IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

UNITED STATES OF AMERICA :	
:	**CRIMINAL NO. 1:13-CR-12-WLS**
v. :	
:	
STEWART PARNELL, :	
MICHAEL PARNELL, and :	
MARY WILKERSON :	
:	
Defendants. :	
:	

GOVERNMENT'S BRIEF IN SUPPORT OF PRE-SENTENCE REPORTS

COMES NOW the Government, by and through undersigned counsel, in accordance with Fed. R. Crim. P. 32(f) and the United States Sentencing Commission, Guidelines Manual ("Guidelines" or "U.S.S.G.") § 6A1.2 (2014), and presents this Government's Brief in Support of Pre-Sentence Reports (PSRs) issued by the U.S. Probation Office regarding Defendants Stewart Parnell, Michael Parnell, and Mary Wilkerson (Wilkerson). The Government submits that the U.S. Probation Office correctly calculated the Sentencing Guidelines adjusted offense level for Stewart Parnell to be 47 with criminal history category I, which results in a life sentence Guidelines range; for Michael Parnell, to be adjusted offense level 37 with criminal history category I, which results in a 210 to 262 months Guidelines range; and for Wilkerson to be adjusted offense level 30 with a criminal history of I, which results in a 97 to 121 months Guidelines range.

I. BACKGROUND

On September 19, 2014, a jury found Stewart Parnell guilty on all but one count; Michael Parnell guilty on all counts except those involving the introduction of adulterated food into interstate commerce; and Wilkerson guilty on one of two counts of obstruction as alleged in the

Indictment. (Doc. 285). On May 28, 2015, this Court denied, in total, Stewart Parnell, Michael Parnell, and Wilkerson Motions for Judgment of Acquittal pursuant to Rule 29(c), Motions for New Trial, and Motions to Dismiss. (Doc. 397). On July 1 and 2, 2015, the Court held an evidentiary hearing on Stewart Parnell, Michael Parnell and Wilkerson's objections to the PSRs. At the hearing, the parties presented evidence for the Court, to be considered in conjunction with the evidence previously presented at trial. At the conclusion of the hearing, the Court granted the parties' request file supplemental briefs regarding the PSRs.

II. OBJECTIONS AND COMMENTS TO PRESENTENCE REPORTS

The Government has no objections to Defendant Stewart Parnell's, Defendant Michael Parnell's or Defendant Mary Wilkerson's Presentence Investigation Reports ("PSRs"). However, Stewart Parnell and Mary Wilkerson presented extensive general objections to the offense conduct sections of their respective PSRs. To the degree that any of those objections are related to facts that are applicable to the guidelines calculations, they are relevant. However, the vast majority of objections are general grievances regarding factual statements or claims of factual omissions; they are nothing more than an attempt to change the facts that were presented at trial and that the jury found in deciding to convict all three Defendants. Much of what the Defendants presented at the evidentiary hearing was a misplaced attempt to call into question the jury's verdict.

The Court's order denying the defendants Motion for Judgement of Acquittal already shut the door on that attempt. In its ruling, the Court stated the evidence at trial was "overwhelming" and "amply supports" or "supports" the defendants' convictions. (Doc. 397). Defendant Stewart Parnell and Wilkerson's general objections, by their very nature, improperly ask this Court to call into question the guilty verdict in this case. "[A] district court cannot use

the post-trial sentencing process to call a jury's verdict into question." *See United States v. Schlaen,* 300 F.3d 1313, 1318 (11th Cir. 2002), *quoting United States v. Costales,* 5 F.3d 480, 488 (11th Cir. 1993).

"At sentencing, the court may accept any undisputed portion of the presentence report as a finding of fact." F.R.Cr.P. 32(i)(3)(A). When asserting objections to a PSR, defendants must do so with precision and clarity. To the degree any of the defendants' objections do not meet this threshold standard, the objection must fail. *See United States v. Beckles*, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PS[R] are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity."); *United States v. Kicklighter*, 346 Fed. App'x. 516, 519 (11th Cir. 2009).

Furthermore, "a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. §6A1.3 cmt. (2014).

> Evidentiary requirements are more relaxed during a sentencing procedure . . . . In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

United States v. Docampo, 573 F.3d 1091, 1099 (11th Cir. 2009); U.S.S.G. §6A1.3(a) (2014).

A. <u>The Advisory Guidelines Were Properly Calculated</u>

Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 264 (2005), the Guidelines are now advisory, though "the district court remains obliged to consult and take into account the Guidelines in sentencing" and to make an accurate guidelines calculation. *United States v. Crawford,* 407 F.3d 1174, 1178-79 (11th Cir. 2005) (internal quotations omitted). Per the Guidelines, "the court may consider relevant information [for

determining proper sentencing guidelines range] provided that the information has sufficient indicia of reliability to support its probably accuracy. U.S.S.G. § 6A1.3(a) (2014).

i. Stewart Parnell's, Michael Parnell's, and Mary Wilkerson's Adjustment for the Number of Victims

According to the Section 2B1.1 Application Notes in the Sentencing Guidelines, a "victim" is:

> (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

U.S.S.G. § 2B1.1 (2014).

a. Stewart Parnell

Defendant Stewart Parnell objected to paragraph 38 of his PSR (Doc. 355 at 13), which increases his base offense level by six levels because the offense involved 250 or more victims. U.S.S.G. §2B1.1(b)(2)(C) (2014). Stewart Parnell concedes that the government introduced sufficient evidence of 31 financial victims (*i.e.*, PCA's corporate customers), but did not establish that any individual sustained bodily injury as a result of Stewart Parnell's conduct. (Doc. 405 at 9). This is simply wrong. Dr. Ian Williams, Chief of the Outbreak Response and Prevention Branch at the Centers for Disease Control ("CDC" or "Center"), testified on September 8, 2014, that the PCA outbreak "included 714 ill people reported to PulseNet from 46 states and included 166 persons who reported being hospitalized," making it "one of the largest multi-state outbreaks [the CDC has] ever investigated. (*See* Excerpt of Williams testimony Tr. at 53, Sept. 8, 2014).

The evidence linking those 714 people to the PCA outbreak is clear, overwhelming, and uncontradicted. Dr. Williams explained that, in order for an individual to be reported to

PulseNet and identified by the CDC as a victim of the PCA outbreak, several steps would have had to have been taken: (1) The sick individual would have had to visit his or her doctor or go to a hospital; (2) the sick individual would have had to have provided a stool sample to the healthcare provider; (3) the healthcare provider would have had to have completed a culture of the individual's stool sample; (3) the healthcare provider would have had to have diagnosed the individual with salmonellosis, based on the stool sample culture and symptoms presented; (4) the healthcare provider would have had to have forwarded the culture on to a PulseNet certified laboratory, where the certified technicians would have had to have performed pulsed field gel electrophoresis ("PFGE"); (5) the certified technician would have had to have uploaded the resulting PFGE pattern to the PulseNet database; and (6) a CDC technician trained to read PFGE patterns would have had to have reviewed the sick individual's PFGE pattern and confirmed that the pattern matched the patterns identified as being associated with the PCA outbreak. *Id.* at 12-15.

Notably, Dr. Williams further testified that, given the rigorous process for a sick individual to be reported to PulseNet as a victim of a foodborne illness, the CDC estimates that for every case of salmonellosis that is reported to PulseNet and confirmed by the CDC, there are approximately 30 other cases of salmonellosis where the sick individual does not complete the process—*e.g.*, the individual doesn't take the step of providing a stool sample or chooses not to seek medical help. *Id.* at 56-57. In the case of the PCA outbreak, Dr. Williams stated that the CDC estimated that the over 700 reported illnesses may represent "as many as 20,000 ill people across the United States." *Id.* Thus, as Dr. Williams stated, "[the CDC is] seeing the tip of the iceberg." *Id.* at 15.

Dr. Williams emphasized the thoroughness of the investigation of the PCA outbreak, and the reliability of the CDC's determination that the outbreak was linked to PCA. He testified at length about the three pillars of evidence in foodborne outbreak investigations—*i.e.*, epidemiological evidence, traceback evidence, and evidence of lab testing of a suspected food source. *Id.* at 20-42. In the case of the PCA outbreak, all three pillars of evidence strongly linked the outbreak to PCA. *Id.* What is more, there was additional robust evidence linking the outbreak to PCA, including the findings by FDA and the Georgia Department of Agriculture during their inspection of PCA and the fact that once all of the PCA products had been recalled, the outbreak stopped. *Id.* at 43- 44. This overwhelming evidence led Dr. Williams to testify that, in the "hundreds and hundreds" of outbreaks he's investigated, "[t]his is among the strongest evidence I've ever seen linking specific food products with a company." *Id.*

Additionally, Alan Maxwell, the Claims Administrator for the civil claims against PCA in the bankruptcy proceedings, testified at the Pre-Sentence Hearing on July 1, 2015, about a number of victims who sustained bodily injury as a result of Stewart Parnell's conduct. Mr. Maxwell testified at length regarding the painstaking process he undertook to evaluate the 145 civil claims submitted to his office for compensation. "[T]here are 17 boxes of health department and medical records associated with this stuff that took my office months to review." (Pre-Sentence Hr'g Tr. at 34-63, July 1-2, 2015; *see also* Gov. Sentencing Exs. 1-6). Mr. Maxwell stated that 123 of the claims were ultimately accepted under the eligibility criteria, qualifying them for some amount of compensation.[1] (Pre-Sentence Hr'g Tr. at 45-46; *see also* Gov. Sentencing Ex. 6). Mr. Maxwell further testified that, of the 145 claims submitted, the records establish that there were nine death claims. "[O]ur internal documents are absolutely clear we had nine death claims." (Pre-Sentence Hr'g Tr. at 57; *see also* Gov. Sentencing Ex. 6).

[1] Mr. Maxwell further testified that his office only reviewed 118 or 119 of the 123 claims that were approved.

Moreover, two federal judges relied on and endorsed the results of Maxwell's thorough and fair claims evaluation process. Mr. Maxwell also testified that his claims evaluation process was reviewed by a federal magistrate judge in the Western District of Virginia, who stated in an order that "Maxwell's Process Was Fair to All Claimants." (Pre-Sentence Hr'g Tr.at 51-53; *see also* Gov. Sentencing Ex. 4). Mr. Maxwell further stated that a federal district court judge in the Western District of Virginia adopted the magistrate judge's recommendations regarding the PCA bankruptcy claims. (Pre-Sentence Hr'g Tr. at 53; *see also* Gov. Sentencing Ex. 5).

Lastly, the New England Journal of Medicine article, *Salmonella Typhimurium Infections Associated with Peanut Products*, which was admitted as Government Exhibit 7 during the July 1, 2015 hearing, is yet more evidence linking the 714 reported illnesses and nine deaths to PCA. Elizabeth Cavallaro et al., *Salmonella Typhimurium Infections Associated with Peanut Products*, THE NEW ENG. J. OF MED., Aug. 18, 2011 at 601-10. No fewer than 24 epidemiologists, scientists, and foodborne outbreak experts signed off on this article, which was published in an exceptionally well-regarded peer-reviewed scientific journal. *Id.*

b. Michael Parnell

Defendant Michael Parnell objected to paragraph 39 of his PSR (Doc. 385 at 12), which increases his base offense level by four levels because the offense involved 50 or more victims. U.S.S.G. §2B1.1(b)(2)(B) (2014). Defendant Michael Parnell claims that the government introduced evidence of only one individual who became ill as a result of eating Kellogg's crackers made with the PCA peanut paste Michael Parnell sold to Kellogg's. Recall that the conduct supporting Michael Parnell's convictions rested on his fraudulent sale of tainted peanut paste to Kellogg's. (Doc. 416 at 5)

Presumably, Defendant Michael Parnell refers to Ponise Youngblood, who was a victim of the PCA Salmonella outbreak, and who testified at trial on September 3, 2014, that she ate Kellogg's Austin peanut butter crackers prior to falling ill. The government submitted ample supporting documentation for Ms. Youngblood's case, including the Austin peanut butter crackers wrapper, showing that Ms. Youngblood consumed product made from PCA lot 8260 peanut paste. The government introduced FDA test records for PCA lot 8260 peanut paste, showing that the paste tested positive for *Salmonella Typhimurium* and that the PFGE pattern for these isolates of Salmonella matched the PCA outbreak strain. (*See* Gov. Ex. 782-A & 8260-16).

Defendant Michael Parnell fails to acknowledge, however, that Dr. Ian Williams testified that, based on the CDC's epidemiologic studies of the PCA outbreak, there was a "statistical association with eating Austin and Keebler brand peanut butter crackers" and that "Austin and Keebler brand peanut butter crackers made by Kellogg's contained peanut paste that was produced by the Peanut Corporation of America." (Excerpt of I. Williams testimony Tr. at 33, Sept. 8, 2014). Moreover, Al Maxwell testified at the Pre-Sentence Hearing on July 1, 2015 that, after his thorough review of the 145 claims submitted for compensation, he determined that there were "over 100 Kellogg['s] related claims." (Pre-Sentence Hr'g Tr. at 63; *see also* Gov. Sentencing Ex. 6).

c. Mary Wilkerson

Mary Wilkerson objected to facts contained in paragraph 26 of her PSR regarding the number of PCA outbreak victims. (Doc. 384 at 9). These facts are relevant to paragraph 43 of Wilkerson's PSR. *Id.* at 18. Wilkerson argues—without any basis or specificity whatsoever—that most of the 714 "known or alleged registered victims who filled out a registration on the CDC website after the fact . . . . were unproven, undocumented and simply someone claiming to

have become ill with nausea and could not possibly be verified with laboratory testing . . . ." (Doc. 402 at 5).

Wilkerson's objection contains a fantastic mischaracterization of the overwhelming evidence admitted at trial (and at the July 1, 2015 hearing), and, in a demeaning and hard-hearted insult, ignores the suffering that these victims must have endured to have led them to health providers. As discussed at length in Section (*i*)(a), above, the detailed testimony by Dr. Ian Williams about the many involved steps that must be taken in order for the CDC to recognize a reported illness as legitimate, and as linked to a particular outbreak, demonstrates the convincing link between those 714 people and the PCA outbreak. In direct contrast to Wilkerson's claims, someone simply claiming to have become ill with nausea would, in fact, have had to have been so ill that he or she went to a doctor or hospital and had his or her stool sample analyzed to determine that they (a) had salmonellosis and (b) had one of the PFGE strains of salmonellosis identified as the outbreak strains before they could be counted as a victim of the PCA outbreak. Furthermore, as Dr. Williams explained, the number of reported illnesses vastly understates the *actual* number of illnesses related the PCA, which he puts at over 20,000 people. If just one of the steps necessary for the CDC to report an individual as suffering from an outbreak is not taken, that sick individual would not be deemed by the CDC as a victim related to this outbreak.

In addition to Dr. Williams' testimony, the testimony of Al Maxwell about his meticulous review of the civil claims against PCA refutes Wilkerson's claims that the victims cited in the PSR are "unproven" or "undocumented." *See* Section (*i*)(a), above for detailed discussion. And, if that is not enough, the NEW ENGLAND JOURNAL OF MEDICINE, perhaps the most influential medical journal in the country, contradicts Wilkerson's baseless claims that the number of

illnesses and deaths associated with the PCA outbreak have not been verified. *See* Section (*i*)(a), above for detailed discussion.

* * *

In conclusion, given the extensive testimony by Dr. Williams and Alan Maxwell coupled with corresponding exhibits that discuss the outbreak investigation and the civil claims evaluation process, there is copious evidence to support the conclusions in the Defendants' PSRs setting forth the numbers of victims (both illnesses and deaths) associated with the PCA outbreak.

ii. Stewart Parnell's, Michael Parnell's, and Mary Wilkerson's Adjustment for the Loss Amount

"The district court needs only to make a reasonable estimate of the loss amount." *United States v. Medina*, 485 F.3d 1291, 1304 (11th Cir.2007); U.S.S.G §2B1.1 cmt. 3(C) (2014). In determining the loss calculation under the Guidelines, "the loss is the greater of actual loss[2] or intended loss[3]." U.S.S.G. §2B1.1 cmt. 3(A) (2014); *United States v. Manoocher Nosrati–Shamloo*, 255 F.3d 1290, 1291 (11th Cir. 2001) (per curiam). "[I]n calculating the amount of loss, the Guidelines require a district court to take into account 'not merely the charged conduct, but rather all "relevant conduct," in calculating a defendant's offense level.'" *United States v. Foley*, 508 F.3d 627, 633 (11th Cir.2007) (quoting *United States v. Hamaker*, 455 F.3d 1316, 1336 (11th Cir.2006)).

a. Stewart Parnell

Defendant Stewart Parnell objected to paragraph 37 of his PSR (Doc. 355 at 13), which increases his base offense level by 26 levels because the offense involved more than $100

[2] "Actual loss means the reasonably foreseeable monetary harm that resulted from the offense." U.S.S.G. §2B1.1 cmt. 3(A)(i) (2014).

[3] "Intended loss refers to the monetary harm that was intended to result from the offense." *Id.* at cmt. 3(A)(ii).

million but less than $200 million of loss. U.S.S.G. §2B1.1(b)(1)(N) (2014). Stewart Parnell claims that the loss calculation in the PSR overstates the loss for a number of reasons; the government addresses these reasons in turn and explains why they fail to call into question Defendant Stewart Parnell's PSR loss calculation.

Defendant Stewart Parnell begins his objections to the loss calculation by claiming that the government selected 31 corporate victims of fraud "without any substantive explanation." (Doc. 405 at 4-5). During the period of time relevant to the investigation, PCA had more than 400 customers. (*See* Gov. Sentencing Ex. 8). In order to focus the investigation on the most relevant conduct, the government selected a subset of PCA's corporate customers from whom to request documents and information. At all events, it is hard to see how including more PCA customers in its investigation would reduce the loss associated with Stewart Parnell's fraud. The loss figures almost certainly would have gone up had the government chosen to broaden its investigation.

Defendant Stewart Parnell also argues at length that information has not been provided regarding "insurance offsets" for all of the relevant corporate victims, suggesting that, without such information, the loss calculation is somehow lacking substantiation. There is no relevance to such "insurance offsets." Any partial reimbursement—*e.g.*, insurance payment—to a victim of fraud does not reduce the amount or otherwise change the calculation of the fraud loss for purposes of the sentencing guidelines. *United States v. Daniels*, 148 F.3d 1260, 1262 (11th Cir. 1998) (holding that partial reimbursement by an insurer to a victim of embezzlement only substitutes the insurer as another victim); *see also United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343-44 (11th Cir. 2009) (stating that insurance companies that sustained losses as a result of the defendant's fraud are victims and that their losses should be included in the loss

calculation under the Guidelines). The information that Stewart Parnell claims to be lacking would not reduce the amount of the fraud loss, it would simply change who suffered that loss. Thus, information regarding insured offsets for PCA's corporate victims is simply irrelevant to Stewart Parnell's loss calculation under the Guidelines.

Along the same lines as the insurance offsets, Defendant Stewart Parnell disputes the inclusion of the over $12 million paid out to civil claimants pursuant to Mr. Parnell's insurance policy with Hartford. Stewart Parnell states that, "[w]ithout the $12.75 million policy, there would have been no compensation for any potential victims of the outbreak." (Doc. 405 at 6). What Stewart Parnell fails to acknowledge, however, is that victims who were sickened or who died as a result of eating tainted PCA products experienced losses—*e.g.*, medical costs, loss of income—regardless whether they received compensation from an insurance company or not. To claim, as Stewart Parnell does, that a victim does not suffer a loss unless he or she is compensated is absurd and without any legal foundation. What is more, as Al Maxwell testified, the insurance payments compensated these victims for only a fraction of their actual losses. Total loss to these victims exceeded the insurance limits. It cannot be disputed that the losses to sickened victims, and to families of deceased victims, are "reasonably foreseeable pecuniary harm"—*i.e.*, it is reasonably foreseeable that if you ship salmonella-contaminated peanut products to customers that customers will get sick and will incur losses due to medical bills, lost wages, *etc*. Those losses are properly included in Defendant Stewart Parnell's loss calculation, and would be included even if he had never purchased the Hartford insurance policy.

Defendant Stewart Parnell attempts to minimize his loss amounts by arguing that he should only have to shoulder one-third of the total loss amount because he possessed only a one-third voting interest in PCA. Remember, we are talking about loss to victims here; not gain to

Stewart Parnell. And, even if we were talking about gain, the Eleventh Circuit has foreclosed any argument that loss calculations under the Guidelines are limited to a defendant's share of the profits or income derived from fraudulent conduct. *See United States v. DeVegter*, 439 F.3d 1299, 1305 (11th Cir. 2006) (stating that the loss amount calculated under the Guidelines should have been equal to the entire bribe amount, rather than just the half-portion the defendant ultimately received); *United States v. Huff*, 609 F.3d 1240, 1245-46 (11th Cir. 2010) (holding in a bribery case that defendant's loss calculations included the total value of the kickbacks, rather than just his share of the kickbacks).

Additionally, Defendant Stewart Parnell notes that "Kellogg's was not a customer of PCA, but rather of P.P. Sales," and that "PCA shipped product from [its Blakely facility] to [Kellogg's facility in] Cary, North Carolina . . . at the direction of its own customer, P.P. Sales." (Doc. 405 at 7). In doing so, Stewart Parnell attempts to use a business arrangement that was nothing more than a formality to shield himself from losses that are properly attributed to him. P.P. Sales was the minority-owned business[4] that Defendant Michael Parnell set up in order to secure the Kellogg's contract. The government presented substantial evidence at trial regarding Stewart Parnell's and Michael Parnell's participation in a criminal conspiracy to defraud PCA's customers, including Kellogg's. At the end of the trial, the jury convicted both Stewart Parnell and Michael Parnell of this criminal conspiracy. Thus, despite Stewart Parnell's claims that he should not be on the hook for Kellogg's losses because Kellogg's purchased peanut paste through P.P. Sales that was supplied by PCA, all losses associated with the criminal conspiracy are properly included in Stewart Parnell's loss calculation.

Defendant Stewart Parnell also lodges general objections to loss calculated in the PSR, claiming that "actual loss," as defined by the Guidelines, cannot be measured, because "Stewart

[4] *See* Defendant Exhibit MP-21, Women's Business Enterprises Certificate for P.P. Sales., Inc.

Parnell did not know and could not reasonably have known that the products [from] PCA's small operation in Blakely, Georgia were used in such a variety of ways." (Doc. 405 at 7). To the contrary, Stewart Parnell certainly knew that PCA, a $30 million a year company, had a wide range of customers with varying needs because he was the person who brought most of the customers in and he regularly interfaced with them. (*See generally* testimony of D. Kilgore and various corporate customer representatives). Moreover, Stewart Parnell was well aware of the vast distribution network PCA had in light of the fact that they sold mostly ingredient products, like peanut granules to be added to ice cream, rather than finished products. (*See generally* D. Kilgore and S. Lightsey testimony). And, perhaps most important, all Stewart Parnell had to know was that his products were going to be eaten. By whom and in what form just does not matter.

As an alternative to "actual loss," which Defendant Stewart Parnell alleges cannot be measured in this case, he suggests the Court use actual gain, as calculated in the chart included in his objections to the PSR.[5] (Doc. 405 at 8). Per the Guidelines, however, the Court should only use actual gain resulting from the offense as an alternative measure of loss where the actual or intended loss cannot reasonably be determined. Application Note 3(B), U.S.S.G. §2B1.1 (2014). Here, the Court has been provided with reliable figures and supporting documentation from a subset of PCA's customers, and Special Agent Allard has testified at length about the loss figures provided by these PCA customers. (*See* Pre-Sentence Hr'g, Agent Allard's testimony Tr. at 269-287, July 1-2, 2015).

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[5] Stewart Parnell's objections to the PSR further state that supporting documentation will be supplied with his "Sentencing Memorandum." (Doc. 405 at 7). The government intends to respond in greater detail upon receipt of Stewart Parnell's Sentencing Memorandum.

b. Michael Parnell

Michael Parnell objected to paragraph 29 and 38 of his PSR (Doc. 385 at 10, 13), which increases his base offense level by 22 levels because the offense involved more than $20 million but less than $50 million of loss. U.S.S.G. §2B1.1(b)(1)(L) (2014). Michael Parnell objects to the loss calculation generally, *see* Michael Parnell's Objections to PSR, letter dated June 10, 2015, but also claims that there is no information provided pertaining to the amount of Kellogg's $45.6 million loss that was insured; he suggests that this information "could become an important factor in this sentencing." (Michael Parnell's Objections to PSR, letter dated June 8, 2015, at 1).

As discussed in detail in Section (*ii*)(a), above, information regarding PCA's corporate victims' insured losses is simply not relevant to Michael Parnell's loss calculation under the Guidelines; indeed, any reimbursement by an insurer to a victim of fraud that resulted from the defendant's fraudulent contact should be included in the defendant's loss calculation. *See United States v. Daniels*, 148 F.3d 1260, 1262 (11th Cir. 1998); *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343-44 (11th Cir. 2009),

As for Kellogg's loss figure of $45.6 million, this is amply supported by the testimony of Special Agent Cynthia Allard during the July 1, 2015 hearing, as well as the supporting documentation provided by Kellogg's under subpoena and analyzed by Special Agent Allard. (*See* Pre-Sentence Hr'g, Agent Allard's testimony, Tr. at 204-210; Gov. Sentencing Ex. 8).

c. Mary Wilkerson

Defendant Mary Wilkerson objected to facts regarding loss amount stemming from the PCA outbreak contained in paragraph 27 of her PSR. (Doc. 384 at 9). Defendant Wilkerson failed, however, to object with any specificity or clarity; indeed, she failed to provide a single

reason why the loss figure in her PSR is erroneous. As a result, Defendant Wilkerson's objection to this particular aspect of her PSR must fail. *Cf. United States v. Beckles*, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PS[R] are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity."); and *United States v. Kicklighter*, 346 Fed. App'x. 516, 519 (11th Cir. 2009). Notwithstanding Defendant Wilkerson's failure to object with any specificity, the government respectfully directs the Court generally to the discussion supporting the loss calculations in Defendants' PSR in Section (*ii*)(a), above.

iii. Stewart Parnell's and Michael Parnell's Adjustment Because the Offense Involved the Conscious or Reckless Risk of Death or Serious Bodily Injury

Defendants Stewart Parnell and Michael Parnell object to the paragraphs in their respective PSRs (Doc. 355 ¶ 39 and Doc. 385 ¶ 40) that assessed a two-level increase because the offenses they were convicted of involved the conscious or reckless risk of death or serious bodily injury pursuant to U.S.S.G §2B1.1(b)(15)(A) (2014). Defendant Stewart Parnell claims that he was unaware of the risk of serious bodily injury or death associated with his conduct. (Doc. 405 at 9). Defendant Michael Parnell claims that he, too, was unaware of the risk of serious bodily injury or death, and that there was no "direct link" established between "P.P. Sales paste deliveries and any adulterated Kellogg's product." (Doc. 416 at 6-7).

The PSR properly considered and included a two-level increase for conscious or reckless risk of death or serious bodily injury, pursuant to U.S.S.G §2B1.1(b)(15)(A) (2014), against Defendants Stewart Parnell and Michael Parnell. Put simply, the Parnells defrauded their customers into believing that their food was safe to eat; it wasn't. It contained a pathogen that

could—indeed did—put people in the hospital or kill them. And, the Parnells sold truckloads of this product, every week, week after week.

Serious bodily injury is defined as injury "involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. §1B1.1 cmt. n.1(L) (2014). The Eleventh Circuit has held, "[t]he Guidelines ... do not require that the victim actually suffer serious bodily injury. Rather, the question is whether the defendant placed the victim at such a risk." *United States v. Snyder,* 291 F.3d 1291, 1294-95 (11th Cir. 2002); *See United States v. Mateos*, 623 F.3d 1350, 1371 (11th Cir. 2010) (Even if there is no evidence of death or serious bodily injury, the increase may "nevertheless be appropriate, because the increase focuses on the defendant's disregard of risk, rather than on the result.")

Defendant Michael Parnell rests his objection, in part, on the claim that no "direct link" was established between peanut paste deliveries and adulterated Kellogg's product. The Court no doubt recalls Ponise Youngblood, who told the jury about how she became sickened from eating Kellogg's peanut butter crackers. She said that she was hospitalized twice, and she experienced severe symptoms, including vomiting, diarrhea, fever, and fainting. She testified that at one point her bowel movements were "pure blood." The government proved that Ms. Youngblood was seriously injured and that she consumed Kellogg's crackers. Those crackers contained salmonella tainted peanut paste produced from PCA lot 8260. That salmonella had the same PFGE found in an unopened container of PCA peanut paste. (*See* Gov. Ex. 8260-16 & 782-A).

Defendant Michael Parnell apparently contends that because the jury convicted him of distributing misbranded food but acquitted him of distributing adulterated food, his offense did

not involve the conscious or reckless risk of death or serious bodily injury. Given the nature of the misbranding in this case, this is flatly wrong. The misbranding – the false COAs – went to the very safety of the food itself. Defendant Michael Parnell participated in a scheme whereby he and others represented to Kellogg's, through a false COA, that the peanut paste they shipped to Kellogg's had been microbiologically tested and determined to be safe, when in fact the majority of the paste sent to Kellogg's was *never tested at all*. (*See* Excerpt of Lightsey testimony at 108, Aug. 8, 2014). Telling your customer that your product had been tested and was free of pathogens when you knew it had not been tested—and therefore had no idea whether it was safe—is akin playing Russian Roulette with your customers. At the very least, this conduct involves the reckless risk of death or serious bodily injury.

Defendants Stewart Parnell and Michael Parnell argue that the two-level enhancement cannot apply to a defendant unaware or unconscious of a risk. Defendant Stewart Parnell cites to *United States v. McCord,* 143 F.3d 1095 (8th Cir.1998) in support of his argument. However, this argument fails to acknowledge that other circuits addressing this issue have refused to adopt the decision in *McCord* and,

> [t]he majority of those circuits have held that the Government is not required to prove that the defendant was subjectively aware of the risk, but rather only that the defendant was objectively aware of the risk, *i.e.,* that the risk would have been obvious to a reasonable person.

United States v. Hernandez, No. 14-11080, 2015 WL 1546306, at *4 (5th Cir. Apr. 8, 2015)(internal quotation and citation omitted).

These circuits have held, in essence, that when considering "the conscious or reckless risk of death or serious bodily injury" the government is not required to show the defendant was aware of the risk.

> We interpret the guideline to require the defendant to have been conscious of *or* reckless as to the existence of the risk created by his or her conduct. Generally, recklessness is an objective standard, and we interpret "reckless risk" to describe objectively culpable conduct. We hold that a defendant's conduct involves a conscious risk if the defendant was subjectively aware that his or her conduct created a risk of serious bodily injury, and a defendant's conduct involves a reckless risk if the risk of bodily injury would have been obvious to a reasonable person.

United States v. Maestas, 642 F.3d 1315, 1321 (10th Cir. 2011); *United States v. Johansson,* 249 F.3d 848, 859 (9th Cir. 2001) ("We do not believe that a defendant can escape the application of the serious risk of injury enhancement by claiming that he was not aware that his conduct created a serious risk, that is, a defendant does not have to subjectively know that his conduct created the risk."); *United States v. Lucien,* 347 F.3d 45, 56 (2nd Cir. 2003) (determining that the Ninth Circuit's "conclusion that a defendant does not have to subjectively know that his or her conduct created a serious bodily risk, is correct."); *Hernandez,* 2015 WL 1546306 at *4.

The evidence at trial supports a two-level enhancement for conscious or reckless risk of death or serious bodily injury pursuant to U.S.S.G §2B1.1(b)(15)(A) (2014). Stewart Parnell and Michael Parnell, through their conduct, exhibited both a conscious and reckless risk of putting people in harm's way of serious bodily injury or death. In other words, it was Stewart Parnell's and Michael Parnell's fraudulent conduct that *created* the risk of serious bodily injury. The risk of serious bodily injury and death proceeds directly from the false COAs. Ultimately, and fatally for nine people, Stewart Parnell and Michael Parnell knew about the effects of salmonella or, at a minimum, were reckless as to its effects upon people. Most telling is the email, Government Exhibit 729, dated February 19, 2007, from Stewart Parnell to Michael Parnell and others. The email contained an extensive news article about the 2007 Conagra peanut butter salmonella outbreak and the injuries and deaths that can occur. At one point the article states, "Salmonella sickens about 40,000 people a year in the U.S. and kills about 600. It can cause diarrhea, fever,

dehydration and abdominal pain and vomiting." In addition to this email, the government proved through the testimony of Plant Managers Sammy Lightsey and Danny Kilgore, among other witnesses, that Defendants Stewart Parnell and Michael Parnell knew:

- There was testing for salmonella contamination in some of the peanut products and peanut paste produced at PCA Blakely.
- The PCA peanut products and paste were made with the knowledge that people would consume them.
- They failed to inform customers of Salmonella contamination and created false Certificates of Analysis which stated the peanut products or peanut paste tested negative for Salmonella when, in fact, the tests were positive for Salmonella or no test had been conducted at all. Customers relied upon the COAs to sell the peanut products and peanut paste to people for consumption, believing the peanut products and peanut paste to be Salmonella-free.

Furthermore, it was proven that salmonella can cause serious bodily injury and death. (*See generally* testimony of Dr. Ian William, Ponise Youngblood, and Al Maxwell.

Defendants Stewart Parnell and Michael Parnell qualify for the two- level enhancement because the crimes that they were convicted for involved "the conscious or reckless risk of death or serious bodily injury" pursuant to U.S.S.G §2B1.1(b)(15)(A) (2014). They subjectively knew that salmonella could cause great harm, knew that their products tested positive for salmonella, and knew that they were selling those products anyway, all the while lying to their customers about the safety of those products.

iv. Wilkerson's Offense Level Computation and Lack of Acceptance of Responsibility

Defendant Mary Wilkerson's Objection #8 objected to the Offense Level Computation contained in paragraphs 34, 35, and 36 of her PSR. (Doc. 384 at 11). Wilkerson claims that she "had no part in any C.O.A. scheme" and "was not a participant nor had knowledge of these events . . . ." (Doc 402 at 8). She further claims that "no evidence linking her to any of these Counts was ever presented."

Contrary to Wilkerson's claims, however, the government presented substantial evidence demonstrating that Wilkerson not only had knowledge of the fraudulent schemes going on at PCA, but that she was a willing participant. (*See generally*, Testimony of Sammy Lightsey and Catina Hardrick). This evidence supports the Guidelines calculations detailed in Wilkerson's PSR.

According to USSG §1B1.3(a)(1)(A) (2014), regarding relevant conduct and factors that determine the guideline range, cross-references in Chapter 2 shall be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." The application notes for this section further elaborate on the relevant conduct to be considered, stating that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. U.S.S.G. §1B1.3, Application Notes, Background.

Even though Wilkerson was not charged with conspiracy, wire fraud, mail fraud, felony adulteration or felony misbranding, the government presented ample evidence of her knowledge of, and participation in, the fraudulent schemes that formed the basis of those offenses with which the other Defendants were charged. The government established through the testimony of Darlene Cowart of JLA Labs, Charles Deibel of Deibel Laboratories, Plant Manager Sammy Lightsey, and Quality Assurance Technician Catina Hardrick that Defendant Wilkerson was, for a significant period of time in 2008, the recipient of JLA and Deibel test reports regarding PCA products. (*See* Excerpt of Lightsey testimony Tr. at 42-45, Aug. 8, 2014). Additionally, Sammy Lightsey, Catina Hardrick, and others testified that Wilkerson served as the Quality Assurance Manager from March 2008 to December 2008, during which time she was responsible for managing the microbiological testing of peanut products. (*See, e.g.,* Gov. Ex. 872, 8344-10). As

QA Manager, Wilkerson was also tasked with creating COAs. (*See* Excerpt of Lightsey testimony Tr. at 42-45, Aug. 8, 2014). Moreover, there can be no dispute that, given her work experience and knowledge of the plant operations, Wilkerson was aware that oftentimes peanut products were produced and shipped on the same day. This knowledge, coupled with Wilkerson's experience with the product testing process as QA Manager and her knowledge that salmonella testing took two to four days from the shipment of the sample, leads to the obvious inference that Wilkerson was aware that PCA was shipping product with false COAs. And, if she was aware of such fraudulent conduct, there is no escaping the conclusion that she knew, at the time of her obstruction of the FDA outbreak investigation, that there was at least a potential for a criminal investigation to arise out of the FDA investigation.[6]

Under § 2J1.2 of the Guidelines, the base offense level for Obstruction of Justice offenses is 14. And under §2J1.2(c), the Guidelines instruct that § 2X3.1 be applied where the obstruction offense involved obstruction of the investigation or prosecution of a criminal offense. In Wilkerson's case, she was aware of, and even participated in, the fraudulent conduct that led to the salmonella outbreak at PCA; her knowledge and participation must be considered as relevant conduct for Wilkerson, per U.S.S.G. §1B1.3(a)(1)(A) (2014). Given Wilkerson's knowledge of, and participation in, the fraud, it is reasonable to assume that Wilkerson obstructed the FDA proceeding knowing that, ultimately, there was a chance of a criminal investigation down the line. The cross-reference to U.S.S.G. § 2X3.1 could therefore be applied.

When applying §2X3.1, the Guidelines instruct that the base offense level for the underlying offense be determined. Per §2B1.1, the base level for wire fraud is 7. When

[6] The government readily concedes that, at the time of the January 2009 FDA investigation, there was no ongoing criminal investigation into the PCA outbreak. The government also notes that Wilkerson was not charged with Obstruction of a criminal investigation, but rather with Obstruction of an Agency Proceeding, under 18 U.S.C. § 1505. However, the government submits that Wilkerson nonetheless would have inferred that there was a potential for a criminal investigation into the outbreak, given her knowledge of the fraudulent conduct that caused the outbreak.

adjusting the base level for loss amount, number of victims, and the conscious or reckless risk of death or serious bodily injury,[7] the offense level becomes 41. Section 2X3.1 then requires a 6-level reduction, and limits the offense level to 30. As a result, according to U.S.S.G.§2J1.2(c), and the cross-referenced §2X3.1, Wilkerson's offense level is properly calculated as 30.

Wilkerson's Objection #9 rejects the PSR's computation of a Base Offense Level of 14, claiming that it is erroneous without providing any basis for this claim.[8] (Doc. 402 at 9) Because Wilkerson objects to this aspect of the PSR without providing a single discernable basis for her objection, her objection must fail. *Cf. United States v. Beckles*, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PS[R] are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity."). Moreover, per Wilkerson's PSR, paragraph 37, her Base Offense Level is derived from U.S.S.G. §2J1.2, the section of the Guidelines for Obstruction of Justice offenses. Thus, even if Wilkerson had objected with specificity, given that she was convicted of Obstruction of an Agency Proceeding under 18 U.S.C. § 1505, the Government fails to see how any error was made in deriving her Base Offense Level from U.S.S.G. §2J1.2.

Wilkerson's Objections #7 and 11 argue the PSR does not provide her with an adjustment for acceptance of responsibility. (Doc. 402 at 8 & 11) Wilkerson contends in support of her objection that her exercise of her right to a jury trial should not preclude her from earning an adjustment for acceptance of responsibility. Wilkerson's claim ignores both the existing case

[7] The government respectfully directs the Court to Sections (*i*), (*ii*), and (*iii*) for an in-depth discussion of these adjustments.

[8] Additionally, Wilkerson intimates the Court may completely disregard the Guidelines. This argument ignores the current case law since *United States v. Booker*, 543 U.S. 220 (2005). Under Eleventh Circuit law, after *Booker*, "the district court is still required to correctly calculate the guidelines range, and the same standards of review apply." *United States v. Caldwell*, 431 F.3d 795, 798 (11th Cir. 2005).

law and the application notes of the Guidelines[9]. The adjustment for acceptance of responsibility is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Wilkerson chose to proceed to trial, where she put the government to its proof by denying all factual elements of guilt as to her charges. At trial, Wilkerson attacked the credibility and motives of the FDA investigators, law enforcement officers, and government witnesses, and attempted to convince the jury that FDA Investigators Gray and Neligan were corrupt and unreliable. Clearly, the defense advanced at trial was one of factual innocence as to all charges, it was not an effort to assert and preserve issues in order to challenge legal guilt.

Moreover, Wilkerson's objection to the facts in the offense conduct section run contrary to commentary for U.S.S.G §3E1.1 and are yet another basis for the Court to deny her an acceptance of responsibility adjustment. The purpose of §3E1.1 is "to reward those defendants who affirmatively acknowledge their crimes and express genuine remorse for the harm caused by their actions." *United States v. Carroll*, 6 F.3d 735, 740 (11th Cir. 1993), *cert. denied*, 510 U.S. 1183 (1994) (internal citation omitted). Accordingly, "a defendant bears the burden of showing entitlement to a §3E1.1 reduction." *United States v. Williams*, 408 F.3d. 745, 756-57 (11th Cir. 2005); *United States v. Akindele*, 84 F.3d 948, 956 (7th Cir. 1996) (holding "a decrease [for acceptance of responsibility] may only be granted if the defendant clearly demonstrates responsibility for [the] offense.") (internal quotation omitted). Defendant Wilkerson has not admitted the conduct for which she was convicted, and has gone out of her way not only to deny her involvement in that conduct, but also to dispute irrefutable facts concerning PCA.

[9] Application Note 2, U.S.S.G. §3E1.1 specifically addresses when a defendant who goes to trial may be considered for acceptance of responsibility.

The Government therefore submits that Wilkerson's objections are without merit and should be overruled.

v. Stewart Parnell's Adjustment for Obstruction of Justice

Defendant Stewart Parnell has objected to paragraph 42 of his PSR adjustment for obstruction of justice (Doc. 355 at 14) which increases his base offense level by two levels. U.S.S.G. §3C1.1 (2014)[10]. In his objection, Stewart Parnell contends that he "did not willfully obstruct, impede, or attempt to obstruct or impede the administration of justice in this case." (Doc. 405 at 10).

Counts 68 and 72 of the Indictment charged Defendant Stewart Parnell with obstruction of justice, in violation of 18 U.S.C. §1505. Count 68 charged that during a telephone conference with a FDA Inspector and Samuel Lightsey, Stewart Parnell failed to correct Mr. Lightsey when Mr. Lightsey stated, after being asked by the inspector if PCA had received any positive results for salmonella, "We had one presumptive positive for salmonella . . . but it was found negative when the tests were completed." (Doc. 1 at 49). Count 72 charged that during a telephone conference, after being asked by the inspector if he remembered any more positives during 2008, Stewart Parnell stated: "This is not something that happens very often and I think I would remember something that came up positive," and he further stated that he had no knowledge of any. (Doc. 1 at 50; *see also* Excerpt of Lightsey testimony Tr. at 22-24, Aug. 14, 2014). The jury returned verdicts of guilty on both of these counts.

The Government submits that this objection is without merit and should be overruled.

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[10] The commentary to §3C1.1 provides: "This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct." U.S.S.G. §3C1.1, cmt. n.4 (2014).

vi. Stewart Parnell's Adjustment for Leadership Role in the Offense

Defendant Stewart Parnell has objected to paragraph 41 of his PSR (Doc. 355 at 14), which increases his base offense level by four levels because he was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. §3B1.1(a) (2014).

Defendant Stewart Parnell's sole objection to this enhancement is that he "maintains his innocence and did not act as an organizer or leader of any criminal activity." (Doc. 405 at 10). The government submits that this is not a sufficient objection, and it should not be considered by the Court. In any event, the evidence clearly established that Defendant Stewart Parnell was an organizer and leader of this criminal activity.

There were no less than eight participants involved in Defendant Stewart Parnell's criminal activity: (1) **Stewart Parnell**[11]; (2) **Michael Parnell**; (3) **Daniel Kilgore** (PCA's Blakely operations manager from 2002 through May 2008); (4) **Samuel Lightsey** (PCA's Blakely operations manager from July 2008 through February 2009); (5) **Mary Wilkerson** (holder of a variety of positions in Blakely from 2002 through February 2009, including quality assurance manager in 2008); (6) **David Voth** (PCA's sales manager through December 2008; Voth worked in the Lynchburg office and reported directly to Defendant Stewart Parnell); (7) **Michael Alexander** (PCA's Plainview operations manager through spring 2007); and (8) **Jeffrey McFay** (PCA's Blakely quality assurance manager from 2003 through November 2007).

Three operations managers testified at trial: Daniel Kilgore, Samuel Lightsey, and Michael Alexander. They reported directly to Defendant Stewart Parnell, communicating with him on a daily basis. Stewart Parnell instructed them on the day-to-day operations of the

[11] When counting the five or more participants required under §3B1.1, the defendant may be counted as one of the five. *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994), *citing United States v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993).

business, and he made the principal decisions for the business. When PCA received a confirmed positive salmonella result after Samuel Lightsey was hired, it was Stewart Parnell who came to the plant to make the "executive decision" to ship the product regardless. (*See* Excerpt of Lightsey testimony at 130-32, Aug. 8, 2014) Their testimony that Stewart Parnell was the company's leader and decision maker was corroborated by the numerous emails introduced into evidence at trial. It was Stewart Parnell who decided to ship product for which laboratory testing had not been completed or for which confirmed positive salmonella results had been received. "Shit, just ship it. I cannot afford to loose [sic] another customer." (Gov. Ex. 16-01). "Ship." (Gov. Ex. 18-01). "Okay, let's turn them loose then." (Gov. Ex. 64-01).

When David Voth inquired about shipping totes of peanut meal that were covered in dust and rodent feces, it was Stewart Parnell who instructed: "Clean em all up and ship them." (Gov. Ex. 19-01). When David Voth lied to customers by telling them that lab results were "inconclusive" when in fact they were confirmed positive for salmonella, he notified Stewart Parnell that he had done so. (Gov. Ex. 66-01).

It was Stewart Parnell who instructed Michael Alexander to swap inferior product for that which the customer had contracted to purchase.[12] (*see, e.g.*, Gov. Ex. 7-01). It was Stewart Parnell who would call Daniel Kilgore and change company policy if that policy got in the way of shipping product. Stewart Parnell was not an absentee owner. He was in daily contact with his operations managers in Blakely and Plainview, either by phone or in person. He participated in every aspect of the daily operations of his business. No decision or matter was too small to warrant his involvement, from deciding to ship totes covered in feces to instructing his manager that he should have added oil to a product without the customer's consent. (Gov. Ex. 27-02).

[12] Mr. Alexander also testified about the Plainview practice of using one test result to generate multiple fraudulent certificates of analysis, a practice that was continued by his successor, Jesus Garrocho.

Likewise, no decision was too big. The decision to ship product that was confirmed positive for salmonella was made by Stewart Parnell, not a three-member board on which he had but one vote. Likewise, the decision to defraud Kellogg's was not made by a three person board but by Stewart Parnell, Michael Parnell, Daniel Kilgore, and Jeffrey McFay.[13]

Regardless of the number of participants involved in Stewart Parnell's criminal activity, however, the government contends that §3B1.1(a) applies because the criminal activity was "otherwise extensive." When determining whether a criminal activity is otherwise extensive, "there are a number of factors relevant to the extensiveness determination, including the length and scope of the criminal activity as well as the number of persons involved." *United States v. Holland*, 22 F.3d 1040, 1046 (11th Cir. 1994); *see also United States v. Rose*, 20 F.3d 367, 374 (9th Cir. 1994) ("whether criminal activity is 'otherwise extensive depends on such factors as (i) the number of knowing participants and unwitting outsiders; . . . (ii) the number of victims; . . . and (iii) the amount of money fraudulently obtained or laundered.").

One need only review Government's Exhibit K13 to conclude that the Kellogg's scheme alone was "otherwise extensive." It is the summary chart of shipments of peanut paste from PCA to Kellogg's. It shows that the majority of lots were never tested. It shows that of those that were, many did not meet microbiological specifications. It shows that many lots contained foreign-made paste in violation of Kellogg's specifications.

However, Stewart Parnell's criminal activity extends far beyond defrauding Kellogg's. Government Exhibit 918 is a chart that shows that PCA consistently received numerous confirmed positive salmonella test results every year between 2003 and 2008. Not a single customer was notified of those results. That was Stewart Parnell's decision. The "manner and

[13] The Kellogg's scheme is more fully discussed in the government's response to Defendant Michael Parnell's objection to his role in the offense in Section (*vii*) below.

means" section of the indictment describes the many different ways in which Stewart Parnell defrauded his customers. Stewart Parnell was convicted of the conspiracy that encompassed those manner and means. His fraud went unchecked for many years, ending only when thousands of people were sickened and nine people died as a result of it.

The extensiveness of that fraud is further demonstrated in the article published in the NEW ENGLAND JOURNAL OF MEDICINE, *Salmonella Typhimurim Infections Associated with Peanut Products,* that was admitted at the sentencing hearing as Government Exhibit 7. The findings in this article were agreed upon by twenty-four epidemiologists, doctors, and other professionals, including Dr. Ian Williams, who testified at trial. The article discusses how the salmonella outbreak was traced back to PCA. There were 714 reported illnesses in 46 states, with nine deaths attributed to the outbreak. (Gov. Sentencing Ex. 7 at 601). The article also states that a "total of 3918 peanut butter-containing products from over 200 companies were recalled between January 10 and April 29, 2009." *Id.* at 607. Further, the "outbreak resulted in one of the largest food recalls in U.S. history and an estimated $1 billion loss in peanut sales." *Id*. In all respects, Defendant Stewart Parnell's fraud was "otherwise extensive."

The government submits that this objection is without merit and should be overruled.

vii. Michael Parnell's Adjustment for Leadership Role in the Offense

Defendant Michael Parnell has objected to paragraph 42 of his PSR (Doc. 385 at 12), which increases his base offense level by three levels because he was "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. §3B1.1(b).

There were no less than seven participants involved in Michael Parnell's criminal activity: (1) **Stewart Parnell**; (2) **Michael Parnell**[14]; (3) **Daniel Kilgore** (operations manager from 2002 through May 2008); (4) **Jeffrey McFay** (quality assurance manager from 2003 through November 2007); (5) **Samuel Lightsey** (operations manager from July 2008 through February 2009); (6) **Mary Wilkerson** (holder of a variety of positions from 2002 through February 2009, including quality assurance manager in 2008); and (7) **Raymond Kimbrell** (production manager from 2001 through November 2008, and occasional interim operations manager, including June and July of 2008).

The Court will recall the scheme that was implemented in order for PCA to meet Kellogg's demand for two to three 44,000 pound truckloads of peanut paste per week. This scheme went on for over a year. Daniel Kilgore testified that at times when PCA did not have results back in time to prepare a legitimate certificate of analysis (COA), Jeffrey McFay or he would fax a blank COA for Michael Parnell to complete with false results. (*See, e.g.*, Gov. Ex. 30-8, 31-10, 56-03, 58-01). However, when it became clear that PCA could not timely supply the needed amount of paste with the required microbiological testing performed upon it, PCA began shipping the paste as soon as it was produced, either before test results had been received or without performing any testing on it at all. They also took multiple samples from some lots and assigned numbers to them to correspond with lots to be produced in the near future. As a result, after implementation of this scheme, every shipment of paste to Kellogg's was accompanied by a false COA based on the results of a previously shipped lot. Also, due to the collection of multiple samples from the same lot, the majority of lots were never even tested at all.

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[14] When counting the five or more participants required under §3B1.1, the defendant may be counted as one of the five. *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994), *citing United States v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993).

Daniel Kilgore testified that this scheme was devised in a meeting between himself, Michael Parnell, Stewart Parnell, and Jeffrey McFay. He said that their agreement upon this scheme was a collective decision. Samuel Lightsey also testified that, unbeknownst to him at the time he was hired, this scheme was already in place, and that he continued the scheme after he learned of it. (*See* Excerpt of Lightsey testimony Tr. at 108-114, Aug. 8, 2014). However, the government proved the existence of this fraudulent scheme by not only the testimony of the cooperating defendants in this case, but also by voluminous documentary evidence. Throughout the trial, the government introduced multiple sets of production, shipping, and testing records in support of the many overt acts and substantive counts related to the Kellogg's "pre-dipping" scheme. Daniel Kilgore and Samuel Lightsey simply corroborated what these records already made clear.

The Court will also recall the testimony of Catina Hardrick, who was a quality assurance technician whose responsibilities included the collection of paste samples for Kellogg's shipments. When she questioned her supervisor, Defendant Mary Wilkerson, regarding the practice of collecting multiple samples from the same lot, Defendant Wilkerson told her to do as she was told. Ms. Hardrick further testified that the production manager / interim operations manager, Raymond Kimbrell, also instructed her to take samples in that manner. Thus, there were at least 7 "participants" in this criminal activity.[15]

As discussed in Section (*vi*), above, however, regardless of the number of participants, the government contends that §3B1.1(b) applies because the criminal activity was "otherwise extensive." *See*, *e.g.*, Government's Exhibit K13 and Section (*vi*) discussion, above.

[15] Or eight if Ms. Hardrick is included, as she could be considered criminally responsible for knowingly participating in a scheme she understood to be fraudulent, although with a much lesser degree of culpability than the others, given her low-level position in the business.

Furthermore, in addition to the knowing participants in the Kellogg's scheme, there were many unwitting participants, per U.S.S.G. §3B1.1 comment 3: The drivers who transported PCA's adulterated product to Kellogg's; the Kellogg's employees who manufactured and distributed crackers containing PCA's paste – paste that had been represented to them as safe, only to find that it was not and that the end result would be a widespread, deadly salmonella outbreak; and may others in the distribution chain from manufacturer to consumer.

Finally, Government's Sentencing Exhibit 6, the list of claims paid through the bankruptcy court, shows that the vast majority of them, well over one hundred, were paid as a result of people consuming Kellogg's products that contained PCA's adulterated paste. Dr. Ian Williams' of the Centers for Disease Control testified at trial that for every one outbreak illness reported to CDC, there are an estimated thirty unreported illnesses. (*See* Excerpt of Williams Testimony Tr. at 56-57, Sept. 8, 2014). Therefore, approximately three thousand people contracted salmonellosis from consuming Kellogg's products. Many of these people were hospitalized. Five of them died. (*See* Gov. Sentencing Ex. 6). By any measure, this criminal activity was extensive.

The PSR classifies Defendant Michael Parnell as a manager or supervisor of the criminal activity. Michael Parnell emphasizes that he was not employed by PCA and was not an officer or director of the company. However, as noted in the commentary to §3B1.1, titles are not controlling. U.S.S.G. §3B1.1, cmt. n.4 (2014). Actual authority is. And, Michael Parnell had that authority. In fact, although the government does not object to the three-level enhancement under §3B1.1(b), the argument could be made that Michael Parnell was an organizer or leader of the criminal activity, justifying a four-level increase pursuant to §3B1.1(a).

> In distinguishing a leadership and organizational role from one of mere management or supervision, . . . [f]actors the court should consider include the

> exercise of decision making authority, the nature of participation in the offense, . . . the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. Given the nature and scope of the criminal activity, his participation in it, and his role in planning and organizing the scheme, Michael Parnell could certainly be characterized as a leader or organizer of the criminal activity.

In any event, the evidence clearly established that Michael Parnell was at the very least a manager or supervisor of the criminal activity. According to both Daniel Kilgore and Samuel Lightsey, Michael Parnell oversaw and directed the operation of the paste line for the Kellogg's contract. Daniel Kilgore referred to Michael Parnell as "the instrument of the paste line." Samuel Lightsey said that Michael Parnell would visit the plant, usually to work on the tankers, and if it was necessary to work on them on weekends, Michael Parnell would pay the labor costs for any PCA employees. (*See* Excerpt of Lightsey Testimony Tr. at 136-37, Aug. 8, 2014). For examples of Michael Parnell managing and directing the operation of the paste line, *see* Def. Exs. SP-63, SP-64, and SP-65. By email dated June 25, 2007, Michael Parnell emailed Daniel Kilgore, Jeffrey McFay, and two other PCA employees, with copies to Stewart Parnell and David Voth. His email contains specific instructions regarding the production and delivery of paste to Kellogg's, and he refers to his email as an "accountability chart." These instructions are not mere requests. They are directives: "Steve Hutto will be completing . . . Joe Sams will arrange . . . Jeff McFay will complete . . . Danny Kilgore needs to confirm . . . Joe Sams will handle . . . ." (Def. Ex. SP-64).

Perhaps the clearest example of M. Parnell's exercise of supervisory authority over this criminal activity is the conversation he had with Samuel Lightsey immediately after Mr. Lightsey learned of the Kellogg's pre-dipping scheme. Mr. Lightsey called Michael Parnell and

told him the practice was wrong and illegal. Michael Parnell told him that they had set up the process before Mr. Lightsey began working at PCA and that Lightsey should not worry about Kellogg's. Samuel Lightsey, the operations manager of the plant, called into question a practice he knew to be illegal, and Michael Parnell instructed him to continue it. (*See* Excerpt of Lightsey testimony Tr. at 108-113, Aug. 8, 2014). That conversation alone warrants an aggravating role enhancement[16]. *See United States v. Johnson*, 4 F.3d 904, 917 (10th Cir. 1993), *quoting United States v. McGuire*, 957 F.2d 310, 316 (7th Cir. 1992); *see also United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187 (9th Cir. 2013) (§3B1.1 management enhancement applies if defendant "managed at least one other participant in the crime.").

Michael Parnell managed and supervised Samuel Lightsey and several other participants in this criminal activity. The government submits that this objection should be overruled.

III. RESTITUTION

Restitution is mandatory in fraud cases pursuant to 18 U.S.C. § 3663A(c)(1)(A)(ii). The only exception is "if the court finds, from facts on the record, that – (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3).

There are two types of direct victims in this case: (a) persons who became ill from eating PCA's contaminated products (likely over 20,000 people according to Dr. Williams), and the estates of the nine persons who died from their illnesses; and (b) PCA's corporate customers that incurred economic losses as a result of the recall.. In addition to the direct victims, there are

[16] Guidelines §3B1.1(b) requires only "evidence that a defendant was a manager or supervisor and the criminal activity involved five or more participants – not that a defendant managed, or controlled, the five or more participants."

third-parties, primarily insurance companies, that suffered indirect financial harm as a result of the offenses.

We address each category of victim in turn.

A. Individual Victims

Significant efforts have been made, both in connection with this prosecution and in connection with the bankruptcy proceedings, to identify individual victims. The government notes that, when this case was indicted in February 2013, the Department of Justice issued a press release, a copy of which is attached hereto as Exhibit 1. The last page of the release contains the following statement: "Individuals who feel they may have been affected by or have become ill from tainted PCA products, and businesses that that purchased products that were recalled as a result of the outbreak, should visit the following website for further details: https://forms.fbi.gov/pca-salmonella-tainted-product-case." The indictment received widespread press coverage, with articles appearing in major newspapers throughout the country such as USA Today, The Wall Street Journal, New York Times, L.A. Times, and the Atlanta Journal-Constitution. Victims who visited the website and completed the requested information have received notifications of court proceedings and have been advised of the rights they are afforded under the Crime Victims' Rights Act. 18 U.S.C. § 3771.

As for the bankruptcy proceeding, Alan Maxwell testified at the sentencing hearing at length about his role as the claims administrator for the $12,000,000 Hartford Insurance fund set aside to compensate injured victims or their estates. He explained the PCA Salmonella Claim Settlement and Distribution Procedure, a copy of which was admitted at the hearing as Government Exhibit 3. Section 2.3 (Notice) required the Trustee to "publish notice of the existence of the BI Claims Fund, the settlement process, and the need to file a Salmonella POC

in the national edition of the USA Today once a week for two weeks." (Sentencing Ex. 3 at 3). That notice was in fact published in the USA Today for two weeks, as indicated in Exhibit 2 hereto. One hundred and forty five claimants submitted claims in the bankruptcy proceedings. The claimants listed in the table of claims admitted at the sentencing hearing as Government Exhibit 6 have also received notifications of court proceedings and have been advised of the rights they are afforded under the Crime Victims' Rights Act. 18 U.S.C. § 3771.

The government notes that individual victims were not fully compensated by the $12,000,000 fund. Mr. Maxwell valued the total of all eligible claims at $15,000,000; therefore, each claimant was paid only a pro-rata share of the value of his claim.

Prior to sentencing, the government will submit to the Court a list of the victims who have established that they suffered economic harm, the amount of that harm, the amount that they have already received to compensate them for that harm, and the amount – if any – that should be paid to them in restitution to compensate them fully for their harm.[17] The government will ask that, in any restitution order, the Court order that restitution be paid to these individuals first.[18]

B. Corporate Victims

As for the corporate victims, the government submits that the company loss records admitted at the sentencing hearing in the binder marked Government Exhibit 8 (and the

[17] Not all bankruptcy claimants would be due additional compensation. As indicated in some of the victim impact statements that have been received, some claimants received compensation from sources in addition to the Hartford fund, and they have received total compensation in excess of the value of their claim as determined by Mr. Maxwell. They would be due no additional restitution. Second, victim impact statements have not been received from all victims. Only those victims who have submitted a victim impact statement showing that they received less than the full value of their claims, as determined by Mr. Maxwell, would be entitled to additional restitution.

[18] Given the steps taken to identify victims both in this prosecution and in the bankruptcy proceeding, the government believes that there is no need to take any further steps to attempt to find additional victims. The steps taken to date were more than reasonable, and were calculated to identify individuals who suffered compensable harm as a result of the PCA outbreak.

additional records on the CD contained in that binder), are sufficient to enable the Court to award restitution to those companies in the amounts shown on the spreadsheet in the binder. These records were produced pursuant to subpoenas issued by the government; they were produced directly to the FBI; and they may be relied upon by the Court, not only for the purpose of determining the estimated guidelines loss amount, but also for the purpose of awarding restitution.

The government notes that it issued subpoenas for loss records to approximately fifty customers of PCA. These fifty companies were estimated by government agents to be the companies that purchased the most product from PCA in calendar year 2008. The companies listed on the spreadsheet in Exhibit 8 are the ones that produced information and/or records in response to those subpoenas. Of course, any award of restitution to these companies would need to be reduced by any insurance payments offsetting their losses, and that information is also reflected in the spreadsheet.

Prior to sentencing, and as with the individual victims, the government will submit to the Court a list of the corporate victims who have established that they suffered economic harm, the amount of that harm, the amount that they have already received to compensate them for that harm, and the amount – if any – that should be paid to them in restitution to compensate them fully for their harm. The government will ask that, in any restitution order, the Court order that restitution be paid to these corporations after all of the individual victims have been fully compensated.[19]

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[19] The government submits that attempting to obtain loss records from additional customers of PCA would unduly complicate and prolong the sentencing process. The customer list that PCA provided to FDA during the inspection, a copy of which is also contained in Government Sentencing Exhibit 8, lists nearly four hundred and fifty companies. It is not clear at this point how many of those corporations – in addition to those already identified as having suffered economic loss – are victims. Many of these customers were smaller, or not regular PCA customers. We have no indication at this point that they were impacted by the outbreak. Therefore, given that it would likely be a burdensome and very time-consuming task of attempting to obtain and evaluate additional information from these

C. Insurance Companies

As noted above, both individual and corporate victims received compensation from third parties, largely from insurance carriers. And, as noted above, the law allows for restitution to be paid to such third parties. Prior to sentencing, the government will submit to the Court a list of third parties that are entitled to restitution, along with the amounts to which they are entitled. The government will ask that, in any restitution order, the Court order that restitution be paid to these third parties after all of the individual and corporate victims have been fully compensated.

CONCLUSION

WHEREFORE, the Government respectfully requests the Court, for the foregoing reasons, consider this Brief in Support of the U.S. Probation Office's Presentence Reports for Defendant Stewart Parnell, Michael Parnell, and Mary Wilkerson.

Respectfully submitted, July 22, 2015.

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companies, the government contends that the exception to mandatory restitution found in 18 U.S.C. § 3663A(c)(3) should apply.

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CERTIFICATE OF SERVICE

I, Mary M. Englehart, Trial Attorney, hereby certify that on the 22nd day of July, 2015, I electronically filed the within and foregoing **GOVERNMENT'S BRIEF IN SUPPORT OF PRE-SENTENCE REPORTS** with the clerk of the Court. Notification of such filing was provided via email to the following:

Attorneys for Defendant, Stewart Parnell

Attorneys for Defendant, Michael Parnell

Attorneys for Defendant, Mary Wilkerson

By: s/ Mary M. Englehart
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