SENTENCE

Defendant Rice contends his advisory Guideline range should be calculated as follows:

Base Offense Level, USSG § 2B1.1(a)(1)	7
Specific Offense Characteristic, USSG § 2B1.1(b)(1)(H) (>$400k-<$1M)	14
Total Offense Level	21

Criminal History Category I, advisory Guideline range 37-46 months.

Based upon the Section 3553(a) arguments herein and one or more of the requested departure/variance grounds, Clarence Allen Rice, requests that the court impose a sufficient but not greater than necessary sentence of 24 months.

RESTITUTION

Clarence Allen Rice requests that the court order no restitution in this matter given Frontier's conduct in this matter “he who seeks equity must do equity” and the amount of excess advance payments exceeding amounts "received" by C&J documented by Dave Lyon. Alternatively, he submits that restitution should be consistent with any net actual "gain" of no more than $600,000.00. He further requests ancillary hearing at a later date to litigate available asset issues including exempt, non-exempt, spousal claims and other considerations.

Respectfully submitted,

BROWN & SCOTT, P.L.C.

/s/ *F. Montgomery Brown*

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Original filed.

CERTIFICATE OF SERVICE

I hereby certify that on 3rd Day of November, 2011, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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