



account for these sources of profit, its conclusion that Defendant misappropriated \$16,186,212.56 of customer funds cannot stand.

**Purely Internal Sales.** The fundamental flaw in the Government's analysis was the failure to account for sales that occurred purely within Nucleo. The Government's determination of what constituted misappropriated customer funds started with an assessment of "customer deposits,"—the dollar amount the Government concluded was deposited into BDI's Wells Fargo account by BDI customers. From January 1, 2009 to July 15, 2015, the Government concluded that \$410,629,564.57 was deposited into BDI's account by customers. After adjusting this number for refunds and/or errors, the number was reduced to \$408,454,830.28. The Government then calculated BDI's profit as "clearing fees" it would have received on this nearly \$409 million by multiplying it by 2%. *See* Gov't Tr. Exs. 179, 180. By this calculation, the Government concluded that BDI earned \$8,169,096.61 in profit from 2009 to 2015. The Government further concluded that BDI spent over \$24 million resulting in misappropriation of \$16,186,212.56.

The Government, however, did not account for internal transactions during that timeframe. For example, in some cases, BDI customers sold bullion through Nucleo but opted to leave the proceeds in their BDI Nucleo account. This would not result in a customer deposit for the sales price to BDI's account, but nonetheless

resulted in earned commission for BDI. The Government did not account for this commission.

Given the hundreds of millions of dollars in transactions that occurred through Nucleo, this miscalculation by the Government was substantial. Indeed, whereas the Government treats its calculation of \$409 million in “customer deposits” essentially as sales, Nucleo database reports indicate that actual sale transactions totaled \$451,937,397.24 during the same time period—nearly \$47 million more than the Government’s customer deposit analysis. Def. PSR Obj. Ex. 1, 2. Applying the 2% clearing fee to actual sales results in \$9,038,747.94 in profit to BDI, or \$869,651.33 more than the Government’s calculation.

**Margin on Sales.** The Government also failed to account for BDI’s profit in connection with margin. As the testimony at trial established, BDI purchased bullion in bulk from discount sellers such as Dillon Gage. Through Nucleo, BDI tracked purchase prices and sale prices of the bullion to determine the margin, if any, on the sales. On average, during the 2009-2015 time period, BDI netted additional 1.58% margin on the bullion it sold, for a total of \$7,140,613.21. Def. PSR Obj. Ex. 1. This represents additional profit which the Government’s calculation does not include.

**Margin on Fees.** BDI also received profit from its delivery, handling, and wire fees charged to customers. After accounting for the cost to BDI for these

services, the fee margins yields another \$1,068,697.25 in profit that the Government did not account for in its analysis. Def. PSR Obj. Ex. 1, 3.

**Trust Income.** BDI also earned income on its trust account. Gov't Tr. Ex. 178. The Government notes that BDI did not earn a commission on money deposited to the trust account, but fails to account trust trading income totaling \$1,348,505.00. Def. PSR Obj. Ex. 1.

**Remaining Funds and Assets.** At the time of bankruptcy, BDI still had \$1,009,886.34 in assets remaining, including cash and bullion. Gov't Tr. Ex. 66, Ex. B. The Government's number does not account for that.

### Summary

As Defendant repeatedly pointed out at trial, the Government's determination that Defendant misappropriated \$16,186,212.56 in customer funds is flawed. As a result, the PSR's "loss" number is also flawed.

Summary Chart 1 summarizes the errors that Defendant was able to identify with respect to the Government's calculation.

**Summary Chart 1**

PSR Loss Number / Government "Misappropriated Customer Funds"	\$16,186,212.56	Gov't Trial Ex. 180
Commissions on Purely Internal Sales	(-) \$869,651.33	Def. PSR Obj. Ex. 1
Margin on Sales	(-) \$7,140,613.21	Def. PSR Obj. Ex. 1, 2
Margin on Fees	(-) \$1,068,697.25	Def. PSR Obj. Ex. 1, 3
Trust Income	(-) \$1,348,505.00	Gov't Trial Ex. 178

Remaining Funds and Assets	(-\$1,009,886.34,	Gov't Trial Ex. 66
Total:	\$4,748,859.43	

At most, the loss number should be between \$3,500,000 and \$9,500,000 for a maximum adjustment of 18 points.

### **OBJECTION TWO**

Defendant objects to Paragraphs 22 and 28, which assert “substantial financial hardship” to seven of 11 victims and assess a four-level enhancement as a result. Importantly, Defendant has not been provided with any of the referenced written responses and the PSR does not qualify what is being deemed “substantial” nor provide any context for such determination. Defendant therefore objects and reserves all rights to supplement this objection pending receipt of the relevant documentation.

### **OBJECTION THREE**

Defendant objects to Paragraph 28, which assesses a two-level enhancement on the assertion that the offense involved “sophisticated means” and defendant intentionally engaged in or caused the conduct involving “sophisticated means.” The PSR does not cite any facts supporting this enhancement. Courts, including the Fifth Circuit, have found clear error when the trial court applied the “sophisticated means” enhancement in the absence of evidence that the defendant used false identities, fraudulent accounts, or fictitious entities to conceal participation in the scheme or to execute and conceal the fraudulent transactions. *See, e.g., United States*

*v. Valdez*, 726 F.3d 684, 695 (5th Cir. 2013) (finding clear error where evidence of sophisticated means merely consisted of money moved between accounts that were both in defendant's own name); *see also United States v. Hulse*, 989 F. Supp. 2d 1224, 1225-27 (M.D. Ala. 2013) (citing *Valdez* and *United States v. Mendez*, 420 F. App'x 933, 938 (11th Cir. 2011)).

There was no evidence at trial that Defendant used any false identities or fraudulent accounts. BDI had subsidiary businesses and separate accounts, but they were all proper businesses and accounts with proper business functions, such as hedging and software development. There was no testimony or evidence that Defendant created any subsidiary or opened any account to conceal any of BDI's business activities or money. In fact, the bulk of the testimony established that Defendant spent nearly a decade and invested a great deal trying to implement a responsible accounting system at BDI.

Nor did the Government present any evidence of conduct that was especially complex or intricate. BDI was a basic marketplace for buyers and sellers of bullion in the 21<sup>st</sup> Century. The software itself may have been complex and sophisticated, but the business model was not. As the *Hulse* court explained:

The guideline is clear: It is not enough for the means used in a scheme to be "complex" or "intricate"; rather, the means must be "especially" so. The definition of "especially" includes "exceptionally" and "particularly." Webster's Third New International Dictionary (1986). That is, the level of complexity or intricacy must set that particular

scheme apart from ordinary schemes, and even ordinarily complex or intricate schemes.

The reasoning behind this heightened requirement is obvious. The essence of fraud involves deceit or deception. *See* Black's Law Dictionary (9th ed. 2009) (fraud involves a "knowing misrepresentation of the truth or concealment of a material fact"). More likely than not, some complexity will always be required to carry out such deceit. If the only requirement to apply this enhancement were some complexity, nearly every fraud would qualify. Therefore, to assure that this guideline does not result in a defendant being punished twice for fraud, the drafters of the guidelines restricted the enhancement to only those schemes that are especially complex or intricate.

*Hulse*, 989 F. Supp. 2d at 1226-27.

The *Hulse* court further acknowledged that the defendant's scheme in that case involved "large sums of money" and "the use of complex financial instruments," but properly concluded that neither circumstance established that the scheme was especially complex or intricate:

[T]he crux of this case is that the defendants lied to obtain money and then lied about the use of the money. As such, the court is not convinced that this scheme was especially complex, intricate or anything else. It just involved an unusually large amount of money, about which the defendants lied. Since the defendants' offense level already amply reflects their culpability based on the loss amount, the court finds that the circumstances here do not warrant an additional sophisticated-means enhancement.

at 1227.

## CORRECTIONS

In addition to the foregoing objections, Defendant notes the following corrections for the record:

1. Paragraph 7 – The PSR incorrectly states that BDI ceased operations on July 20, 2015. This date should be June 15, 2015.

2. Paragraph 8 – The PSR indicates that BDI purchased metals from Dillon Gage, Hereaus, and other wholesale distributors. BDI also purchased metals from individuals.

3. Paragraph 9 – The PSR indicates that customer’s metals were sold without notice to the customer. The evidence at trial established that BDI’s terms of service included a “Use Clause,” which was believed by Defendant to constitute notice and was some notice to customers.

4. Paragraph 10 – The PSR misstates the evidence at trial regarding Defendant’s corrective actions following early reports that obligations exceeded cash/metal on hand. Rather than “ignoring” this information, the evidence established that Defendant took immediate steps to repay personal loans and to implement better accounting practices and software.

5. Paragraph 15 – The PSR omits key language in citing BDI’s website. The omitted language is as follows in bold: “***through the system of accounts,*** product is exclusively allocated to your account portfolio . . . .”

6. Paragraph 15 – The PSR references alleged claims that “more than one” customer had “personal telephone calls” with Defendant. Notably, the Government did not call a single victim who said he or she personally spoke with Defendant at

any time. The Government did not introduce a single email where Defendant was communicating with any customer. Nor did the Government establish through any of its witnesses that Defendant ever had any personal communication with BDI customers, except for this uncorroborated hearsay testimony from the bankruptcy trustee.

7. Paragraph 54 – The PSR states that Defendant attended college from 1989 to 1990. This should be 1988 to 1990.

### **PROPOSED REVISED GUIDELINE CALCULATION**

Based on the above objections and corrections, Defendant submits to the Court that his revised guideline calculation should be a Total Offense Level of 27 rendering the advisory guideline sentence range 70 to 80 months.

Dated: December 5, 2019

Respectfully submitted,

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*/s/ Tiffany C. Raush*  
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CHARLES MCALLISTER

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct of the above and foregoing filed via the CM/ECF system which caused service upon all parties on December 5, 2019.

/s/ Tiffany Raush  
TIFFANY C. RAUSH

**GOVT ANALYSIS (Chart#180)**

**Transaction Data-Driven Analysis**

Customer Deposits	\$410,629,564.57	\$410,629,564.57		Source:
less: (Adjustments)	(\$2,174,734.29)	(\$2,174,734.29)		Govt
Net Customer Deposits	<b>\$408,454,830.28</b>	408,454,830.28	451,937,545	Bullion Sales
	(\$408,454,830.28)	(\$408,454,830.28)		Govt
		<b>\$408,454,830.28</b>		Govt
		\$43,482,714.96	Adjustment for additional sales above	Margin Worksheet
		<b>\$451,937,545.24</b>	Total Bullion Sales	Margin Worksheet
		\$9,038,747.94	At Gov't assumed 2%	Govt Chart #178
Commissions (Clearing Fees) to BDI (at 2% of Net)	\$8,169,096.61	\$7,140,613.21	Margin adj./correction: 1.58%	Margin Worksheet
		\$1,068,697.25	Margin on Fees	S and H Worksheet
		\$1,348,505.00	BDI Trust Trading Income	Govt Chart #178
		<b>\$1,009,886.13</b>	Remaining Cash and Metal	Bankruptcy filing ?
		<b>\$19,606,449.54</b>		
	less:			
Customer Redemptions/Fulfillments	\$120,484,287.85			
less: (Check/Wire Returns)	(\$1,408,265.84)			
Net Customer Redemptions/Fulfillments	<b>\$119,076,022.01</b>	<b>\$119,076,022.00</b>	"Customer Purchases"	Govt
Payments for Purchase of Metal(s)	\$266,983,228.55			
less: (Returns)	(\$1,959,729.45)			
	<b>\$265,023,499.10</b>	<b>\$265,023,499.00</b>	"Dealer Purchases"	Govt
Operational Expenses (2% Commission)	<b>\$8,169,096.61</b>	<b>\$19,606,449.54</b>	Allowance for operational expenses	
Amount of Misappropriated Customer Funds	(\$16,186,212.56)	(\$4,748,859.74)		

BDI Report: **Transaction and Margin Summary**

Period: January 2009 thru June 2015

Source: <https://54.191.98.247/admin/mvc/reports/ordersummary>Source Description: **BDApp - Admin/SummaryAndMarginsReport**

Customer Statuses: Locked; Active; New

Total Bullion Sales: **\$451,937,545.24**  
 Total Bullion Margin: **\$16,187,260.09**  
 Total %Margin of Bullion Sales: **3.58%**

	<u>Bullion Transactions</u>	<u>Margin Indications</u>	
Catalog Sales	\$283,273,903.76	\$6,288,680.66	2.22% Sales Margin
BD Nucleo Sales	\$45,817,989.22	\$1,058,395.55	2.31% Margin (1.31%) plus Commission (1%)
C2C Nucleo Sales	<u>\$122,845,652.26</u>	<u>\$1,228,456.52</u>	1.00% Buy (Sales) Commission
Total Bullion Sales	<b>\$451,937,545.24</b>		
BD Nucleo Purchases	\$44,193,185.21	\$1,215,312.59	2.75% Discount Margin (1.75%) plus Commission (1%)
<b>*BD Purchases (dealers)</b>	\$265,023,499.10	\$5,167,958.23	1.95% Discount Margin (1.95%)
C2C Nucleo Purchases	<u>\$122,845,652.26</u>	<u>\$1,228,456.52</u>	1.00% Sell (Purchase) commission
Total Bullion Purchases	\$432,062,336.57	<b>\$16,187,260.09</b>	<b>3.58%</b> As a % of Total Bullion Sales

**\*Source: Govt Exhibit 180**

Period: January 2009 thru June 2015

Source: (Draft) BD Financials 2010 thru 2014

Source Description: **Internal Financial Analysis using BD Dbase Queries; BDAApp/Admin Reports; QuickBooks**

Total % Fee Margins: **30.1%**

	Jan - June 2009	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	
Freight/Shipping/Handling			\$730,529.00	641,484	\$550,629	354,534		\$2,277,175.35
Credit Card Charges/Discounts			-166,826	-91,946	-75,000	-75,000		(\$408,772.00)
Freight/Shipping			-448,965	-287,100	-232,053	-215,000		(\$1,183,118.00)
								\$685,285.35
								<b>30.1%</b>

BDI Report: **Incoming Shipments**  
 Period: **1/1/2009 thru 6/16/2015**  
 Source: <https://54.191.98.247/admin/audit/form/findTransactions/search.do>  
 Source Description: **BDAApp - Admin/FindTransactions**  
 Customer Statuses: Locked; Active; New  
 Transaction Type: Incoming Shipments  
 Transaction Status: Filled; Package Sent  
**Total: \$153,537.88**

BDI Report: **Shipping, Handling, Wire Fees**  
 Period: **1/1/2009 thru 6/16/2015**  
 Source: [BD Dbase Query \(Brad Plies email\)](#)  
 Source Description: **BDAApp - Dbase Query Fees**  
**Total: \$3,408,786.30**

\$3,562,324.18

0.301

**Fee Margin: \$1,072,259.58**